OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F20-37

VANCOUVER ISLAND UNIVERSITY

Elizabeth Barker
Director of Adjudication

August 26, 2020

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Summary: The applicant requested records about her former employment with Vancouver Island University. The University refused access to some information and records under ss. 13 (policy advice or recommendations), 14 (solicitor client privilege) and 22 (unreasonable invasion of third party personal privacy) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator confirmed the University's s. 14 decision and confirmed, in part, the University's ss. 13 and 22 decisions. The University was required to disclose the information the University was not authorized or required to refuse to disclose under ss. 13 and 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2)(a), 13(2)(k), 13(2)(l), 13(2)(m), 13(2)(n), 14, 22(1), 22(4)(b), 22(4)(e), 22(3)(a), 22(3)(d), 22(3)(g), 22(3)(h), 22(2)(a), 22(2)(b), 22(2)(c), 22(2)(e), 22(2)(f), 22(2)(h), 22(5)

INTRODUCTION

[1] The applicant, who is a former employee of Vancouver Island University (University), requested access to information about her and her employment for the period August 7, 2012 to January 10, 2017.[1] The University disclosed some records but withheld other records and portions of records pursuant to ss. 13 (policy advice or recommendations), 14 (solicitor client privilege), 21 (harm to third party business interests) and 22 (unreasonable invasion of third party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[1] The applicant made a similar request for records related to her employment but for a different time period, and the request for review of that matter is decided in Order F20-38.

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the University's decision.[2] As a result of mediation, the applicant confirmed she is not interested in a review of the University's decision to refuse her access to information under s. 21. However, mediation did not resolve the remaining issues and the applicant requested that they proceed to an inquiry. During the inquiry, the OIPC provided approval for some of the University's submission and evidence to be accepted *in camera*.

Preliminary matters

[3] New Issues - In her response submission, the applicant raises several issues that were not included in the notice of inquiry or mentioned in the OIPC investigator's fact report. The applicant states that s. 25 applies in this case so the information should be disclosed to her on that basis.[3] The applicant also alleges that the University's decision about her access request was made "in contravention of FIPPA" because the head of the public body did not make the decision and it was made by someone without delegated authority to do so.[4] She also complains that the University failed to identify and produce all of the responsive records.[5]

[4] The University objects to the applicant raising any new matters falling outside the scope of the inquiry, and says that she should be precluded from doing so at this late stage in the proceedings. The University made its initial submission based on the understanding that the notice of inquiry set out the only issues to be adjudicated.

[5] The notice of inquiry specified the issues to be decided in this inquiry and said that, in general, the adjudicator will only consider the issues in the investigator's fact report. The notice of inquiry also advised the parties to review the OIPC's *Instructions for Written Inquiries*, which say that parties may not add new issues without the OIPC's prior consent and the request to add a new issue must be made before the date for initial submissions. Past OIPC orders have reinforced this by saying that a party may only introduce a new issue into an inquiry if the OIPC grants permission to do so.[6]

[6] There must be a valid reason to warrant introducing issues for the first time at the inquiry stage. That is because changing the scope of the inquiry at that point effectively circumvents and undermines the investigation and mediation

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[2] The applicant also made a complaint about the University's disclosure of her personal information and the adequacy of its search for records (OIPC file F17-70839). The complaint was resolved and is not part of this inquiry.
[3] Applicant's submissions at para. 63.
[4] Applicant's submission at paras. 17-18 and 170.
[5] Applicant's submission at para. 210.
[6] Order F07-03, 2007 CanLII 30393 (BC IPC) and Order F11-28, 2011 BCIPC 34 at para. 11.

phase of the FIPPA review process. Adding issues late also deprives the parties of the opportunity to have the OIPC investigate and mediate those issues and determine if they warrant proceeding to inquiry.

[7] The applicant does not explain why she did not raise these issues earlier or seek the OIPC's permission to add them into the inquiry. She does not say why they should be added at this late date.

[8] I have given particular thought to whether s. 25 should be added because it requires a public body to disclose information without delay when it is in the public interest to do so. This section overrides all of FIPPA's exceptions to disclosure and there is a high threshold before it applies. The s. 25 duty to disclose exists only in the "clearest and most serious of situations" and the disclosure must be "not just arguably in the public interest, but *clearly* (*i.e.,* unmistakably) in the public interest."[7] There is nothing in the specific information in dispute that suggests that s. 25 may be engaged. Therefore, I have decided that s. 25 will not be added as an issue in this inquiry.

[9] I also decline to add into this inquiry the complaint that the University failed to produce all of the responsive records and the allegation that the University's decision was not properly made by the "head" of the public body.

[10] University affidavit evidence - The applicant submits that the OIPC should not accept the affidavits of the University Secretary and the University's external legal counsel (Lawyer) into evidence. In brief, the applicant characterizes the affidavit evidence as perjury. She also says that a missing formality in one affidavit is a substantive defect that renders it inadmissible.

[11] After the applicant made the FIPPA access request that led to this inquiry, the University retained a lawyer (Investigator) to investigate a matter that the applicant had been looking into when she was an employee. In her affidavit, the University Secretary says that the University retained the Investigator to conduct an independent external investigation. The applicant says that the Investigator was the University's agent so he was not "independent" or "external" to the University. The applicant says that by saying the Investigator was conducting an independent, external investigation, the "University Secretary made a false statement under oath by affidavit, with the intent to mislead".[8]

[12] The applicant also says that the University Secretary committed perjury in her affidavit by contradicting what she said previously about who hired the Investigator. In her affidavit, the University Secretary says that the University

[7] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 45, italics in original. See also *Tromp v. Privacy Commissioner*, 2000 BCSC 598 at paras. 16 and 19.
[8] Applicant's submission at para. 37.

authorized her to retain the Investigator.[9] In an email that predates the affidavit by several years, the University Secretary said "The process [investigation] was instituted by the president."[10]

[13] The University disputes that the University Secretary gave false evidence. It says that calling the Investigator "external" was an accurate description because he is a lawyer in private practice and not a University employee. The University also says that an inconsistency in explaining who was responsible for retaining the Investigator is not perjury. Further, the University says that there is no evidence of any intent to mislead the OIPC adjudicator in this inquiry, especially when the issue of whether the Investigator is external and who retained him are immaterial to the issues in this inquiry.[11]

[14] I accept that the applicant disagrees with what the University Secretary says about the role of the Investigator and who retained him. However, the University Secretary's affidavit evidence about those matters cannot reasonably be construed as false evidence intended to mislead, and I find the applicant's perjury claims to be without merit.

[15] The applicant also says that I should not admit the Lawyer's affidavit because it is missing words to the following effect: "I … have personal knowledge of the facts and matters herein, except where stated to be based upon information and belief, and where so stated I have named the source of the information, and believe the same to be true."[12] The University disputes that the affidavit should not be admitted due to that missing language. To remove any doubt, however, it provided the Lawyer's second affidavit in which the procedural defect in the first affidavit is corrected.

[16] I do not consider the missing element in the Lawyer's first affidavit to be a reason to disregard his affidavit, as the applicant suggests. Besides, the University corrected this defect in his second affidavit.[13]

[17] I have, therefore, accepted the affidavits of the University Secretary and the Lawyer into evidence and I will consider them along with the rest of the University's arguments and evidence.

[18] Joinder of related inquiries - The applicant requests that the OIPC combine this inquiry with her other inquiry involving the University.[14] The OIPC already decided not to join the two inquiries back in 2019, before the notices of

[9] Applicant's submission at paras. 36, 173 and 297.
[10] Applicant's submission at tab 23.
[11] University's reply submission at paras. 41-51.
[12] Applicant's submission at paras. 43-47.
[13] Lawyer's second affidavit.
[14] Applicant's submission at para. 56.

inquiry were issued. Both inquiries are now closed. The applicant provides no persuasive reason for why I should reconsider that decision and restart the two inquiries as one, so I decline to do so.

[19] Matters unrelated to FIPPA - The applicant's lengthy submission extensively addresses how the University and certain administrators dealt with issues in the learning and working environment. Most of these complaints are about matters that are not material to the FIPPA issues in this inquiry. They also fall outside my statutory authority to decide, so I will not consider them.

ISSUES

[20] The issues to be decided in this inquiry are as follows:

1. Is the University authorized by ss. 13(1) and 14 of FIPPA to refuse the applicant access to the information in dispute?

2. Is the University required by s. 22(1) of FIPPA to refuse the applicant access to the information in dispute?

[21] Section 57 of FIPPA says that the public body has the burden of proving that ss. 13(1) and 14 apply. Section 57 says, however, that the applicant has the burden to prove that disclosure of any personal information in the records would not be an unreasonable invasion of a third party's personal privacy under s. 22(1) of FIPPA.

DISCUSSION

Background

[22] The applicant worked several years for the University in a professional administrative capacity. A little over three years ago, the University terminated her employment on a without cause basis. The applicant says she seeks access to the information in dispute because the University did not provide her with the reasons for terminating her employment and she wants to examine all relevant circumstances.

[23] The applicant alleges she was fired because she was investigating allegations that a student had been sexually harassing women (the Student Matter). She says that the University did not deal appropriately with the Student Matter and certain staff obstructed her investigation. She has filed a civil suit and a human rights complaint regarding her firing. The applicant says the human rights complaint has been resolved, but her civil claim is still in progress.

Records at issue

[24] The University located approximately 3000 pages of records that are responsive to the applicant's request. The University is refusing to disclose approximately 1000 pages in their entirety or in part. The records consist primarily of emails, letters and memoranda. The University grouped the disputed information into the following four categories and provided a records table for each:[15]

1. Employment Records – These records relate to the applicant's employment, including her medical leaves, disability claim and return to work, employer expectations and the termination of her employment.

2. Student Matter Records – These records are about an investigation and internal administrative process involving a student's behaviour, his complaints about third parties and the impact it had on the student's academics. The applicant was involved in looking into the Student Matter just before her employment was terminated, and these records are also about the respective concerns that the applicant and third parties had with how the Student Matter was handled.[16]

3. SVMP Policy Records – These are records about the development of the University's sexual violence and misconduct policy and procedures. The applicant was involved in working on this policy matter during her employment.[17]

4. Miscellaneous Records – These records relate to issues the applicant worked on during her employment. The applicant says that she is only interested in the Miscellaneous Records from 2016. There are only two records that match that criteria, so I will only make a decision about those two.[18] I conclude the University's severing of the other Miscellaneous records is no longer in dispute.

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[15] The University provided a record table for each of the four categories, listing page numbers, a description of the disputed information, the FIPPA exception applied and the reason for the redactions. The pages are numbered sequentially, so for pinpoint references, I refer to the page number, not the category.
[16] The records in dispute do not relate to the investigator's work and report. Those records are not within the scope of the access request because, presumably, they post-date the access request.
[17] The University says that given the passage of time it no longer objects to the disclosure of some of these SVMP Policy Records and it provided more of them to the applicant along with its inquiry submissions. University's initial submissions at para. 104.
[18] Applicant's initial submission at para. 493. The only Miscellaneous Records from 2016 are emails on pp. 88-89 and 193-194.

Advice or recommendations - s. 13(1)

[25] Section 13(1) says that the head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister. The purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.[19]

[26] Section 13(1) applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate inferences about the advice or recommendations.[20] In addition, the BC Court of Appeal in *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)* [*College*], said that the term "advice" includes "an opinion that involves exercising judgment and skill to weigh the significance of matters of fact," including "expert opinion on matters of fact on which a public body must make a decision for future action."[21]

[27] The first step in the s. 13 analysis is to determine whether disclosing the information in dispute would reveal advice or recommendations developed by or for the public body. If it would, then one must decide if the information falls into the categories listed in s. 13(2) which a public body must not refuse to disclose under s. 13(1). Finally, if the records have been in existence for more than 10 years, s. 13(3) says that they may not be withheld under s. 13(1). In this case the records are not that old, so s. 13(3) is not called into play.

[28] The University submits that it is clear on the face of the disputed records that the information withheld under s. 13 "falls squarely within that exception to disclosure as it has been applied by the courts and adjudicators under the Act."[22]

[29] The applicant disputes that s. 13 applies because she says s. 13 cannot apply to internal advice or recommendations provided to a public body by its own employees. She says it can only apply if the advice and recommendations is provided by, or to, someone *outside* the public body.[23]

Analysis and findings, s. 13(1)

[30] I begin by addressing the applicant's argument that s. 13 cannot apply to internal advice or recommendations provided to a public body by its own

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[19] *John Doe v. Ontario (Finance*), 2014 SCC 36 at paras. 45-51.
[20] Order 02-38, 2002 CanLII 42472 (BCIPC) and Order F10-15, 2010 BCIPC 24 (CanLII).
[21] *College,* 2002 BCCA 665 at para. 113.
[22] University's initial submission at para. 31.
[23] Applicant's submission at para. 339.

employees. This is not what the orders of this office state; they clearly show that s. 13(1) is not restricted in the way that the applicant suggests.[24] Section 13(1) may apply as long as the information would reveal advice or recommendations developed by or for a public body or minister.

[31] I have reviewed the information withheld under s. 13 and find that most of it reveals advice or recommendations developed by or for the University. My findings are as follows.

[32] Employment Records – These records contain emails in which administrators discuss and advise the University's president (President) on human resource concerns related to the applicant. I find most of this severed information clearly reveals advice and recommendations provided to the President to assist him with his deliberations and decision-making.
Some of the information withheld under s. 13 in the Employment Records is in draft documents. The University withheld drafts of the President's memos to the applicant about job expectations and his letter terminating her employment. There is also a draft of an email notification the President sent to inform others that the applicant was no longer an employee

[33] Section 13(1) does not apply to records simply because they are drafts. [25] The usual principles apply and a public body can withhold only those parts of a draft which reveal advice or recommendations about a suggested course of action that will ultimately be accepted or rejected during a deliberative process.

[34] I find that disclosing the withheld emails and the draft wording suggestions that accompany them would reveal advice and recommendations provided to the President. Several administrators are involved in providing these drafts to the President, and the cover emails that accompany the drafts establish that they are the staff's advice and recommendations to the President about what he should communicate about human resources issues.

[35] Student Matter Records – Most of the information that I find is advice and recommendations in the Student Matter Records is in University staff emails (many are from the applicant) discussing how best to handle the student's complaints and his interactions with University staff. There are also some notes that reveal advice and recommendations about the Student Matter.[26] There is also some information that reveals a recommendation to the President about a specific type of support for students.[27]

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[24] For example, see Order F18-41, 2018 BCIPC 44 (CanLII).
[25] Order 00-27, 2000 CanLII 14392 (BC IPC) at p. 6, Order 03-37, 2003 CanLII 49216 (BC IPC) at paras. 59; Order F14-44, 2014 BCIPC 47 (CanLII) at para. 32; Order F15-22, 2015 BCIPC 36 (CanLII) at para. 23; Order F18-38, 2018 BCIPC 41 (CanLII) at para. 17; Order F17-13, 2017 BCIPC 14 at para. 24.
[26] Pages 2747-2751 of the Records.
[27] Pages 341-343 of the Records.

[36] SVMP Policy Records – These records contain emails and memos between University staff (including the applicant) and the steering committee members developing the SVMP Policy. There are also some notes from a working group's brainstorming session. The information withheld from these records reveal discussions, recommendations, advice and opinions about how the policy should operate and what it should say. Some of the disputed information also reveals the suggestions and recommendations provided by stakeholders within the University community. I find that all of this type of information reveals advice or recommendations under s. 13(1).

[37] Miscellaneous Records – The applicant only wants access to the Miscellaneous Records from 2016. I find that s. 13(1) only applies to one page of these records.[28] That page contains the applicant's advice and recommendations to University administrators about how to handle a complaint.

[38] However, I find that the balance of the Miscellaneous Records information at issue under s. 13(1) does not reveal advice or recommendations. It is statements or questions of a factual nature, process related decisions and instructions, document headings, dates, email subject lines and "to/from" details.[29] The University has not established that it is authorized to refuse to disclose this information under s. 13(1).

Section 13(2)

[39] The next step in the s. 13 analysis is to decide if s. 13(2) applies to the information that I found above would reveal advice or recommendations. The applicant submits that ss. 13(2)(a), (k), (l), (m) and (n) apply. The University says that none of the categories of information in s. 13(2) apply.[30]

Section 13(2)(a)

[40] Section 13(2)(a) says that the head of a public body must not refuse to disclose under s. 13(1) any factual material. The term "factual material" in s. 13(2)(a) has a distinct meaning from factual "information." The compilation of factual information and weighing the significance of matters of fact is an integral component of advice and informs the decision-making process. If facts are compiled and selected, using expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of the public body, then the facts are not "factual material" under s. 13(2)(a).[31]

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[28] Page 88 of the Records.
[29] For example, pp. 88, 219, 338, 341-343, 601-608, 642, 740, 969, 1265 and 1270 of the Records.
[30] University's reply submission at paras. 156-158.
[31] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner,* 2013 BCSC 2322 at paras. 91-94.

[41] I find that none of the information withheld under s. 13(1) is factual material under s. 13(2)(a). The facts found in the disputed records are not a body of distinct source materials separate and independent from the advice and recommendations. Rather, I find the facts are intermingled with, and an integral part of, the advice and recommendations.

Section 13(2)(k)

[42] Section 13(2)(k) states that the head of a public body must not refuse to disclose under s. 13(1) "a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body."

[43] The applicant says that the University established a Sexual Violence and Harassment Education and Response Steering Committee to consider sexualized harassment and violence matters and make reports or recommendations, as required by the *Sexual Violence and Misconduct Policy Act*. She submits that s. 13(2)(k) applies to any such reports.[32] However, the records in dispute do not include such reports.

[44] In this case, the advice and recommendations are in emails between University staff as well as drafts of memos and letters related to the applicant's employment. It is also in the applicant's memo to the University's Executive Director of Student Affairs about the draft sexual violence and misconduct policy and subsequent emails about the memo.[33] There is also advice and recommendations in a memo about sexual violence and misconduct policies that was sent by the Post Secondary Employers' Association (PSEA) to the members of its Labour Relations Advisory Committee, who I understand from the contents of the memo are post-secondary institutions.[34]

[45] In my view, s. 13(2)(k) does not apply to these emails, letters and memos for two reasons. First, they are not "reports." Previous orders have said that a report in s.13(2)(k) means a formal statement or account of the results of the collation and consideration of information,[35] and these records are not of that nature. Second, even if they were reports, none is a report "of a task force, committee, council or similar body" that was established for the purpose of considering the matters the records address.[36]

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[32] Applicant's submission at paras. 350-353.
[33] This memo is at pp. 600-608 (duplicate at 1025-1033) of the records.
[34] This memo is at pp. 902-904 of the records.
[35] Order F17-33, 2017 BCIPC 35 (CanLII) at para. 17; Order F17-39, 2017 BCIPC 43 (CanLII) at para. 46.
[36] In Order 01-14, 2001 CanLII 21568 (BC IPC) at para. 34, former Commissioner Loukidelis also found that for s. 13(2)(k) to apply, the task force, committee, council or similar body needs to have been established for the purpose of considering the matter in the records.

Section 13(2)(l)

[46] Section 13(2)(l) applies to "a plan or proposal to establish a new program or activity or to change a program or activity, if the plan or proposal has been approved or rejected by the head of the public body." The applicant submits that s. 13(2)(l) applies because the records show that the Executive Director of Student Affairs "submitted a plan or proposal for her to take leadership in establishing the Respondent's new Sexual Violence and Misconduct Committee for policy development."[37]

[47] The records that contain advice or recommendations are not, as the applicant thinks, about committee leadership. More importantly, these records are clearly not "a plan or proposal to establish a new program or activity or to change a program or activity." Therefore, I find that s. 13(2)(l) does not apply.

Section 13(2)(m)

[48] Subsection 13(2)(m) says that the head of a public body must not refuse to disclose under s. 13(1) "information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy."

[49] The applicant's s. 13(2)(m) submission focuses on the situation addressed in the Student Matter records.[38] The applicant alleges that certain University staff handled the Student Matter incorrectly and she says that the University made a "decision" not to hold them accountable. She points to the public statements about the investigation as evidence that s. 13(2)(m) applies to the information in dispute.[39]

[50] The applicant's evidence establishes that the University publicly stated it had hired an experienced and legally trained external investigator to investigate and write a report about the Student Matter, and the investigator determined that the University's actions were appropriate and reasonable.[40] The investigation report and records related to it are not part of the records in dispute in this inquiry.

[51] I do not agree with the applicant that the University has publicly cited the information in dispute as a reason for making any decision. The only decision the public statements reveal is that the University decided to hire an external investigator; however, as previously noted, the information in dispute is not about hiring the investigator or his investigation and report. Further, contrary to what

[37] Applicant's submission at paras. 354-359.
[38] Applicant's submission at paras. 360-366.
[39] Applicant's submission at para. 362.
[40] Applicant's submission at para. 362. The University does not dispute these public statements were made.

the applicant submits, the University's public statements are not about a decision regarding staff conduct and accountability. I am not persuaded that the information in dispute under s. 13(1) was cited publicly by the University as the basis for making a decision or formulating a policy.[41] Therefore, I find that s. 13(2)(m) does not apply.

Section 13(2)(n)

[52] Subsection 13(2)(n) says that the head of a public body must not refuse to disclose under s. 13(1) "a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant."

[53] The applicant says the University made a decision to terminate her employment and then, later, to terminate her employment benefits. She submits that s. 13(2)(n) prohibits the University from refusing to disclose any information or details about those decisions.[42]

[54] I do not agree that s. 13(2)(n) applies as broadly as the applicant suggests. Previous orders have said that s. 13(2)(n) does not require the disclosure of all records which relate in any way to the exercise of a discretionary power or an adjudicative function, but only those records which contain a decision or reasons for it.[43] None of the records or information that I find reveal advice or recommendations is a decision to terminate the applicant's employment and benefits or contains reasons for any such decision. I find that s. 13(2)(n) does not apply.

Summary – s. 13

[55] In conclusion, I find the University has established that disclosing most of the information it withheld under s. 13(1) would reveal advice or recommendations developed by or for the University. I also find that ss. 13(2) and 13(3) do not apply to that information. There are, however, a few instances where I find that the information may not be withheld under s. 13(1) because disclosure would not reveal any advice or recommendations. I have highlighted that information in a copy of the relevant pages that will be provided to the University along with this order.

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[41] I include all four categories of records in this statement, not just the Student Matter records.
[42] Applicant's submission at paras. 367-382.
[43] Order No. 191-1997, 1997 CanLII 1518 (BC IPC) at p. 4-5; Order No. 218-1998, at p. 7; Order 00-17, 2000 CanLII 9381 (BC IPC) at p. 6; Order F08-05, 2008 CanLII 13323 (BCIPC) at paras. 5-9; Order F07-17, 2007 CanLII 35478 (BC IPC) at para. 37.

Solicitor client privilege, s. 14

[56] Section 14 of FIPPA states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege. The law is well established that s.14 of FIPPA encompasses both legal advice privilege and litigation privilege.[44] The University submits that legal advice privilege applies to the information it is withholding under s. 14.

[57] With respect to establishing legal advice privilege, the Supreme Court of Canada has said that privilege must be claimed document by document, with each document being required to meet the following criteria:

(i) a communication between solicitor and client;
(ii) which entails the seeking or giving of legal advice; and
(iii) which is intended to be confidential by the parties.[45]

[58] Not every communication between client and solicitor (or their agent) is protected by legal advice privilege. However, if the conditions set out above are satisfied, then legal advice privilege applies to the communications and the records relating to it.[46]

[59] The information in dispute under s. 14 is a few lines in three emails between University administrators[47] and five entire records (described in more detail below). The University did not provide these redacted lines or records for my review. I determined that the s. 14 evidence in the University's initial and reply submissions was insufficient to make a decision about whether s. 14 properly applied, so I provided it an opportunity to submit additional evidence.[48]

[60] The University provided a third affidavit from the Lawyer and a second affidavit from the University Secretary, both of which included a table of records describing the privileged records.[49] The applicant was given a chance to respond to this additional evidence but did not do so.

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[44] *College, supra* note 21 at para. 26.
[45] *Solosky v. The Queen*, [1980] 1 SCR 821 [*Solosky*] at p. 837. The Court was speaking of legal advice privilege.
[46] *Solosky*, *ibid* at p.829. *See also R. v. B.,* 1995 CanLII 2007 (BCSC) at para. 22.
[47] The three emails are at pp. 124, 1299 and 1400 (duplicate of p. 124) of the Records. I do not need to decide about the s. 14 severing on p. 46, which is part of the Miscellaneous Records because it is not dated 2016.
[48] Adjudicator's May 8, 2020 letter. The commissioner has the power pursuant to s. 44(1) of FIPPA to order production of records over which solicitor client privilege is claimed. However, given the importance of solicitor client privilege, and in order to minimally infringe on that privilege, the commissioner will only order production when absolutely necessary to adjudicate the issues in an inquiry. Before considering such an order, the commissioner's practice is to give the public body a further opportunity to provide evidence regarding the information being withheld under s. 14.
[49] University's May 20 and 21, 2020 letters and affidavits, dated May 22, 2020.

[61] The Lawyer says the following about the information withheld under s. 14:

> I have reviewed and identified the Withheld Records and Severed Records and attest that these records or, as applicable, the portions of them withheld on the basis of solicitor client privilege:
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> a. constitute communications or set out or describe communications that have taken place;
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> b. the records describe, set out or constitute communications between the University with me or with other legal counsel…; and
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> c. the communications are directly related to the seeking, formulating or giving of legal advice to the University.
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> I further attest that there is no indication on the face of the Withheld Records or Severed Records which suggests that they have not been maintained in confidence, and I am informed by [the University Secretary] that the University has strictly maintained the confidentiality of such communications and has no intention to waive privilege over these records or information subject to solicitor client privilege. [50]

[62] The Lawyer also says that the information severed from the three emails is "internal communication setting out legal advice received from external legal counsel."[51]

[63] The five records withheld in their entirety are described as follows in the table accompanying the Lawyer's third affidavit:

1. Internal University email setting out details of legal advice provided by external legal counsel to the responsible representative of the University (1 page).
2. Internal University email attaching a legal opinion and related documents received from external legal counsel (9 pages).
3. Duplicate of document #2 (9 pages).
4. Email from the office of external legal counsel to the office of responsible official of the University attaching legal opinion and related documents provided in anticipation of a telephone conference between external legal counsel and that official for the purposes of discussing the above referenced legal opinion and receiving further legal advice (9 pages).

[50] Lawyer's 1st affidavit at paras. 6 and 7. The ellipsis in the quote at (b) replaces evidence about p. 46, which is not a record in dispute because it is not from 2016. See note 47 above.
[51] Lawyer's 2nd affidavit at Exhibit A.

5. Notes prepared by responsible University official, including both notes prepared in anticipation of a telephone call with external legal counsel for the purposes of seeking legal advice, and notes from the conversation between the responsible University official and external legal counsel setting out the legal opinion and advice provided by external legal counsel (3 pages).

[64] The applicant disputes that the information withheld under s. 14 is protected by solicitor client privilege. The applicant repeats her assertion (addressed in the preliminary matters above) about perjury and the veracity of the affidavit evidence. She also says that the affidavit evidence is hearsay and has no probative value.

[65] I do not agree with the applicant that the evidence provided by the Lawyer and the University Secretary has no probative value. What the Lawyer says, as cited above in paragraph 67, is not hearsay. Further, what he says the University Secretary told him about confidentiality is confirmed by what she says in her own affidavit.[52]

[66] I accept the Lawyer's evidence regarding s. 14. He says he has directly reviewed the information in dispute and he provides sufficient detail about each specific record to allow me to assess if privilege applies. Based on the Lawyer's evidence, I am satisfied that all of the information withheld under s. 14 comprises written communication between solicitor and client that entails the seeking or giving of legal advice.

[67] I am also satisfied that these communications were intended to be confidential. The Lawyer's evidence is that they were only between the University and its legal counsel or their executive secretaries. The fact that these secretaries were involved does not negate the confidentiality of these communications. Seeking advice from a legal adviser includes consulting those who assist the legal advisor professionally, for example, their secretary or articling student.[53] Further, the Lawyer says that there is nothing on the face of the records that suggests that they have not been maintained by the University in confidence.[54] The University Secretary also says that the information at issue under s. 14 has "been maintained by the University in confidence".[55]

[68] In conclusion, I find the University has established that legal advice privilege applies to the information it is refusing to disclose under s. 14.

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[52] Lawyer's 1st affidavit at para. 7 and University Secretary's 1st affidavit at para. 69.
[53] *Descoteaux v. Mierzwinski*, [1982] 1 SCR 860 at p. 873.
[54] Lawyer's 1st affidavit at para. 7.
[55] University Secretary's 1st affidavit at para. 69.

Waiver

[69] Waiver of privilege is ordinarily established where the possessor of the privilege knows of the existence of the privilege and voluntarily shows an intention to waive that privilege.[56] The law is well established that the privilege belongs to the client and may only be waived by the client. Once privilege is established, the onus of showing it has been waived is on the party seeking to displace it.[57]

[70] The applicant submits that the University waived privilege because it publicly said it had retained an external lawyer (i.e., the Investigator) to investigate the Student Matter and it disclosed a summary of the Student Matter investigation report.[58]

[71] The University responds that the external lawyer hired to conduct the investigation was not retained to provide legal advice. It also says the investigation report is not a record at issue in this inquiry and, even if it were, the University is not claiming the investigation report is protected by privileged, so the issue of waiver does not arise.[59]

[72] Given of the importance of solicitor client privilege to the functioning of the legal system, evidence justifying a finding of waiver must be clear and unambiguous.[60] The applicant's submission about waiver fails to show that any of the information that the University is claiming is protected by legal advice privilege was disclosed. There is insufficient evidence to find that there has been a waiver of privilege over the information at issue in this case.

Exercise of Discretion

[73] Having found s. 13(1) and 14 apply to some of the withheld information, I will now address the applicant's submission that the University failed to properly exercise its discretion when it decided to refuse her access to this information.

[74] The word "may" in ss. 13 and 14 confers on the head of a public body the discretion to disclose information that it is authorized to withhold. If the head of the public body has failed to exercise its discretion, the Commissioner can require the head to do so. The Commissioner can also order the head of the public body to reconsider the exercise of discretion where the decision was made

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[56] *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd*., 1983 CanLII 407 (BCSC) at para 6.
[57] *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc*., 2007 BCSC 1420 at para. 22; *Maximum Ventures Inc. v. de Graaf*, 2007 BCSC 1215 [*Maximum*] at para. 40.
[58] Applicant's submission at para. 284.
[59] University's reply submission at paras. 125-132.
[60] *Maximum*, *supra* note 57 at para. 40.

in bad faith or for an improper purpose, the decision took into account irrelevant considerations, or the decision failed to take into account relevant considerations.[61]

[75] The applicant says that the University Secretary made the decision about the applicant's access request in bad faith because she was biased against the applicant and acted out of self-interest. The applicant provides extensive submissions about this. In brief, the applicant disagreed with how the University Secretary handled the Student Matter and she alleges the University Secretary is concealing the details in an effort to avoid being held publicly accountable.[62] I have carefully considered what the applicant and the University say about this. I find the applicant's allegations that discretion was exercised in bad faith and out of self-interest to be purely speculative and not supported by what is revealed by the records in dispute and how they have been severed.

[76] The applicant also submits that the University provided no evidence to explain its exercise of discretion.[63] However, I find otherwise. In its initial submission, the University provides evidence about the factors it considered when exercising its discretion under ss. 13 and 14.[64] Regarding s. 13, the University Secretary says the following factors were considered:

- the sensitivity of the records;
- the passage of time since the records were created, whether the information pertained to matters still in progress or under deliberation and whether disclosure would interfere with those deliberative processes;
- whether there was an expectation that the information would be maintained in confidence;
- whether disclosure might impact the willingness of University staff or advisors to be open and candid;
- whether disclosure would be harmful to the University or its staff;
- whether there were safety or other public interest considerations that weighed in favour of disclosure;
- whether the applicant's prior knowledge of the contents offset other factors supporting non-disclosure.

[77] As for the s. 14 information, the University Secretary says that the University has no intention of waiving solicitor client privilege; therefore, it

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[61] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 52. See also Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 147.
[62] Applicant's submission at paras. 180-81.
[63] Applicant's submission at para. 160.
[64] University Secretary's 1st affidavit at para. 70.

exercised its discretion to preserve the privileged nature of that information by refusing to disclose it.

[78] I find there is no persuasive evidence to support the applicant's allegation that the University considered improper or irrelevant factors or that it acted in bad faith in deciding to withhold information under ss. 13(1) and 14. Further, based on my review of the severing in the records, it is clear that the University engaged in a line-by-line consideration of the information in dispute. In conclusion, I am satisfied that the University exercised its discretion properly in this case.

Unreasonable invasion of third party personal privacy, s. 22

[79] The University withheld the rest of the information in dispute under s. 22. Section 22 requires public bodies to refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party's personal privacy.[65]

Personal information

[80] The first step in a s. 22 analysis is to determine if the information in dispute is personal information. Personal information is defined in FIPPA as "recorded information about an identifiable individual other than contact information." Contact information is defined as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."[66] Whether information will be considered "contact information" will depend on the context in which the information is sought or disclosed.[67] The purpose of the "contact information" exclusion is to clarify that information relating to the ability to communicate with a person at that person's workplace, in a business capacity, is not personal information and that, accordingly, public bodies need not have s. 22 concerns regarding disclosure of such information.

[81] The information in dispute under s. 22 includes some dates, email subject lines and other information that is not about identifiable individuals so it is not personal information. Also, I find that there is some information in the "to" and "from" lines and signature blocks of emails whose purpose is clearly to enable the person to be reached at their workplace, so it is contact information.

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[65] Schedule 1 of FIPPA says: "third party" in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than (a) the person who made the request, or (b) a public body.
[66] See Schedule 1 of FIPPA for the definitions of personal information and contact information.
[67] Order F08-03, 2008 CanLII 13321 at para. 82; Order F14-45, 2014 BCIPC 48 at para. 41 and Order F19-15, 2019 BCIPC 17 at para 43.

Section 22 does not apply to any of the information that is not personal information, so I will not consider it further.

[82] However, I find that the balance of the information the University is refusing to disclose under s. 22 meets the definition of personal information. It includes some University staff work email addresses and email signature block information that in another setting might be contact information, but I find it is personal information here due to the context in which it appears. Given what has already been disclosed in those emails, it reveals that these University staff were identified as possible respondents or witnesses in the student's complaints.

[83] The applicant says she wants access to her own personal information to understand the University's decision to terminate her employment and cancel her benefits.[68] During both the investigation and the inquiry, she clarified that she is not interested in accessing the personal information of third parties.[69] While the University says that it is only refusing access to third party personal information, the applicant disputes this. The applicant makes it clear in her submission that she does not trust the University's decisions about what is "personal information" or "third party" personal information.

[84] I have carefully reviewed the University's s. 22 severing, and I find that the vast majority of the personal information withheld under s. 22 is exclusively third party personal information. It is about University staff and other third parties who were not University staff. It is also about the student who made several complaints and whose own behaviour was the subject of staff concern. There is also a fair bit of third party personal information in emails that is the sort of social chat that coworkers exchange about their personal lives and non-work matters.

[85] I conclude that it is not necessary to analyze the third party personal information more extensively because the applicant has said she does not want access to it.[70] I conclude the personal information that is exclusively third party personal information is not in dispute and the University's decision to refuse to disclose it under s. 22 is not at issue in this inquiry.

Applicant's personal information

[86] Some of the information withheld under s. 22, however, is the applicant's personal information, and she has clearly said that she wants access to that. An applicant will rarely be denied access to their own personal information in order to protect third party personal privacy.[71] There are, however, situations where

[68] Applicant's submission at para. 55.
[69] Applicant's January 15, 2018 email and Investigator's fact report at para. 7.
[70] Although not necessary in this case to continue on with the s. 22 analysis of the third party personal information, I note that most of it is the type of personal information whose disclosure is presumed to be an unreasonable invasion of personal privacy under s. 22(3)(a) and (d).
[71] Order 01- 54, 2001 CanLII 21608 (BC IPC) at para. 26.

disclosure to an applicant of their own personal information would unreasonably invade a third party's personal privacy. The question here is whether the applicant can have access to her own personal information without unreasonably invading the privacy of others.

[87] A small amount of the applicant's personal information is exclusively her personal information. For that reason, I find that disclosing this information to her would not be an unreasonable invasion of third party personal privacy and the University is not required or authorized to refuse to disclose it under s. 22. It is the applicant's self assessment of her work performance and her personal opinion about a politician.[72]

[88] However, the rest of the applicant's personal information is simultaneously the third parties' personal information because it is about their interactions with each other and their opinions of each other.[73] All of this type of personal information is in the Student Matter Records and the Employment Records and it is as follows:

(a) Instances where the applicant is communicating with University staff and other third parties when she was investigating the Student Matter. This third party personal information is in emails and also in a letter the applicant sent to the University after her employment ended.[74] Much of this third party personal information includes the applicant's opinions and judgements of the actions of third parties as well as her directions about what they should do.[75]

(b) Instances where University staff share their opinions and feelings about their interactions with the applicant and her involvement in the Student Matter.[76]

(c) Parts of peer evaluations of the applicant's work. The evaluation forms do not contain the evaluators' names, so they appear to have been submitted anonymously. The University disclosed the evaluations and only refused access to a few lines that provide context that would allow the applicant to identity the evaluators.

(d) Emails that contain a mix of the applicant's and third parties' personal information that is largely about administrative process.[77]

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[72] Pages 163-170 and 193 of the Records.
[73] Previous orders have also found that opinions are the opinion-giver's personal information as well as the personal information of the individual the opinion is about: Order F14-47, 2014 BCIPC 51 (CanLII) at para. 14; Order F16-32, 2016 BCIPC 35 (CanLII) at para. 51.
[74] Page 1676 of the Records.
[75] For example, pp. 78, 82- 84 and 126, 128, 2458, 2467 and 2472 of the Records.
[76] For example, pp. 344, 1222, 1223, 1400, 1405, 1406, 1409, 1412 of the Records.
[77] For example, pp. 1419, 2756 and 2773 of the Records.

[89] To be clear, given what the applicant has said about the type of personal information she seeks, I will only consider the personal information in paragraph 88(a) - (d) from this point forward.

Not an unreasonable invasion, s. 22(4)

[90] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If so, its disclosure is not an unreasonable invasion of third party personal privacy. The University submits that s. 22(4) does not apply. The applicant argues that ss. 22(4)(b) and (e) apply.

[91] Section 22(4)(b) – This provision says that a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if there are compelling circumstances affecting anyone's health or safety and notice of disclosure is mailed to the last known address of the third party.

[92] Section 22(4)(b) is a relevant consideration in the context of a complaint about the public body's decision to *disclose* the disputed information under s. 22(4)(b). It is in that circumstance a public body will need to defend its decision to disclose the personal information by showing that there were compelling circumstances affecting someone's health or safety and notice of disclosure was mailed to the last known address of the third party. I agree with Order F19-02, which said that s. 22(4)(b) is not relevant or applicable in a request for review of a public body's decision to *refuse* to disclose information.[78] In this case, the University is refusing to disclose the information and it has not given notice of disclosure to the third parties, so I conclude that s. 22(4)(b) does not apply.

[93] Section 22(4)(e) - Section 22(4)(e) says that a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff.

[94] The applicant says that the University administrators challenged her handling of the Student Matter and asserted their jurisdiction over those matters. For that reason, she submits the information relates to their positions, job descriptions and functions.

[95] I do not agree with the applicant's description of the third party personal information. The specific personal information in dispute in paragraph 88(a) - (d) is not about the third parties' job descriptions, positions or functions. Nor does it reveal the third parties carrying out their usual day-to-day work activities. Instead,

[78] Order F19-02, 2019 BCIPC 02 (CanLII) at paras. 20-27.

it is third party personal information in the context of an investigation into the complaints and allegations underlying the Student Matter and in the context of anonymous peer evaluations of her work performance. Therefore, I find that s. 22(4)(e) does not apply.

Presumptions, s. 22(3)

[96] The third step in the s. 22 analysis is to determine whether any of the presumptions against disclosure in s. 22(3) apply. If so, disclosing that personal information is presumed to be an unreasonable invasion of third party personal privacy.

[97] The University and the applicant raise ss. 22(3)(a), (d), (g) and (h), which state:

> 22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
>
> …
>
> (d) the personal information relates to employment, occupational or educational history,
>
> …
>
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
>
> (h) the disclosure could reasonably be expected to reveal the content of a personal recommendation or evaluation, a character reference or a personnel evaluation supplied by the third party in confidence and the applicant could reasonably be expected to know the identity of the third party,

[98] I find that ss. 22(3)(a) and/or (d) apply to all of the student's personal information in the Student Matter Records. Section 22(3)(a) applies to some of the student's personal information because it relates to his health matters. Section 22(3)(d) also applies because the student's personal information it is about an investigation into his complaints about how he was treated by the University, his behaviour while at school and the impact of all of that on his academics and enrolment.[79]

[99] I find that s. 22(3)(d) also applies to some of third party personal information that appears in the context of complaints and assessments about what the third parties did at work during the investigation into the Student Matter.

[79] For example, pp. 97, 108-111, 333 and 1224 of the Records.

Therefore, it is the type of information that previous orders have said relates to a third party's employment history.[80]

[100] The University also submits that s. 22(3)(g) applies to the third party personal information, but I do not agree. Previous orders have found that s. 22(3)(g) applies to formal performance reviews, job or academic references or an investigator's comments and views about workplace performance and behaviour in the context of a complaint investigation.[81] Most of the third party personal information is in emails where the applicant and third parties express their differing opinions about how the Student Matter is proceeding and whether certain third parties are acting improperly. I find that these opinions do not have the level of formality required to properly characterize them as a personal recommendation or evaluation, character reference or personnel evaluation under s. 22(3)(g).

[101] I also find that no s. 22(3) presumptions apply to the information withheld from the peer evaluations about the applicant. This is the information that would allow the applicant to identify the anonymous evaluators. The University submitted that s. 22(3)(d) and (g) apply to that information, and it cites BC Order F19-19 in support.[82] In that order, like many others where ss. 22(3)(d) and (g) were found to apply, the information revealed evaluations and criticism of *third parties'* work performance. Here, the evaluations are about the applicant, so they do not relate to a third party's employment or occupational history. Similarly, s. 22(3)(g) only applies to personal recommendations or evaluations, character references or personnel evaluations about the *third party*, and that is not the situation with these evaluations. Therefore, I find that ss. 22(3)(d) and (g) do not apply to the information withheld from the evaluations.

Relevant circumstances, s. 22(2)

[102] The final step in the s. 22 analysis is to consider the impact of disclosing the third party personal information at issue in light of all relevant circumstances, including those listed in s. 22(2). It is at this step, after considering all relevant circumstances, that the ss. 22(3)(a) and (d) presumptions may be rebutted. Between them, the applicant and the respondent raise the following s. 22(2) circumstances:

> 22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

[80] Order 01-53, 2001 CanLII 21607 (BC IPC) at paras. 32-41.
[81] Order 01-53, 2011 CanLII 21607 (BC IPC) at para. 44; Order 01-07, 2001 CanLII 21561 (BC IPC) at para. 21; Order F16-46, 2016 BCIPC 51 (CanLII) at para. 33; F14-10, 2014 BCIPC 12 (CanLII) at para. 19; Order F05-30, 2005 CanLII 32547 (BC IPC) at paras. 40-42.
[82] University's reply at para. 234. Order F19-19, 2019 BCIPC 21 (CanLII).

> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
> …
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence,
> …
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

Public scrutiny of public body's activities, s. 22(2)(a)

[103] The applicant submits that s. 22(2)(a) applies because it will reveal the wrongdoings and false public statements of the University and its employees in the Student Matter.[83] She submits the information warrants public scrutiny.

[104] The University submits that disclosing the information in dispute is not desirable for the purpose of subjecting the activities of the University to public scrutiny because the matters they address are private to the participants. It says that the information in dispute does not contain evidence of staff misconduct and a conspiracy as the applicant suggests. Further, it says that the applicant's own materials show that there has already been public scrutiny of the Student Matter and the issues she raises. The University says that it is difficult to imagine what more could be achieved by disclosing this information three years after the fact.[84]

[105] I find that the third party personal information in the Student Matter Records is very specific to the third parties and disclosure would provide no value in allowing the public to scrutinize the University's activities. For instance, it is sensitive detail about the student's health and his behaviour as well as information about how his behaviour made certain people feel. It also reveals the identities of the individuals that the applicant identified as possible respondents or witnesses in the student's complaints as well as staff concerns about how the applicant was handling the investigation into the Student Matter. I cannot see how the specific information at issue would reveal, as the applicant implies, staff wrongdoings or false public statements. After considering the applicant's extensive submissions and allegations, I am not persuaded that disclosing this

[83] Applicant's submission at paras. 588-591.
[84] University's reply at para. 237.

third party personal information is desirable for the purpose of subjecting the University's handling of the Student Matter to public scrutiny.

[106] I am also not persuaded that disclosing the information that identifies the people who provided peer evaluations of the applicant's work would be desirable for the purpose of subjecting the University's activities to public scrutiny. That information is solely about the applicant and it has no broader significance.

[107] I find that s. 22(2)(a) is not a circumstance that weighs in favour of disclosing the personal information in dispute.

Public health and safety, s. 22(2)(b)

[108] The applicant says that disclosure of the personal information is needed to promote public health and safety and overrides the protection of personal privacy in the circumstances.[85] She alleges that the student's behaviour continues to be unsafe and he is a threat to women. She also alleges that University staff pose a risk to the public because the way they dealt with the student shows they cannot be relied upon to keep women safe.

[109] The applicant says that she has reported the danger the student poses to the media and also to the student's new university. She provided a copy of the email she sent to another university providing details about the student's behaviour and voicing her concerns about him.[86] Her submissions also contain news articles in which she spoke publicly and in detail about the student and criticized the University for failing to take quick or meaningful action. In the articles, she also alleges that University staff obstructed her attempts to investigate the Student Matter and that she was fired in retaliation for looking into the matter and trying to protect women.[87]

[110] The University says that disclosing the disputed information would add nothing new to what the applicant has already disclosed publicly about the student and the information is more than three years old and would not provide any valuable insights into any current risk to the public.[88] The University says that there is no evidence of staff misconduct and the applicant's submission is based entirely on her own theories and suppositions about the actions and motivations of certain staff.

[111] The applicant's evidence demonstrates that the media has already reported extensively on the Student Matter and the applicant has publicly expressed her views about the student's behaviour, the risk she perceives and

[85] Applicant's submission at para. 594.
[86] Applicant's submission at tab 22.
[87] Applicant's submission at tabs 18, 20 and 21.
[88] University's reply at para. 237-239.

how the University handled the matter. What the applicant says about s. 22(2)(b) indicates that she believes it is necessary to publicly share more details of the Student Matter than what has already been brought to the public's attention and, presumably, she will be the one to do so once she has access to the disputed information.

[112] I have considered what the applicant says about s. 22(2)(b), but I am not persuaded it applies. What the student said to University administrators about his grades, for example, or what staff said to each other about how the applicant handled the Student Matter does not relate to public health and safety. The information that the applicant says the public needs to know for its own wellbeing has already been publicly reported. Therefore, I find that s. 22(2)(b) is not a circumstance that weighs in favour of disclosure of the disputed information.

Fair determination of rights, s. 22(2)(c)

[113] The applicant says that her civil claim against the University is still in progress and she needs the information in dispute for that litigation. In her notice of civil claim, the applicant asserts that the terms of her employment contract did not permit the University to terminate her employment on a without cause basis. She claims that she could only be fired for unsatisfactory work performance, and she denies that her work performance was unsatisfactory.[89]

[114] The applicant says that the information in dispute is not third party information but "is in fact the real reason for the Applicant's termination of employment and benefits."[90] She says the University's decision to terminate her employment and medical benefits was "based on untried accusations made by the Culpable VIU Administrators for improper motives."[91] She says that she needs to know who made the accusations that led to the termination of her employment so she can challenge their credibility.

[115] The University says that the termination was "without cause" and the applicant received pay in lieu of notice. The University says that it never claimed that there were reasons for the termination of her employment, and information that might reveal reasons are irrelevant to a fair determination of her wrongful dismissal proceeding.[92] The University cited case law that establishes that an employee who is terminated without cause does not have an entitlement to reasons or an explanation - only notice or pay in lieu of notice and any other compensation provided for in the employment contract.[93]

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[89] Applicant's submission at tab 29, paras.19-21.
[90] Applicant's submission at para. 616.
[91] Applicant's submission at para. 611.
[92] University's reply at paras. 245-246.
[93] *Styles v. Alberta Investment Management Corporation*, 2017 ABCA 1 (CanLII) at paras. 34-41. University's reply submission at para. 247

[116] Previous orders have said that the following four criteria must be met in order for s. 22(2)(c) to apply:

1. the right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;

2. the right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;

3. the personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and

4. the personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.[94]

[117] I find that the first two parts of the test are met because the applicant has a legal right to sue the University for an alleged breach of her employment contract and her lawsuit about that matter is not yet complete. However, I am not persuaded that the last two parts of the test have been met. The applicant has not explained how "untried accusations" about how she performed her duties would have any bearing on, or significance for, deciding whether the employment contract permitted the University to terminate without cause. She has also not explained why such information would be necessary to prepare for the proceedings and ensure a fair hearing.[95] Therefore, I find that s. 22(2)(c) does not weigh in favour of disclosure.

Unfair exposure to financial or other harm, s. 22(2)(e)

[118] The University submits that the personal information in the Student Matter Records is of a highly sensitive nature given what it discusses, and disclosure has the potential to cause personal distress and anxiety to those against whom allegations have been made.[96] The University also says that disclosing the identities of the peers who evaluated the applicant may cause these third parties to experience negative attention from the applicant or embarrassment and that this would be harm under s. 22(2)(e). The University says that it may also undermine the willingness of others to participate candidly in future evaluation processes.[97]

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[94] Order 01-07, 2001 CanLII, 21561 (BC IPC) at para. 31.
[95] For the sake of added clarity, contrary to what the applicant suspects, the information in dispute reveals nothing about accusations leading to the termination of her employment. None of the records involve third parties discussing or exchanging information about reasons to terminate the applicant's employment.
[96] Secretary's affidavit #1 at para. 37-50 and University's initial submission at para. 66.
[97] University's initial submission at para. 54.

[119] The applicant submits that the University's argument about harm are speculative and there is no evidence upon which a reasonable inference can be drawn that any third party would be unfairly exposed to harm as a result of disclosure. She also says that even if disclosure caused the University administrators embarrassment that does not rise to the level of serious mental distress required for it to be "harm" for the purpose of s. 22(2)(e).[98]

[120] Previous orders have said that harm under s. 22(2)(e) can include mental harm, in the form of serious mental distress or anguish. However, embarrassment, upset or having a negative reaction do not rise to the level of mental harm.[99]

[121] Keeping in mind that the applicant only wants access to her own personal information, I find that s. 22(2)(e) considerations weigh against disclosure where her personal information is intermingled with the *student's* personal information. I am referring to information that reveals what the applicant said about the student's behaviour and medical situation and how University administrators responded to him. I find all of that information is highly sensitive. The applicant has already publicly disclosed highly sensitive personal information about the student to the media and to other universities without any apparent regard for the student's personal privacy. It seems likely she will treat this personal information in the same way in view of what she said regarding public health and safety. Given what I read in the records about the student and the context of what transpired, I think that disclosing such intimate details to the applicant would unfairly expose the student to serious mental distress and anguish.

[122] However, I find otherwise when it comes to the harm that the University thinks would result if the identifying information in the peer evaluations is disclosed, namely embarrassment and negative attention. That kind of impact, in my view, does not rise to the level of serious mental distress or anguish that previous orders have said s. 22(2)(e) addresses. I draw the same conclusion regarding the information in emails where third parties discuss their thoughts and opinions about how the applicant was handling the Student Matter.

[123] Therefore, I find s. 22(2)(e) is a circumstance that only weighs against disclosure of the student's personal information.

Supplied in confidence, s. 22(2)(f)

[124] Section 22(2)(f) requires considering whether the personal information was supplied in confidence. The University submits that it considered the third party personal information in the Student Records to be sensitive and received in

[98] Applicant's submission at para. 630.
[99] Order 01-15, 2001 CanLII 21569 (BC IPC) at paras. 49-50 and Order 01-37, 2001 CanLII 21591 (BCIPC) at para. 42.

confidence.[100] The University also says that it considered the identity of the individuals who provided the peer evaluations to be their confidential and sensitive personal information.[101]

[125] The applicant says that there is no reliable evidence that any personal information was supplied in confidence.[102]

[126] Many of the emails are marked as "Personal and Confidential" or "Sensitivity: Confidential"; for instance, some emails containing complaints about and by the student, as well as details of his health and studies. Emails about other third parties' involvement in the Student Matter and the applicant finding fault with their actions are similarly marked as confidential. There are also emails between University staff marked as personal and confidential in which they express their thoughts and feelings about how the applicant was handling the Student Matter, and the nature and tone of those is that of coworkers confiding in each other about the personal impact of a situation that they were finding to be challenging. There is nothing in the emails with confidentiality labels that suggests that there was any intent to more broadly share the third party personal information. Given the context was a complaint investigation involving a student and allegations of harassment, all of this third party personal information is the type of personal information that one would reasonably expect to be have been supplied in confidence.

[127] There are also several emails between the student and two or three University administrators that are not expressly marked as confidential. They contain sensitive details about the student's complaints, academic matters, health and feelings. In light of the nature and context of this information, I find that it was likely supplied with an expectation of confidentiality.

[128] I have also considered whether the information severed from the peer evaluations was supplied in confidence. The only third party personal information in these evaluations is the few lines that would allow the applicant to identify the evaluator. The University's evidence about the confidentiality of this third party personal information was provided by the University Secretary who says that she considered the identity of the evaluators to be confidential.[103] I note that there is no place on the evaluation forms for an evaluator to record their name, which suggests that they understood and expected that their evaluation was anonymous and would not be linked back to them. Therefore, I am satisfied that the third party personal information in these evaluations was supplied in confidence.

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[100] University's initial submissions at para. 66(f).
[101] University Secretary's affidavit at para. 34 and University's initial submission at para. 54(c).
[102] Applicant's submission at para. 644.
[103] University Secretary's affidavit at para. 34.

[129] However, I find that that the emails at paragraph 88(d) above do not contain personal information that was supplied in confidence. These emails are largely about administrative steps and they are not marked as confidential.

[130] On balance, I am satisfied that all of the third party personal information identified in paragraph 88(a)-(c) was supplied in confidence. However, I am not persuaded that the information in paragraph 88(d) was supplied in confidence.

Unfairly damage reputation, s. 22(2)(h)

[131] The University submits that the personal information in the Student Records includes complaints and allegations made about the conduct of third parties and disclosing such information has the potential to unfairly damage their reputations.[104]

The applicant submits that the University did not provide reliable or persuasive evidence to establish that disclosure might damage anyone's reputation or any specifics as to how the alleged damage to anyone's reputation would be unfair.[105] She also submits that any damage to the University administrators' reputations would not be unfair because it is a direct result of their own "unlawful and unethical actions."[106]

[132] I find that the third party personal information that consists of the applicant's assessment of certain third parties' involvement in the Student Matter would unfairly damage their reputations. That is because the context is one where the applicant calls into question their professional judgement and actions and there is no corresponding detail about their side of the story or the outcome of any processes that may have been taken place to address her concerns. In my view, this personal information links the third parties to unproven allegations about their professional conduct, and I find disclosing it may unfairly damage their reputations.[107]

Applicant's existing knowledge

[133] The applicant submits that she was involved in investigating the Student Matter and her prior knowledge of the personal information is an important factor in favour of disclosure.[108] The University submits that even though the applicant may know some of the third party personal information, due to her involvement in

[104] University's initial submission at para. 66(e).
[105] Applicant's submission at para. 658.
[106] Applicant's submission at para. 662.
[107] For similar findings, see Orders F15-54, 2015 BCIPC 56 (CanLII) and F14-10, 2014 BCIPC 12 (CanLII).
[108] Applicant's submission at para. 553.

the matters addressed in the records, disclosure to her is in effect disclosure to the world.[109]

[134] It is apparent that the applicant once knew, and may still remember, some of the details of the third party personal information. Much of it is in emails that she sent or received while working for the University. Gaining access to the unsevered information in the records would allow her to refresh her memory about what she knew when the events took place over three years ago. She will also then have access to the University's records that contain the information.

[135] The fact that the applicant evidently knows some of the third party personal information weighs somewhat in favour of its disclosure. However, this is strongly outweighed by the likelihood that she will further disseminate the information that is disclosed to her. The applicant has already disclosed sensitive third party personal information that she acquired while working for the University to the media and to others. The applicant's past disclosures, combined with her submissions that the public needs to know about the third party behaviour that she finds fault with, lead me to conclude that she will further disclose the third party personal information.

[136] Therefore, while the applicant knows some of the third party personal information and that weighs in favour of its disclosure to her, that factor is not sufficient to counter the likelihood that she will disseminate it more broadly, if not publicly.

Findings, s. 22(2) circumstances

[137] Having considered and weighed the above circumstances, I find that the ss. 22(3)(a) and (d) presumptions that apply to the information described in paragraph 88(a) and (b) above have not been rebutted. That information is sensitive information about the student's health, academic matters and complaints about the student's interactions at school. It is also about the actions of third parties that arises in the context of a workplace investigation. The only circumstance weighing in favour of disclosure was the fact that the applicant clearly already knows some of the third party personal information given her personal involvement in the events the records address. However, that factor is not sufficient to rebut the presumptions, and I conclude that disclosing this third party information would be an unreasonable invasion of third party privacy.

[138] The third party personal information that is described in paragraph 88(c) is not subject to any s. 22(3) presumption. It is information that would reveal the identity of the individuals who supplied peer evaluations of the applicant's work. I found the evaluators supplied their evaluations anonymously which weighs against the disclosure of their identities. There were no circumstances weighing

[109] University's initial submission at para. 69.

in favour of disclosure. Therefore, I find that disclosing the information withheld from the peer evaluations would be an unreasonable invasion of the evaluators' personal privacy.

[139] However, I find otherwise regarding the information in paragraph 88(d). It is a mix of the applicant's and third parties' personal information that is largely about administrative process. Disclosing this information would not be an unreasonable invasion of personal privacy and further severing is possible. Although this will result in only a few more partial sentences being disclosed, it seems that this may assist the applicant to understand the nature of the matters addressed in those emails and allay her suspicions that they contain information about why she was fired.

Section 22(5) summary

[140] The applicant submits that s. 22(5) applies in this case. Under s. 22(5), a public body must give an applicant a summary of their personal information that was supplied in confidence by third parties, but only if the summary can be prepared without identifying the third party who supplied the personal information. I find that such a summary is not feasible in this case because any summary would reveal the identity of the third party providing the information. Therefore, there is no obligation on the University to provide a summary under s. 22(5).

Summary of s. 22 findings

[141] I found that some of the information is not personal information so the University is not required to refuse to disclose it under s. 22.

[142] The applicant said that she did not want access to third party personal information in the disputed records, so the University's decision to refuse access to it under s. 22 was not in dispute in this inquiry.

[143] The applicant said that she only wanted access to her own personal information. I found two instances where the personal information was exclusively about the applicant and the University is not authorized or required to refuse her access to it under s. 22.

[144] The balance of the applicant's personal information was simultaneously third parties' personal information because it was about their interactions or opinions about each other. I found that s. 22(4) did not apply to that information. The ss. 22(3)(a) and (d) presumptions that say that disclosure would be an unreasonable invasion of third party personal privacy applied to some of it. After weighing all relevant circumstances, including those in s. 22(2), I found that the presumptions had not been rebutted.

[145] As for the information to which no presumptions applied, I found that disclosing the information in the anonymous peer evaluations would be an unreasonable invasion of third party personal privacy. However, disclosing the third party personal information that was largely about administrative process would not be an unreasonable invasion of third party personal privacy.

[146] Finally, I found that the University was not required to provide the applicant with a summary under s. 22(5).

[147] I have highlighted the information that the University is not authorized or required to refuse to disclose under s. 22(1) in a copy of the relevant pages that have been sent to the University along with its copy of this order.

CONCLUSION

[148] For the reasons given above, I make the following order under s. 58 of FIPPA:

1. I confirm, in part, the University's decision that it is authorized to refuse to disclose the information in dispute under s. 13(1) of FIPPA, subject to paragraph 4 below.

2. I confirm the University's decision that it is authorized to refuse to disclose the information in dispute under s. 14 of FIPPA.

3. I confirm, in part, the University's decision that it is required to refuse to disclose information under s. 22(1) of FIPPA, subject to paragraph 4 below.

4. The University is not authorized or required by ss. 13(1) or 22(1) to refuse to disclose the information that I have highlighted in a copy of the relevant records that are provided to the University with this order. I require the University to give the applicant access to the highlighted information.

5. The University must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records it provides to the applicant.

[149] Pursuant to s. 59(1) of FIPPA, the University is required to comply with this order by October 8, 2020.

August 26, 2020

ORIGINAL SIGNED BY

Elizabeth Barker, Director of Adjudication

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