



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

Decision F10-15

SIMON FRASER UNIVERSITY

Alexander Boyd, Adjudicator

December 2, 2010

Quicklaw Cite: [2010] B.C.I.P.C.D. No. 62

CanLII Cite: 2010 BCIPC No. 62

Document URL: <http://www.oipc.bc.ca/orders/section56/DecisionF10-15.pdf>

Summary: The respondent made an access request for a copy of emails concerning a room in Hamilton Hall. SFU provided access to the requested records, but severed portions under s. 13 of the Act. The respondent requested a review of SFU's reliance on s. 13 and presented that s. 25 was also a consideration. SFU then asked that an inquiry not be held as the withheld portions meet the s. 13 requirement of being advice or recommendations. It is plain and obvious that the withheld portions of the records meet the requirement of being advice or recommendations and the content is such that an inquiry is not necessary to consider s. 25. Simon Fraser University's request that this matter not proceed to inquiry is granted.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 56; s. 13; s. 25.

Authorities Considered: B.C.: Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Decision F07-04, [2007] B.C.I.P.C.D. No. 20; Decision F08-11, [2008] B.C.I.P.C.D. No. 36; Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38; Order 00-17, [2000] B.C.I.P.C.D. No. 17; Order F08-06, [2008] B.C.I.P.C.D. No. 6.

1.0 INTRODUCTION

[1] Simon Fraser University ("SFU") has made an application under s. 56 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") that an inquiry under Part 5 of FIPPA not be held with respect to an access to

information request made by the respondent. For the reasons that follow, after considering both parties' submissions, I have exercised my discretion to grant SFU's request.

2.0 DISCUSSION

The access request

[2] The respondent made an access request for a copy of any emails between SFU's Department of Environmental Health and Safety and its Department of Residence and Housing concerning fungal sampling done on, or any other issues concerning, room 1013 of Hamilton Hall for the year of 2007. Hamilton Hall is an SFU student residence.

[3] SFU responded by providing the respondent with a severed copy of the requested emails. In its response letter to the respondent, SFU informed him that it had severed information under s. 13 of FIPPA.

[4] The respondent requested that the Office of the Information and Privacy Commissioner ("OIPC") review SFU's decision to deny him access to portions of the requested records. In his request for review letter, the respondent argued that s. 25 should be a consideration as the disclosure of the information is in the public interest.

[5] As mediation was not successful in resolving this matter, the respondent requested that an inquiry take place under Part 5 of FIPPA. SFU then requested that, under s. 56 of FIPPA, an inquiry not proceed.

Parties' arguments

[6] In its initial submission, SFU argued that it is apparent on the face of the record that the severed information meets the definition of being advice and/or recommendations developed by and for SFU and that s. 13(1) of FIPPA therefore applies.¹ SFU contended that the severed information consists of advice sought by one SFU employee and advice provided by another SFU employee in response.²

[7] In support of its position, SFU referenced Order 00-17 and Order F08-06, both of which dealt with matters pertaining to s. 13(1).³ SFU argued that, in Order 00-17, the Commissioner confirmed that s. 13(1) permits public body employees to provide confidential advice to other employees.

¹ SFU's initial submission, para. 4.

² SFU's initial submission, para. 7.

³ Order 00-17, [2000] B.C.I.P.C.D. No. 17; Order F08-06, [2008] B.C.I.P.C.D. No. 6.

[8] SFU also submitted an affidavit sworn by Dr. Patricia Hibbitts, the SFU employee who exercised her discretion to withhold portions of the records under s. 13(1). In her affidavit Dr. Hibbitts states that she considered a number of relevant factors when determining whether she would exercise her discretion to apply s. 13(1) to portions of the records.⁴

[9] As to whether s. 25 would require SFU to release the severed portions of the records, in its reply submission, SFU submitted that the information severed from the records does not relate to any risk of significant harm to the health or safety of the public or a group of people.⁵

[10] In his submission, the respondent submitted that Decision F07-04 outlines the applicable criteria in exercising discretion under s. 56.⁶ He argued that one such criterion is that there must be no issue meriting adjudication in an inquiry and that in his view, there is a serious issue that merits adjudication in relation to s. 25.⁷

[11] In support of his belief, the respondent provided background information as to the extent of a mold problem in Hamilton Hall. He stated that SFU had commissioned engineering reports about the problem and that it had a duty under s. 25 to release these reports because they pertained to a matter that could have negatively impacted the health of scores of students.⁸

[12] The respondent argued that, if the severed portions of the records contain advice on policy, then it is advice that encouraged SFU staff to knowingly mislead him and to knowingly violate s. 25.⁹

[13] The respondent further argued that, as he did not receive information relevant to his health as required by s. 25, SFU may not have correctly applied s. 13(2)(n) in regards to the limits it puts on the application of s. 13(1). He requested that the OIPC review whether or not SFU has correctly applied s. 13 (2)(n).¹⁰

⁴ Affidavit of Dr. Patricia Hibbitts, para. 5.

⁵ SFU's reply submission, para. 4.

⁶ Respondent's submission, para. 1.

⁷ Respondent's submission, para. 2.

⁸ Respondent's submission, para. 2.

⁹ Respondent's submission, para. 3.

¹⁰ Respondent's submission, para. 5.

Issue

[14] 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.

[15] There have been a number of previous decisions and Orders that have laid out the principles for the exercise of discretion under s. 56.¹¹ I have taken the same approach without repeating those principles here.

Analysis

[16] There are two issues at the root of this matter. The first is whether there is an arguable issue that the severed portions of the records should be disclosed in accordance with s. 25. The second issue is whether SFU has established that it is plain and obvious that the withheld portions of the records are subject to s. 13 of FIPPA so that there is no merit to holding an inquiry.

Section 25

[17] Section 25, in relevant part, reads as follows:

25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or

(b) the disclosure of which is, for any other reason, clearly in the public interest.

[18] For s. 25 to be a consideration, the withheld information must be about a risk of significant harm to the environment or to the health or safety of the public or a group of people or information that it would clearly be in the public interest to disclose.

[19] The records that are the subject of this matter are emails between three SFU employees. One employee asked for advice on how to respond to an email

¹¹ See for example Decision F07-04, [2007] B.C.I.P.C.D. No. 20 and Decision F08-11, [2008] B.C.I.P.C.D. No. 36.

from the respondent and the other two employees provided advice or recommendations on how she could do so. None of the withheld portions contains information pertaining to a risk of significant harm to the health or safety to the public or to any group of people nor is it information the disclosure of which would be clearly in the public interest. I find that there are no matters pertaining to s. 25 that would require consideration at an inquiry.

Section 13(1)

[20] The records are emails between three SFU employees. The withheld portions contain advice and recommendations provided by two of the employees to the third who had asked them to advise her on how to respond to an email from the respondent. Having regard for previous orders on s. 13(1) and its purpose, I find it plain and obvious that s. 13(1) applies here because the withheld portions meet the definition of being advice and recommendations. No inquiry is warranted on this issue.

Section 13(2)(n)

[21] The respondent asked that the OIPC consider whether SFU has correctly applied s. 13(2)(n). This section reads as follows:

13(2) The head of a public body must not refuse to disclose under subsection (1)

...

(n) 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.

[22] With respect to s. 13(2)(n) of FIPPA, my review of the records confirms there is nothing within them relating to the exercise of any discretionary power or to an adjudicative function. There are no issues relating to s. 13(2)(n) that would need consideration at an inquiry.

Exercise of discretion

[23] Section 13 is a discretionary exception. In Order No. 325-1999, the Commissioner outlined that at an inquiry, public bodies must be prepared to demonstrate that they have exercised their discretion.¹²

[24] The affidavit of Dr. Patricia Hibbitts outlines the factors that she considered when exercising her discretion under s. 13(1). SFU has

¹² Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38

demonstrated that it exercised its discretion and I see no arguable issues regarding this aspect of the matter that would need consideration at an inquiry.

3.0 CONCLUSION

[25] For the reasons that I have given above, this matter will not proceed to an inquiry under Part 5 of FIPPA. This Office's file on the review will be closed.

December 2, 2010

ORIGINAL SIGNED BY

Alexander Boyd
Adjudicator

OIPC File: F09-39872