OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F20-38

VANCOUVER ISLAND UNIVERSITY

Elizabeth Barker
Director of Adjudication

August 26, 2020

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Summary: The applicant requested records about her and her 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), 17 (harm to financial or economic interests), 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*. The adjudicator confirmed the University's ss. 14 and 17 decisions. She did not need to consider s. 21 because s. 17 applied to the same information. The adjudicator confirmed the University's s. 13 decision, in part, but found that s. 22 did not apply. The University was ordered to disclose the information that 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)(m), 13(2)(n), 14, 17(1), 17(1)(b), 17(1)(f), 22(1), 22(4)(e), 22(3)(d), 22(2) and 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 January 11, 2017 to August 2, 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), 17 (harm to financial or economic interests), 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 F20-37.

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the University's decision. During mediation, the University disclosed additional information. However, mediation did not resolve the remaining issues and the applicant requested that they proceed to an inquiry.

[3] Some of the information in dispute under s. 21 relates to the Colleges, Universities and Institutes Benefits Consortium (Consortium).[2] The OIPC invited the Consortium to provide a submission regarding the application of s. 21, and it did so.[3] As I explain below, ultimately, it was not necessary for me to consider s. 21 or the Consortium's submission.

Preliminary matters

[4] New Issues - In her response submission, the applicant raises issues that were not included in the notice of inquiry or mentioned in the OIPC investigator's fact report. The applicant alleges that the University's decision about her access request was made "in contravention of" FIPPA because it was made by the University Secretary who is the head of the public body and did not have the delegated authority to make the decision.[4] She also complains that the University failed to produce all of the records responsive to her request.[5]

[5] 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.

[6] 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]

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[2] That information is in a record called "Severance Guidelines – BC Colleges and Institutions Consortium."

[3] On September 6, 2019, an OIPC adjudicator decided that, under s. 54(b), the Consortium was an appropriate person to receive a copy of the request for review and it was invited to make a submission. On September 16, 2019, the applicant filed a judicial review of the s. 54(b) decision (petition #S88739). In February 2020, the applicant put her judicial review into abeyance.

[4] Applicant's submission at paras. 2-18, 160, 199 and 356.

[5] Applicant's submission at paras. 203-204.

[6] Order F07-03, 2007 CanLII 30393 (BC IPC) and Order F11-28, 2011 BCIPC 34 at para. 11.

[7] 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 such a late point circumvents and undermines the investigation and mediation phase of the FIPPA review process. Adding issues late deprives the parties of the opportunity to have the OIPC investigate and mediate those issues and determine if they warrant proceeding to inquiry.

[8] The applicant does not explain why she did not raise these issues earlier and formally seek the OIPC's permission to add them into the inquiry or why they should be included at this late point. I am not persuaded that there is a justifiable reason for including these new issues into the inquiry, and I decline to do so.

[9] University affidavit evidence - The applicant submits that the University's affidavit evidence should not be admitted into evidence because it is unreliable and lacking in credibility. She said that there are procedural flaws in two affidavits, and one affiant committed perjury and another mischaracterized their employment relationship with the University. She also made these arguments about the affiants in the inquiry that resulted in Order F20-37. I have already addressed in some detail what she says about the affidavit evidence in that order and I will not repeat all that I said here. However, in short, I found that the missing procedural elements in the affidavits did not make them inadmissible and the University had corrected the omissions. I also found that the affidavit evidence could not reasonably be construed as false evidence intended to mislead and I the applicant's perjury claims were without merit.

[10] I make that same finding here with regards to the affiants' evidence, including what one affiant says about their employment status. As I did in that case, I have accepted the affidavits that the University provides into evidence and I will consider them along with the rest of the University's arguments and evidence.

[11] Joinder of related inquiries - The applicant requests that the OIPC combine this inquiry with her other inquiry involving the University.[7] The OIPC already decided not to join the two inquiries back in 2019, before the notices of 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.

ISSUES

[12] The issues to be decided in this inquiry are the following:

1. Is the University authorized by ss. 13(1), 14 and 17 of FIPPA to refuse the applicant access to the information in dispute?

[7] Applicant's submission at paras. 61- 63.

2. Is the University required by ss. 21(1) and 22(1) of FIPPA to refuse the applicant access to the information in dispute?

[13] Section 57 of FIPPA says that the public body has the burden of proving that ss. 13(1), 14, 17 and 21(1) apply and 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

[14] 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. Upon termination, she elected to receive several months of salary and benefit continuance. After her employment ended, she raised a number of issues with the University concerning the status and administration of her employment benefits. The disputed records relate to the University's internal deliberations about how best to respond to her concerns.[8]

[15] The Consortium is comprised of 17 post-secondary institutions in British Columbia and the Yukon, and it is governed by representatives of those institutions. Its role is to ensure that employee benefits are procured and delivered in the most cost effective manner for the Consortium's members. The Consortium's members have entered into agreements with Manulife Financial and Industrial Alliance Pacific, the benefit providers, for the provision of group benefits.[9]

Records in dispute

[16] The disputed information is in a handful of emails and a two-page document titled *Severance Guidelines – BC Colleges and Institutions Consortium* (Guidelines).[10] The emails are between the University's Associate Vice-President Human Resources, its Human Resources Advisor and Benefits Plan Administrator, its Director of Human Resources and its University Secretary. The University severed parts of the emails under ss. 13(1), 14 and 22(1) and a small amount of information in the Guidelines under ss. 17 and 21(1).

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[8] University's initial submission at paras. 15-16 and Secretary's affidavit at para. 17.
[9] This background information about the Consortium comes from the affidavit of the Chair of the Consortium and the Guidelines and the disclosed information.
[10] The emails are at pp. 445 (duplicates at pp. 1206 and 1215), 518, 597, 1131, and 1204-1205 of the records. The Guidelines are at pp. 443-444 (duplicate at pp. 1098-1099) of the records.

Advice or recommendations - s. 13(1)

[17] 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.[11]

[18] 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.[12] 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."[13]

[19] 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) does not apply.

Advice or recommendations

[20] The University says that the information that has been withheld under s. 13 is the advice, opinions and recommendations developed by the University's human resources and management team.[14] The University also says that the information includes proposed communications to the applicant that were not sent.[15]

[21] The applicant submits that s. 13 cannot apply in this case because it only applies to government and the University is not government. She also says that s. 13 does not apply to internal advice or recommendations. She asserts s. 13 can only apply if the advice and recommendations is provided by, or to, someone

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[11] *John Doe v. Ontario (Finance*), 2014 SCC 36 at paras. 45-51.
[12] Order 02-38, 2002 CanLII 42472 (BCIPC) and Order F10-15, 2010 BCIPC 24 (CanLII).
[13] *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 at para. 113.
[14] University's initial submission at para. 20
[15] University's initial submission at para. 25.

outside the public body.[16] The applicant also disputes that the records contain advice or recommendations.[17]

[22] 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 during its deliberations about how to respond to the applicant's concerns. Specifically, I find that the information at pages 597 and 1204-1205 are clearly the University Secretary's and the Associate Vice-President Human Resources' advice and recommendations on what the University should communicate to the applicant. However, I find that the information withheld under s. 13 on pages 518 and 1131 are statements of a factual nature that do not reveal any advice or recommendations.

[23] I do not accept the applicant's arguments that s. 13 is an exception that is only available to government and it cannot apply to internal advice or recommendations provided to a public body by its own employees. She has provided no case law that supports her interpretation of s. 13. Past orders have clearly shown that s. 13(1) may apply as long as the information would reveal advice or recommendations developed by or for a public body or minister.[18] Section 13 contains no limitations related to whether the advice is internal to, or from outside, the public body. In addition, there is no part of the definition of public body in Schedule 1 of FIPPA that excludes non-government public bodies. The University is a "public body" under FIPPA because it meets the definition of "local public body" in FIPPA.[19]

Section 13(2)

[24] 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.

[25] The University submits that the redacted information does not fall within any of the categories listed in section 13(2). The applicant says that ss. 13(2)(a), (m) and (n) apply.

[26] Section 13(2)(a) - 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

[16] Applicant's submission at paras. 326-396.
[17] Applicant's submission at paras. 365-368.
[18] For example, see Order F18-41, 2018 BCIPC 44 (CanLII) Order F19-41, 2019 BCIPC 46 (CanLII) and F17-39, 2017 BCIPC 43 (CanLII).
[19] The University meets the definition of "educational body" in Schedule 1 in FIPPA and in that way it is a "local public body".

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).[20]

[27] In my view, none of the information on pages 597 and 1204-1205 that I find would reveal advice or recommendations is factual material under s. 13(2)(a). The facts that appear in those emails are intermingled with, and an integral part of, the advice and recommendations.

[28] Section 13(2)(m) - 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."

[29] The applicant's submission about s. 13(2)(m) are not persuasive as they are not about the records or the information at issue this inquiry. Her s. 13(2)(m) submissions are about public statements the University made about an investigation it conducted into a student's behaviour.[21] In the present inquiry, the advice and recommendations contained in the records are about how the University should respond to the applicant's concerns about her employment benefits. The applicant identified nothing that establishes that the University ever publicly cited this advice or recommendations.

[30] Section 13(2)(n) - 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." The applicant says that the decisions to terminated her employment and benefits are an exercise of a discretionary power or adjudicative function as contemplated by FIPPA that affected and continue to affect her rights. She then elaborates on why she believes the decisions were wrong.[22] The advice and recommendations at issue in this inquiry are not actual decisions, about the matters the applicant raises or any other matters. For that reason, I find that s. 13(2)(n) does not apply.

Summary, s. 13

[31] In conclusion, the University has established that disclosing the information it withheld under s. 13(1) on pages 597 and 1204-1205 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, so it may be withheld under s. 13(1). There is, however, some information on pages 518 and 1131 that may

[20] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner,* 2013 BCSC 2322 at paras. 91-94.
[21] Applicant's submission at paras. 341-347.
[22] Applicant's submission at paras. 348-363.

not be withheld under s. 13(1) because disclosure would not reveal any advice or recommendations.

Solicitor client privilege - s. 14

[32] 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.[23] The University submits that legal advice privilege applies to the information it is withholding under s. 14.

[33] 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.[24]

[34] 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.[25]

[35] The information in dispute under s. 14 is several lines in the emails at pages 445 (duplicates at pages 1206 and 1215), 1131 and 1204. The University did not provide these redacted lines for my review. Instead, it provided an affidavit from its external legal counsel (Lawyer) who says that he was engaged by the University to represent it in connection with certain claims made by the applicant. He says the following about the information withheld under s. 14:

> 6. I have reviewed the Privileged Material and attest as follows:
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> > a. The Privileged Materials on pages 445, 1131, 1206, 1215 of the records appear within internal email communications at the University setting out the fact that legal advice was to be obtained from me and the information forming the basis upon which legal advice was to be sought. I confirm that such advice was requested from me and provided by me to the University. Disclosure of these records would therefore reveal information about privileged communications between the University and me; and

[23] *College, supra* note 13 at para. 26.
[24] *Solosky v. The Queen*, [1980] 1 SCR 821 [*Solosky*] at p. 837. The Court was speaking of legal advice privilege.
[25] *Solosky*, *ibid* at p.829. *See also R. v. B.,* 1995 CanLII 2007 (BCSC) at para. 22.

> b. The Privileged Material on page 1204 appears in an internal communication at the University setting out confidential legal advice provided by me.
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> 7. I further attest that the Privileged Materials
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> a. constitute internal communications at the University;
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> b. those communications either set out legal advice that was provided by me or they describe communications between the University and me that had taken place or did subsequently take place; 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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> 8. I further attest that there is no indication on the face of the Privileged 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.[26]

[36] In her affidavit, the University Secretary says that she has reviewed the Lawyer's affidavit and she agrees with his description of the information. She also says that to the best of her knowledge and belief, the University has maintained the confidentiality of the information withheld under s. 14.[27]

[37] Much of the applicant's s. 14 submissions are about records and matters that are not at issue in this inquiry. However, it is clear that she disputes that the information is privileged.

[38] The applicant says that the affidavit evidence provided by the Lawyer and the University Secretary contains hearsay, and the Lawyer's affidavit is not properly sworn. Thus, the applicant argues, their evidence is inadmissible.[28] She submits that the only way for me to determine if s. 14 properly applies is to examine the records.[29]

Analysis and findings, s. 14

[39] To begin, I do not agree with the applicant that the only way to determine if s. 14 properly applies is to examine the withheld information in the records. 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

[26] Lawyer's February 28, 2020 affidavit.
[27] University Secretary's affidavit at para. 22.
[28] Applicant's submission at paras. 30, 34, 262 and 265.
[29] Applicant's submission at para. 269.

privilege, the commissioner will only order production when absolutely necessary to adjudicate the issues in inquiry. In this case, I find that the University's evidence is sufficiently detailed to determine whether s. 14 was properly applied, and there is no need to also see the disputed information.[30]

[40] I am not persuaded by the applicant's argument that the affidavits of the Lawyer and the University Secretary are inadmissible because they contain hearsay or procedural defects. The rules of evidence do not apply strictly in the context of administrative proceedings, and evidence is admissible if it is relevant and can fairly be regarded as reliable.[31] The applicant has been given a fair opportunity to comment on the evidence and contradict it. Besides, I do not find that the evidence of the Lawyer and the University Secretary that I have cited above is hearsay, and the University has provided a re-sworn affidavit from the Lawyer which corrects the procedural defects the applicant identified. Further, what the Lawyer says the University Secretary told him about confidentiality is confirmed by what she says in her own affidavit.[32]

[41] I accept the Lawyer's evidence about what the severed information is about. He has directly reviewed the records and he was retained by the University to represent it in connection with the matters that these emails address. His evidence establishes that he is personally familiar with the information in dispute because it is about his communications with the University.

[42] The Lawyer says that the redacted information in the email on page 1204 is an internal University staff communication that sets out confidential legal advice that he provided to the University. The parts of the email that I can see show that no one other than University staff participated in this email.

[43] I also find that the University has proven that legal advice privilege applies to the redacted information in the emails on pages 445 (duplicates at pages 1206 and 1215) and 1131. I can see that these emails are only between University staff. The Lawyer's evidence establishes that disclosing the withheld information in these emails would reveal the nature of legal advice that University staff sought and he provided. Regarding the element of confidentiality, the Lawyer says these emails would reveal information about "privileged" communications he had with the University. The Lawyer is a practicing lawyer who was retained by the University, and I do not doubt that he understands that confidentiality is fundamental to the concept of privilege. Therefore, on a balance of probabilities, I conclude that by using the term "privileged" in the context of his affidavit he

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[30] See Order F20-16, 2020 BCIPC 18 at paras. 8-10.
[31] Order P07-01, 2007 CanLII 44884 (BC IPC) at para. 59 citing *Cambie Hotel (Nanaimo) Ltd. (c.o.b. Cambie Hotel) v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2006 BCCA 119.
[32] Lawyer's 1st affidavit at para. 7 and University Secretary's 1st affidavit at para. 22.

meant to encompass all elements of that term, including that the communications were confidential between him and his client.

[44] In conclusion, based on the evidence provided by the University and my review of the records, I am satisfied that the information reveals the confidential communications between the University and its legal counsel about the seeking, formulating and providing of legal advice. I find, therefore, that the University has proven that the information is protected by legal advice privilege and it may be withheld under s. 14.

Exercise of Discretion

[45] 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 information under ss. 13(1) and 14.

[46] The word "may" in ss. 13(1) 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 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.[33]

[47] The University Secretary says that the following factors were considered when the University exercised its discretion under ss. 13:

- the sensitivity of the records;
- the passage of time since the records were created, whether they pertained to matters still in progress or under deliberation by the University 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 in future such discussions;
- whether disclosure would be harmful to the University or harmful to any of its personnel;
- whether there were applicable safety of other public interest considerations that weighed in favour of disclosure; and

[33] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 52. See also Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 147.

- the extent to which the applicant may already be aware of the information in the records.[34]

[48] Regarding s. 14, the University Secretary says that the University has no intention of waiving solicitor client privilege, and it exercised its discretion to preserve the privileged nature of that information by refusing to disclose it.[35]

[49] The applicant says that the University has "furnished no evidence for any reasonable, transparent, and intelligible explanation for withholding information in exercise of any discretion."[36] She also submits that the University Secretary exercised discretion dishonestly, in bad faith, in a biased way and for an improper purpose.[37] The applicant alleges that the University Secretary made the decision about the applicant's access request in bad faith because the University Secretary was biased against the applicant and acted out of self-interest. The applicant provides extensive submissions about this.[38] In brief, the applicant disagrees with how the University Secretary handled an investigation into a complaint about a student's behaviour and also how she handled the issue of the applicant's benefits. The applicant alleges the University Secretary may be concealing the details of what she did in an effort to avoid being held accountable for her actions.

[50] I have carefully considered what the applicant and the University say about discretion and I find the applicant's allegations that discretion was exercised in bad faith and out of an improper self-interest to be purely speculative. Her allegations are not supported by persuasive evidence or what is revealed by the records and how they have actually been severed. Further, I can see that the information is not about the matters that the applicant speculates the University Secretary is trying to hide.

[51] I disagree with the applicant's argument that the University furnished no evidence for the exercise of discretion. I accept the University's evidence about the list of factors that were considered, and I do not find any of them to be irrelevant or improper considerations. Based on my review of the records, it is also evident that the University engaged in a line-by-line examination of the records when it made its severing decision. Only small parts of the records have

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[34] University Secretary's 1st affidavit at paras. 23.
[35] University Secretary's 1st affidavit at para. 24.
[36] Applicant's submission at para. 158,
[37] Applicant's submission at paras. 148-380. She also makes allegations about how the University Secretary was acting outside her powers because she did not have properly delegated authority to make the decision. The issue about the University President's delegation of his powers is one of the issues that I have declined to add into the inquiry. She also says the University Secretary committed perjury in her affidavit, which I have also addressed above in the Preliminary Matters section of this order.
[38] Applicant's submission at para. 185.

been withheld. I am satisfied that the University properly exercised its discretion in this case.

Harm to financial or economic interests - s. 17

[52] The University is refusing to disclose a small amount of information in the Guidelines under s. 17(1)(b) and 17(1)(f). For the reasons that follow, I find that s. 17(1)(f) and s. 17(1) generally apply, and that it is unnecessary to also discuss s. 17(1)(b). Sections 17(1) and 17(1)(f) state as follows:

> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
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> …
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[53] To rely on s. 17 a public body must establish that disclosure of the information could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy. Subsections 17(1)(a) to (f) are examples of information that may result in harm under s. 17. Past orders have said that subsections 17(1)(a) to (f) are not stand alone provisions and even if information fits within those subsections, a public body must also prove the harm described in the opening words of s. 17.[39] Therefore, regardless of the type of information, the overriding question will always be whether disclosure of the information could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of the government to manage the economy.

[54] The standard of proof for s. 17, which uses the language "could reasonably be expected to harm" is a middle ground between that which is probable and that which is merely possible. A public body must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to meet the standard. The determination of whether the standard of proof has been met is contextual. How much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent

[39] See for example: Order F05-06, 2005 CanLII 11957 (BC IPC) at para 36; Order F10-39, 2010 CanLII 77325 (BC IPC) at paras. 32–34; Order F11-14, 2011 BC IPC 19 at paras. 47–48. Order F12-02 2012, BCIPC 2, at para. 42.

probabilities or improbabilities or the seriousness of the allegations or consequences."[40]

Parties' submissions

[55] The University explains that the Guidelines set out the arrangement between the Consortium and its benefit carriers, Manulife Financial and Industrial Alliance Pacific, concerning the continuation of benefits to terminated employees.[41] The information withheld under s. 17 is the maximum time periods during which a Consortium member may extend the benefits to a terminated employee. The University is also withholding the details for how to calculate the risk premium to extend certain benefits.

[56] The University says that extending benefits beyond termination is exceptional and not automatic, and doing so results in costs in terms of continued premiums and human resources time and effort.[42] The Guidelines state that institutions are required to obtain approval from Manulife Financial and Industrial Alliance Pacific for the benefit extension period prior to notifying the employee.[43]

[57] The University's Director of Human Resources (Director) says that it is common for insured benefits to cease on the day an individual's employment is terminated. She says that the arrangements set out in the Guidelines are unique both in permitting Consortium members to extend certain benefits beyond termination and in the length of time over which benefits can be extended. She says that the Guidelines provide Consortium members with greater flexibility to negotiate more generous arrangements for the extension of benefits in appropriate circumstances.

[58] The Director says that the Guidelines are circulated annually to the Consortium's members as part of a confidential package of information that is provided to the human resources department at each institution. She says that to the best of her knowledge the Guidelines have not been made public. She also says she expressed her concerns to the University Secretary about any disclosure of the Guidelines, in particular the portions that were redacted.[44]

[59] Regarding s. 17(1)(f), the University submits that disclosure of the Guidelines will influence future negotiations to the detriment of the University's financial interests.[45] The University submits that disclosure will interfere with its

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[40] All principles and quotes in this paragraph are from *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3.

[41] Life insurance, accidental death and dismemberment, weekly indemnity, long term disability, extended health and dental benefits.

[42] University's submission at para. 44.

[43] Guidelines at p. 444 of the records.

[44] Director's affidavit at para. 9.

[45] University's reply submission at para. 203.

ability to negotiate shorter benefit extension periods as employees with access to this information will invariably be less likely to accept a lesser amount.[46] The University says that it is reasonable to expect that knowledge of the specific limits available under the Guidelines will result in greater demands being made by departing employees and their representatives, and put the University and other Consortium members under intense pressure to negotiate these arrangements in every case. The University says, "Put simply, any party that enters a negotiation is disadvantaged if the other party already knows its 'bottom line'."[47]

[60] The Director says the following about the harm to the University's negotiations:

> In my view, there is and was a risk that Consortium members, including the University, would be disadvantaged in negotiations with departing employees if the contents of the [Guidelines] became broadly known. Unions and employees would then be aware of the upper limit to which the University could extend benefits."[48]

The applicant disputes that s. 17 applies. She says that the University's evidence of harm is unconvincing because it is "speculative, imprecise and, in large measure, uncorroborated hearsay."[49] She also says that there is no evidence of a direct connection between disclosure and the potential occurrence of any harm. She doubts that the Guidelines have been kept confidential given that the Consortium also provided them to other public bodies' employees.[50]

Analysis and findings

[61] For the following reasons, I find that the University has established that disclosing the information it withheld under s. 17 could reasonably be expected to harm its negotiating position and its financial interests under s. 17(1)(f) and s. 17(1) generally.

[62] The withheld maximum time periods set out in the Guidelines reveal the ceiling available to the University when it negotiates severance arrangements with individuals who may be contemplating pursuing a lawsuit related to the termination of their employment. In future negotiations, this information would reveal the University's potential upper range, which the terminated employee would not otherwise have known. I am satisfied that disclosing this information would reveal a key aspect of the University's negotiating position.

[63] I conclude that the University would be at a disadvantage in future negotiations if the party it is negotiating with knows how much the University has

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[46] University's initial submission at paras. 44-47.
[47] University's reply submission at para. 198.
[48] Director's affidavit at para. 10.
[49] Applicant's submission at para. 519.
[50] Applicant's submission at para. 537.

available to draw upon. The terminated employee would adjust their own negotiating position, knowing it was worth pushing and negotiating harder because there are more weeks of benefits available. This could reasonably be expected to result in increased financial costs to the University in the form of prolonged negotiations and more expensive terms of agreement, specifically prolonged premium payments and related administrative and human resources costs. If this occurred, it would harm the University's financial interests. Therefore, I am satisfied that s. 17(1)(f) and s. 17(1) both apply to the information in dispute in the Guidelines.

[64] My conclusion is bolstered by previous orders where s. 17 was found to apply to similar types of information. For example, in Order F18-51, the adjudicator said that s. 17 applied to the contingency amounts that BC Hydro set aside for project delays and cost overruns.[51] BC Hydro satisfactorily established that if its contingencies were disclosed, contractors would attempt to obtain the full amount of the contingency although the full amount may not be needed to resolve the changes to the project scope. The adjudicator concluded that BC Hydro would be at a disadvantage during negotiations if contractors knew how much BC Hydro had set aside to address unforeseen changes, so disclosure of the contingency amounts could reasonably be expected to harm BC Hydro's financial interests.

[65] In addition, other orders have said that s. 17 applied to an insurance company's reserves, which are amounts set aside for ongoing claims based on the insurer's view of the upper range of potential damages and expenses which may be necessary to settle the claim.[52] Those orders found that the reserve amount, when it related to an ongoing claim, reveals the insurance company's views on risk and disclosing it would be detrimental to the public body's negotiating position.

[66] Similarly, orders have said that s. 17 applies to information about a public body's risk assessment, financial assumptions and savings targets in the context of ongoing or future negotiations. For instance, in Order F10-34 the commissioner found that disclosing information about how the public body evaluates risks associated with projects would harm the public body's negotiating position in future contract negotiations.[53] Similarly, Order 03-35 dealt with a public body's financial assumptions and expected savings targets related to a proposed project for which it anticipated engaging in a competitive bidding process.[54] The commissioner concluded that disclosing the information would allow proponents to orient their bids to those assumptions and targets, rather

[51] Order F18-51, 2018 BCIPC 55 (CanLII) at paras. 15-25. See also F20-20, 2020 BCIPC 23 (CanLII) at paras. 113-119, issued after this present inquiry closed.
[52] Order F18-04, 2018 BCIPC 4 at paras. 98–101; Order F06-19, 2006 CanLII 37939 (BC IPC) at para. 130; Order F08-19, 2008 CanLII 66913 (BC IPC) at para. 55.
[53] Order F10-34, 2010 BCIPC 50.
[54] Order 03-35, 2003 CanLII 49214 (BC IPC).

than exploring and offering more aggressive cost-saving opportunities, to the public body's financial detriment.

[67] In conclusion, I find that the University has met its burden of proof and established that disclosing the information it withheld in the Guidelines could reasonably be expected to harm the University's financial interests and its negotiating position. Therefore, the University may refuse to disclose this information to the applicant under s. 17(1)(f) and, more generally, under s.17(1).

Harm to third-party business interests - s. 21

[68] Section 21(1) of FIPPA requires public bodies to withhold information the disclosure of which would harm the business interests of a third party. The only information withheld under s. 21 is on page 443 (duplicate on page 1098), and I have already found that s. 17(1)(f) and s. 17(1) apply to that information. Therefore, it is not necessary to decide if s. 21 also applies.

Unreasonable invasion of third party personal privacy - s. 22

[69] 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.[55] The University withheld a few sentences from the emails under s. 22.[56]

Personal information

[70] 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."[57]

[71] I find the information withheld under s. 22 is third party personal information because it is about a named third party and it is not contact information. The information is not the applicant's personal information because it is not about her.

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[55] 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.
[56] At pp. 445 (duplicates at p. 1206 and 1215), 518, 1204 of the records.
[57] See Schedule 1 of FIPPA for the definitions of personal information and contact information.

Not an unreasonable invasion, s. 22(4)

[72] 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 applicant submits that s. 22(4)(e) applies but the University submits it does not.

[73] 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. Previous orders have found that s. 22(4)(e) encompasses personal information that relates to the individual's job duties in the normal course of work-related activities, such as objective, factual statements about what the individual did or said in the normal course of discharging their job duties, but not qualitative assessments or evaluations of such actions.[58]

[74] I find that s. 22(4)(e) applies to some of the personal information because it is objective, factual detail about what a third party said and did in the normal course of their employment. There is no element of evaluation or judgement of any individual associated with this personal information. Disclosing it, therefore, would not be an unreasonable invasion of a third party's personal privacy. Because s. 22(4)(e) applies, the University cannot refuse to disclose it to the applicant under s. 22.[59]

[75] However, I find that s. 22(4) does not apply to the rest of the third party personal information, which I will refer to from this point forward as the balance of the personal information. The balance of the personal information is not about what a third party said and did in the normal course of their employment. Rather, it is about a third party's whereabouts and work conditions.

Presumed unreasonable invasion of privacy, s 22(3)

[76] The third step in this s. 22 analysis is to determine whether s. 22(3) applies to the balance of the personal information. If so, disclosure is presumed to be an unreasonable invasion of the third party's personal privacy. The University submits that s. 22(3)(d) applies. Section 22(3)(d) says that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to employment, occupational or educational history.

[77] The University says that s. 22(3)(d) applies to the personal information because it "relates to matters that constitute either the 'employment' or

[58] Order 01-53, 2001 CanLII 21607 (BC IPC) at para. 40.
[59] That information is on p. 445 (duplicated on pp. 1206 and 1215).

'occupational' history of the University employees as those terms have been applied and interpreted within section 22(3)(d) of the Act."[60] It does not elaborate or cite case law. The University does say, however, that the personal information is about vacations and personal schedules and that it seeks to protect the personal privacy of its employees.[61]

[78] The applicant says that she does not know if the s. 22(3) presumptions apply.[62]

[79] The OIPC has interpreted s. 22(3)(d) as applying to, for example, a third party's work history, resume information, leave transactions, discipline, personnel file information, performance appraisals, resignation letters and reasons for leaving a job.[63] Section 22(3)(d) has also been found to apply to comments about a third party's workplace actions or behaviour in the context of a workplace complaint or discipline investigation.[64] The balance of the personal information in this case is not about such matters. Rather, it is factual statements about the third party's whereabouts and work conditions, and I find that s. 22(3)(d) does not apply. No other s. 22(3) presumptions apply either.

Relevant circumstances, s. 22(2)

[80] The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those listed in s. 22(2). The applicant raises 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
>
> > (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,
> > …
> > (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,

[60] University's reply submission at para. 187.
[61] University's submission at paras. 34 -36.
[62] Applicant's submission at paras. 438-448.
[63] See for example: Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 92; Order F08-20, 2008 CanLII 66914 (BC IPC) at paras. 28-33; Order F09-24, 2009 CanLII 66961 (BC IPC) at para. 9; Order F10-05, 2010 BCIPC 8 (CanLII) at para. 47.
[64] Order 01-53, 2001 CanLII 21607 (BC IPC) at para. 40.

> (g) the personal information is likely to be inaccurate or unreliable,
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and
> …

[81] I find that none of these s. 22(2) circumstances are relevant when considering the specific third party personal information in this case. The balance of the personal information is more than three years old and it is innocuous and general facts about an employee's location on a particular day and their work conditions. The information casts no judgement on the employee, and there is also no evidence to suggest that it reveals anything confidential or sensitive about the employee.

[82] In conclusion, having considered the circumstances, I find that it would also not be an unreasonable invasion of third party personal privacy to disclose the balance of the personal information.

Section 22(5)

[83] The applicant submits that s. 22(5) applies in this case.[65] Under s. 22(5), a public body must give an applicant a summary of their own 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. None of the personal information in dispute in the records is the applicant's personal information, so s. 22(5) does not apply.

Section 22 Summary

[84] In summary, I find that all of the information withheld under s. 22 is third party personal information, and disclosing it would not be an unreasonable invasion of third party personal privacy. That is because s. 22(4)(e) applies to much of the personal information. As for the balance of the personal information, none of the s. 22(3) presumptions apply and all relevant circumstances indicate that disclosure would not be an unreasonable invasion of a third party's personal privacy.

CONCLUSION

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

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[65] Applicant's submission at paras. 500-505.

1. I confirm, in part, the University's decision to refuse to disclose the disputed information 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 disputed information under s. 14, 17(1) and 17(1)(f) of FIPPA.

3. The University is not required to refuse to disclose the information in dispute under s. 22(1) of FIPPA.

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 on pages 445, 518, 1131,1204, 1206, 1215 of the 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.

[86] 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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