



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Decision F05-08

UNIVERSITY OF BRITISH COLUMBIA

Celia Francis, Adjudicator
October 25, 2005

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Summary: UBC's request that an inquiry under Part 5 not be held is granted. An inquiry will not be held.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22 & 56.

Authorities Considered: B.C.: Order 04-15, [2004] B.C.I.P.C.D. No. 15; Order 02-57, [2002] B.C.I.P.C.D. No. 59; Order 01-03, [2001] B.C.I.P.C.D. No. 3; Order 01-16, [2001] B.C.I.P.C.D. No. 17.

1.0 INTRODUCTION

[1] This decision deals with a request by the University of British Columbia ("UBC") that I decline, under s. 56 of the Act, to proceed with an inquiry under Part 5 of the Act in relation to an access to information request, which I describe below, that the respondent access applicant ("respondent") made to UBC under the *Freedom of Information and Protection of Privacy Act* ("Act").

2.0 DISCUSSION

Background

[2] The respondent made an access request on June 14, 2002. On September 25, 2002, UBC denied access to records that the respondent had requested respecting his employment, tenure and promotion at any level at UBC. The matter ultimately was the subject of an inquiry and, in Order 04-15,¹ I ordered UBC to disclose further information to the respondent. Regarding other records, I ordered UBC to make a decision on whether the applicant was entitled to have access. UBC complied with these orders on August 26, 2004.

¹ [2004] B.C.I.P.C.D. No. 15.

[3] On August 30, 2004, the respondent wrote to this Office expressing concern about the severing of information from the latter set of records, pp. 2050-2056, saying that these “should be released in their entirety.” This Office wrote to the respondent, noting that, since UBC had made a new access decision in response to Order 04-15, the respondent could request a review of the new decision under Part 5 of the Act. The applicant did so, the matter was referred to mediation under Part 5 of the Act and UBC agreed to release more information. The matter did not, however, completely settle and, on May 13, 2005, this Office told the parties that an inquiry would be held under Part 5 respecting information that UBC withheld from pp. 2050-2051 and 2054-2055.

[4] On June 15, 2005, UBC wrote to this Office and asked that an inquiry not be held. The respondent and UBC both made submissions regarding UBC’s request. UBC later disclosed more information.

Discussion

[5] Section 56(1) of the Act reads as follows:

Inquiry by Commissioner

56(1) If the matter is not referred to a mediator or is not settled under section 53, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[6] Section 56(1) confers discretion as to whether to hold a Part 5 inquiry respecting a request for review. As has been said before, there may be a variety of reasons why the discretion under s. 56 might be exercised one way or another. These include the principles articulated in Order 02-57² and Order 01-03.³

[7] In the first of these decisions, Commissioner Loukidelis held that Simon Fraser University could refuse to process an access request that attempted to avoid the outcome of Order 01-16,⁴ which involved the same records. He held that the second access request was an abuse of process and that the legal principle of *res judicata*⁵ applied. Order 01-03 is another case in which he held that *res judicata* and the doctrine of issue estoppel can apply. In that case, these principles prevented an applicant from making a second request for records that had previously been refused, a refusal which Commissioner Flaherty upheld in a decision.

[8] As indicated above, UBC made a new decision on some of the records that were in dispute in Order 04-15 and a small amount of information from those same records is in issue here, *i.e.*, small amounts of information found on pp. 2050-2051 and 2054-2055. I have reviewed the disputed information and note that, while the respondent has been given his own personal information, UBC has withheld identifying information of third parties. This information is third-party personal information.

² [2002] B.C.I.P.C.D. No. 59.

³ [2001] B.C.I.P.C.D. No. 3.

⁴ [2001] B.C.I.P.C.D. No. 17.

⁵ To lawyers, the Latin term “*res judicata*” means the thing has already been judged.

[9] In Order 04-15, I adjudicated the applicability of the presumed unreasonable invasion of personal privacy created by s. 22(3)(d) in relation to personal information in the records, including records like those now in issue. On its face, the information in dispute is also covered by s. 22(3)(d).

[10] In Order 04-15, I also decided that, contrary to the respondent's contention, the circumstance found in s. 22(2)(c) did not favour disclosure of personal information in the records. In his submissions in this proceeding, the respondent has attempted to re-argue the s. 22(2)(c) issue in the same terms as he did in the inquiry leading to Order 04-15.

[11] Technically, UBC had not, in the circumstances leading up to Order 04-15, made a decision respecting the small amount of personal information now in dispute.⁶ While I do not agree with UBC that the principle of *res judicata* applies, I have concluded that the issue has been determined in Order 04-15, such that the principle of issue estoppel applies.

[12] In Order 01-03, Commissioner Loukidelis reviewed the law on issue estoppel and said this:

[18] Issue estoppel applies in cases where—even though the later proceeding involves a different cause of action—an issue in the later proceeding has already been decided in an earlier proceeding. In *Angle*, Dickson J. cited, with approval, the House of Lords judgement in *Carl Zeiss Stiftung v. Rayner and Keeler Ltd. et al. (No. 2)*, [1966] 2 All E.R. 536, where, at p. 565, Lord Guest summed up the requirements for issue estoppel as follows:

The requirements of issue estoppel still remain (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final, and (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[13] These conditions have been met here. The s. 22 issues are, I am satisfied, the same in nature as those decided in Order 04-15. Order 04-15 was final in the sense that it disposed finally of the issues between the parties and no judicial review application was made respecting that decision, with which UBC complied. Last, the respondent and UBC were also parties to Order 04-15. For these reasons, issue estoppel applies.

⁶ I will note here that I do not agree with UBC's suggestion, if I understand it correctly, that s. 22(2)(c) would not apply unless the respondent has legal rights against UBC, as opposed to legal rights against others. I see no basis in s. 22(2)(c) to support this.

4.0 CONCLUSION

[14] For the above reasons, I have decided to exercise the discretion under s. 56 by deciding not to hold an inquiry in this matter.

October 25, 2005

ORIGINAL SIGNED BY

Celia Francis
Adjudicator

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