Office of the Information & Privacy Commissioner for British Columbia

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Order F17-39

CAPILANO UNIVERSITY

Carol Whittome
Adjudicator

September 13, 2017

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Summary: An applicant requested that Capilano University disclose records about a funding initiative for graduates of its film studies program. The University released some records but withheld other records and information pursuant to ss. 13 (advice or recommendations), 14 (solicitor client privilege), 17 (harm to financial interests) and 22 (unreasonable invasion of personal privacy) of FIPPA. The adjudicator held that the University was not authorized to withhold any information under s. 17, but was authorized to refuse to disclose all of the information it withheld under s. 14 and most of the information under ss. 13 and 22. The adjudicator ordered the University to provide a small amount of information to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13, 14, 17 and 22.

Authorities Considered: B.C.: Order F15-24, 2015 BCIPC 26 (CanLII); Order 01-32, 2001 CanLII 21586 (BC IPC); Order F05-25, 2005 CanLII 28524 (BC IPC); Order F12-07, 2012 BCIPC 10 (CanLII); Order F17-31, 2017 BCIPC 33 (CanLII); Order 01-26, 2001 CanLII 21580 (BC IPC); Order F14-39, 2014 BCIPC 42 (CanLII); Order F14-57, 2014 BCIPC No. 61 (CanLII); Order F10 15, 2010 CanLII 77326 (BC IPC); Order F14-44 2014 BCIPC 47 (CanLII) ; Order F17-13 2017 BCIPC 14 (CanLII); Order 15-33, 2015 BCIPC 36 (CanLII); Order F17-32, 2017 BCIPC 34 (CanLII); Order F17-03, 2017 BCIPC 3 (CanLII); Order F17-33, 2017 BCIPC 35; Order F11-23, 2011 BCIPC 29 (CanLII); Order F16-14, 2016 BCIPC 16; Order F15-52, 2015 BCIPC 55 (CanLII); Order F15-67, 2015 BCIPC 73 (CanLII); Order F10-20, 2010 BCIPC 31 (CanLII); Order F16-28, 2016 BCIPC 30 (CanLII); Order 00-10, 2000 CanLII 11042 (BC IPC); Order F14-12, 2014 BCIPC 15 (CanLII); Order F12-02, 2012 BCIPC 2 (CanLII); Order 326-1999, 1999 CanLII 4353 (BC IPC); Order 01-53, 2001 CanLII 21607; Order F16-38, 2016 BCIPC 42 (CanLII); Order No. 175-1997, 1997 CanLII 3724 (BC IPC); Order F03-25, 2003 CanLII 49204 (BC IPC); Order F13-20, 2013 BCIPC 27 (CanLII); Order F14-45, 2014 BCIPC 48 (CanLII); Order F05-30, 2005 CanLII 32547

(BC IPC); Order F10-11, 2010 BCIPC 18 (CanLII); Order F05-18, 2005 CanLII 24734; Order 01 52, 2001 CanLII 21606 (BC IPC); Order F16-12, 2016 BCIPC 14 (CanLII).

Authorities Considered: ON: Order PO-3560-I, 2015 CanLII 88780 (ON IPC); Order PO-1709, 1999 CanLII 14388 (ON IPC), upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.); Order MO-2262, 2008 CanLII 1825 (ON IPC).

Cases Considered: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII); *Schweneke v. Ontario*, 2000 CanLII 5655 (ON CA); *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII); *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII); *Provincial Health Services Authority v. British Columbia (Information and Privacy* Commissioner, 2013 BCSC 2322 (CanLII); *R. v. B*., 1995 CanLII 2007 (BC SC); *Bank of Montreal v. Tortora*, 2010 BCSC 1430 (CanLII); *Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General)*, [1988] O.J. No. 1090 (Ont. S.C.J.); *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2007 BCSC 1420 (CanLII); *Maximum Ventures Inc. v. de Graaf*, 2007 BCSC 1215 (CanLII); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC).

Secondary Sources: OIPC, *Guide to OIPC Process (FIPPA)*, online: https://www.oipc.bc.ca/guidance-documents/1599; BC Government's *FOIPPA Policy & Procedures Manual*, online: http://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual; *Canadian Oxford Dictionary* (2nd ed.), Toronto: Oxford University Press.

INTRODUCTION

[1] An applicant requested that Capilano University (University) disclose records about a funding initiative for graduates of its film studies program. The University released some records but withheld other records and information pursuant to ss. 14 (solicitor client privilege) and 22 (unreasonable invasion of personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) and it deemed some of the information "out of scope" of the access request.

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the University's decision to withhold information. The University reconsidered its severing and disclosed further information to the applicant. However, mediation failed to resolve all the issues in dispute and they proceeded to inquiry.

[3] During the inquiry process, the OIPC directed the University to reconsider the information severed as "out of scope," as FIPPA does not authorize a public body to withhold portions of responsive records based on an assertion that the

information is "out of scope" of the access request.[1] The University subsequently disclosed some of the previously severed "out of scope" information but withheld some of the information under ss. 13 (advice and recommendations), 17 (harm to financial or economic interests) and 22 (unreasonable invasion of personal privacy).[2]

ISSUES

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

1. Whether the University is authorized to refuse to disclose the information at issue under ss. 13, 14 and 17; and

2. Whether the University is required to refuse to disclose the information at issue under ss. 22 of FIPPA.

[5] Section 57 of FIPPA governs the burden of proof in an inquiry. The University has the burden of proving that the applicant has no right of access to the information it is refusing to disclose under ss. 13, 14 and 17. The applicant has the burden of proving that disclosure of any personal information in the requested records would not be an unreasonable invasion of third party personal privacy under s. 22.

DISCUSSION

Background and Records

[6] In 2012, the University announced a funding initiative called the Launchpad Fund for graduates of its Motion Picture Arts degree program, which would provide emerging filmmakers with up to $100,000 to complete a film project. The Launchpad Fund was funded by film industry donors. The University shortlisted candidates, obtained recommendations on the shortlist from members of the film industry (judges) and then selected the winner.[3]

[7] The applicant requested records related to the "initiation, management of, and operation of" the Launchpad Fund, including information about the directors/founders, judges, directives/purpose, winners, contact information, rules for entering/winning and expectations for the winners.

[8] The University disclosed 564 pages of records, but is withholding some information pursuant to ss. 13, 14, 17 and 22 of FIPPA.

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[1] See Order F15-24, 2015 BCIPC 26 (CanLII).
[2] After the "out of scope" review and disclosure, the University and the applicant made further submissions on the information withheld under ss. 13, 17 and 22. I refer to these submissions as the second submissions throughout this order.
[3] Director of the Bosa Centre for Film & Animation (Director) affidavit, paras. 3, 4 and 8.

Preliminary Issue 1 – Issue Estoppel

[9] The applicant submits that the inquiry should be expanded to include a complaint that the University failed to fulfill its duty to assist the applicant under s. 6 of FIPPA.[4] In reply, the University asserts that the OIPC already decided this issue prior to the inquiry and it would be procedurally unfair to address it now.[5]

[10] The University provides a letter written by the Investigator, which sets out the s. 6 complaint and the Investigator's finding that the University conducted an adequate search, and thus complied with its duty to assist under s. 6 of FIPPA.[6]

[11] The University's arguments raise the legal doctrine of issue estoppel. The underlying purpose of issue estoppel is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case.[7] The Supreme Court of Canada has stated that the following three criteria must be met in order to establish issue estoppel:

1. the same question has been decided;

2. the judicial decision which is said to create the estoppel was final; and,

3. 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.[8]

[12] If a party establishes these three criteria, a decision-maker must still determine whether, as a matter of discretion, issue estoppel should apply.[9] Since the University is relying on this doctrine, it bears the burden of proof.[10]

[13] The applicant made a formal complaint to the OIPC about the University's alleged failure to comply with its duties under s. 6 of FIPPA.[11] I have reviewed the Investigator's decision and find that the applicant made the same complaint to the Investigator as he is making now at inquiry, which is that the University did not meet its duty to assist the applicant under s. 6 of FIPPA because it failed to conduct an adequate search for records. I therefore find that the first part of the test has been established.

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[4] Applicant's response, para. 33; Applicant's second response, paras. 3, 7 and 10.
[5] University's final reply, paras. 1 and 2.
[6] University's final reply, attachment "A".
[7] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII), para. 33 (*Danyluk*).
[8] *Danyluk*, *supra*, para. 25.
[9] *Danyluk*, *supra*, para. 33.
[10] *Schweneke v. Ontario*, 2000 CanLII 5655 (ON CA), para. 38 (*Schweneke*).
[11] To note, this complaint was separate from the request for review the applicant made to the OIPC, which is the subject of this inquiry. For more information about the OIPC's request for review and complaint processes, see the OIPC's *Guide to OIPC Process (FIPPA)*, online: https://www.oipc.bc.ca/guidance-documents/1599.

[14] The second part of the test requires a finding that the judicial decision was final. Courts have said that in order for a decision to be considered "judicial", decision-makers must base their decisions on findings of fact and the application of an objective legal standard to those facts.[12] Under ss. 42(2) and 49 of FIPPA, OIPC investigators have the delegated authority to exercise adjudicative authority over s. 6 complaints. If a public body or complainant disagrees with the investigator's findings, either party may request that the OIPC reconsider its decision. This request may be granted in situations where, for example, relevant issues were not addressed or where new evidence or facts are brought forward that were not previously available.[13]

[15] I am satisfied that the OIPC Investigator decided the applicant's complaint in a judicial manner. She set out her findings of fact and the objective legal standard required in assessing whether a public body has met its duty to assist under s. 6 of FIPPA.[14] She then applied that standard to her findings of fact and determined that the University had conducted an adequate search for records and thus met its duty to assist the applicant. I also find that the decision was final. To my knowledge, the applicant did not request a reconsideration of the Investigator's decision or otherwise challenge the decision. I therefore find this was a final, judicial decision and the second part of the test is met.[15]

[16] I find that the third part of the test is also met, as the parties to the complaint are the same parties to this inquiry. Therefore, I find that the University has established that issue estoppel applies to the applicant's complaint that the University failed its duty to assist required by s. 6 of FIPPA.

[17] However, I must still consider, taking into account all of the circumstances of the case, whether it would be unfair to apply issue estoppel to this particular situation. Courts have stated that, in exercising this discretion, the decision-maker must ask whether there is something in the circumstances of this particular case such that the usual doctrine of issue estoppel would work an injustice.[16] Since the applicant is seeking to invoke the discretion, he has the burden of demonstrating that injustice.[17]

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[12] *Danyluk*, *supra*, para. 41.

[13] OIPC, *Guide to OIPC Process (FIPPA)*, online: https://www.oipc.bc.ca/guidance-documents/1599.

[14] See Order 01-32, 2001 CanLII 21586 (BC IPC), para. 9, which states that, in searching for records, a "public body must apply such efforts as a fair and rational person would expect to be undertaken. A standard of perfection is not imposed, but the public body's search for records must be thorough and comprehensive."

[15] See *Danyluk*, *supra*, paras. 57 and 58, where the Court determined the decision was final even though the individual had no statutory right of appeal and could only request an internal review from the decision-making body.

[16] *Danyluk*, *supra*, para. 63, citing *Schweneke*, *supra*, para. 38.

[17] *Schweneke*, *supra*, para. 38.

[18] The applicant has provided two new pieces of evidence that were not before the Investigator when she made the complaint decision: an affidavit in which the applicant describes his spouse's telephone conversation with a University employee and a purported transcript of that telephone conversation.[18] I consider this new evidence relevant in determining whether it would be unfair to apply issue estoppel in this case. The applicant says that this evidence shows that University employees interfered with the access request process and that it is reasonable to conclude that records responsive to the request were "potentially hidden, withheld, or destroyed."[19]

[19] While the University acknowledges that a University employee had a telephone conversation with the applicant's spouse to try to resolve the issue prior to inquiry, it does not accept the authenticity of the transcript and objects to its admissibility.[20] The University further submits that there is nothing improper about communication between parties to an inquiry to attempt to resolve the matters at issue.[21]

[20] I have considered the new evidence raised by the applicant, but it does not persuade me that University employees improperly interfered with the access to information process. Setting aside the question of whether the transcript is authentic, there is no statement attributed to the University employee that could reasonably be considered inappropriate in the circumstances. I accept the University's evidence that a University employee contacted the applicant to canvas whether issues could be resolved prior this inquiry. This is reflected in the telephone transcript provided by the applicant. It is appropriate and desirable for parties to attempt to reach a mutually agreeable resolution of their dispute before the OIPC investigation or inquiry processes. Such attempts are conducive to the fair, efficient and timely resolution of disputes under FIPPA. Further, the evidence provided does not lead me to conclude that the University destroyed or intentionally withheld records responsive to the request.

[21] I also consider the fact that the applicant did not request a reconsideration of the Investigator's decision supports a finding that issue estoppel should apply in this situation.[22] Moreover, it is clear from the Investigator's decision that both parties were afforded an opportunity to present their evidence to the Investigator and there is no evidence that there was a defect in the process leading to procedural unfairness or a breach of natural justice.

[22] In conclusion, I find that issue estoppel applies to the applicant's complaint. The applicant made the same complaint earlier and it was decided by the OIPC in a final judicial decision. Further, there is no unfairness in applying

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[18] Applicant's response, attachments "2a" and "2b".
[19] Applicant's response, para. 33.
[20] University's final reply, ft. 1.
[21] University's final reply, para. 5, citing Order F05-25, 2005 CanLII 28524 (BC IPC), para. 27.
[22] See *Danyluk*, *supra*, para. 74.

issue estoppel in this case, considering all of the circumstances and the further evidence provided by the applicant.

[23] Even if issue estoppel did not apply, I would not have exercised my discretion to expand the inquiry to include this s. 6 complaint. There is insufficient material before me to make a finding as to whether the University complied with its s. 6 duties.[23] Expanding the inquiry at this point in order to seek submissions on those issues would result in a lengthy delay and would not be conducive to the fair, efficient and timely resolution of this dispute. Moreover, these findings do not prejudice the applicant, as he still has the right to make a new access request for the specific records relating to the Launchpad Fund, which he believes exist.[24]

[24] For the above reasons, I decline to add s. 6 as an issue for this inquiry.

Preliminary Issue 2 - Notice to Third Parties after Close of Inquiry

[25] The University concluded its submissions on s. 22 with the following:

> The University submits that if the Commissioner finds that the information at issue regarding the donor, judges and advisory group members is not personal information and/or orders the information contained in the records to be released, principles of procedural fairness would require that third parties whose information is contained within the records be notified and provided with an opportunity to respond.[25]

[26] A similar argument was made and addressed in Order F17-31, where I set out the process for involving third parties in OIPC inquiries.[26] In that Order, I noted that the public body is generally in the best position to provide notice under s. 23 of FIPPA to affected third parties and can do so at a much earlier stage than the OIPC.[27] I agree with previous orders that have found that notifying third parties should occur before an inquiry begins, not afterwards or based on the outcome of the inquiry.[28] This is not to say the Commissioner would never invite third parties as an appropriate person after the close of an inquiry, but this would only occur if the prejudice to the third party would be greater than the prejudice to the applicant. This would only occur in an unusual case.[29]

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[23] Order F12-07, 2012 BCIPC 10 (CanLII), para. 6.
[24] I note that some of the records the applicant alleges are missing were originally withheld as being "out of scope" and have now been withheld under other FIPPA sections.
[25] University's submissions, para. 46.
[26] Order F17-31, 2017 BCIPC 33 (CanLII), paras. 10 and 11.
[27] For example, the public body usually has the names and contact information of the third parties and can contact them to determine their view on disclosure before the matter enters the OIPC's review or inquiry processes. Furthermore, it is common to have multiple third parties mentioned in records. The delay that would result if the OIPC provides notice and seeks their submissions after the inquiry has closed would be detrimental to the fair, efficient and timely resolution of the case.
[28] Order 01-26, 2001 CanLII 21580 (BC IPC), para. 47 and 48; Order F14-39, 2014 BCIPC 42 (CanLII), para. 63.
[29] Order F14-39, 2014 BCIPC 42 (CanLII), paras. 61 – 65.

[27] In the present case, the University chose not to provide s. 23 notice to individuals who may have a privacy interest in the withheld information. The University also chose not to raise this issue with the OIPC after it received the Notice of Inquiry and prior to the submissions deadline. Instead, it waited until its initial submissions to assert that third parties should be invited to participate in the inquiry. Furthermore, it provided no arguments, evidence or details as to why it did not raise this issue earlier or why the OIPC should exercise its discretion at this late stage to provide notice to any potentially affected individuals. The University also chose not to obtain affidavit evidence from the affected third parties.

[28] In my view, reopening the inquiry at this late date to invite third party submissions would be prejudicial to the applicant because it would result in an unnecessary delay. Further, the University has not satisfactorily explained why it did not raise the issue of including third parties before the inquiry commenced or shortly after the Notice of inquiry was issued. Inviting third parties' submissions at this stage in the process effectively gives the University a second opportunity, after the inquiry has closed, to add further evidence to buttress its position that s. 22 applies to the withheld information. This approach is contrary to the fair, efficient and timely resolution of this dispute.

[29] For the above reasons, I have determined that the third parties will not be given notice at this late stage. In any event, as will be explained below, I find that the University is required to withhold most of the withheld information under s. 22. In light of those findings, any objections to disclosure of their personal information that the third parties may have made would not have altered my decision.

Section 13 – Advice or Recommendations

[30] Section 13 authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body, subject to certain exceptions. Section 13 states, in part, as follows:

> 13(1) 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.
>
> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> > (a) any factual material,
> > …
> > (k) 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,

> (l) 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,

[31] The Supreme Court of Canada has stated that the purpose of exempting advice or recommendations from disclosure "is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice."[30] Similarly, the BC Court of Appeal has stated that s. 13 "recognizes that some degree of deliberative secrecy fosters the decision-making process."[31]

[32] Previous orders and court decisions have found that s. 13(1) applies to information that directly reveals advice or recommendations, as well as information that would enable an individual to draw accurate inferences about advice or recommendations.[32] In addition, the BC Court of Appeal has held that the word "advice" should be interpreted to include "an opinion that involves exercising judgment and skill to weigh the significance of matters of fact."[33]

[33] In determining whether s. 13 applies, the first consideration is whether disclosing the information "would reveal advice or recommendations developed by or for a public body or a minister." If it would, the second consideration is whether the information is excluded from s. 13(1) because it falls within a category listed in s. 13(2). If it does fall into one of the categories, the public body must not refuse to disclose the information under s. 13(1).

Analysis and Conclusion on Section 13(1)

[34] Information has been withheld under s. 13 from two records. One is an email with attachment sent by a University employee to the University's Director of the Bosa Centre for Film & Animation (Director), and copied to six other University employees.[34] The attachment is a draft of a legal contract. The second record is the minutes from a University Advisory Committee meeting.[35]

Email and attachment

[35] The University submits that this email and the attachment contain advice and reflects internal deliberations regarding student project management, and that it was circulated internally for the purpose of sharing advice and

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[30] *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII), para. 43.
[31] *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII) (*College*), para. 105.
[32] For example, Order F14-57, 2014 BCIPC No. 61 (CanLII), para. 14 and *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII), para. 52.
[33] *College*, *supra*, para. 113.
[34] Records: pp. 17 – 19.
[35] Records: pp. 22 – 24.

recommendations.[36] The applicant does not make submissions on s. 13(1) but asserts that s. 13(2)(l) applies to the records. I will address this argument below when I consider s. 13(2).

[36] Based on my review of the records, I find that only one paragraph in the email consists of advice or recommendations.[37] In that paragraph, the email sender is conveying other individuals' advice and recommendations about future contract language. I find that disclosure of this withheld information would directly reveal advice and recommendations developed by or for the University.

[37] However, I find that the balance of the email and the draft contract do not reveal advice or recommendations. Previous orders have established that s. 13(1) does not apply to records simply because they are drafts.[38] As well, s. 13(1) does not apply to information that simply discloses a public body's request for advice and recommendations, even if it discloses the scope of advice or recommendations requested.[39] In this case, I find that the email sender was requesting advice or recommendations on the draft contract language. The draft contract does not itself contain or reveal any advice or recommendations. I have no evidence before me that this is a situation where disclosure of the draft contract could allow an individual to draw accurate inferences about any advice or recommendations provided about that draft. For example, the University has not disclosed the final contract to the applicant, which might allow the applicant to compare versions (if they are different) and thus infer what advice or recommendations may have been given.[40] Therefore, I find that the balance of the email and the attached draft contract do not reveal advice or recommendations and the University is not authorized to withhold them pursuant to s. 13(1).

Advisory Committee meeting minutes

[38] This record contains information about what was discussed in an Advisory Committee meeting. The University submits that the withheld information consists of advice and recommendations developed by the Advisory Committee members at the meeting. For context, the University refers to an email sent to University employees and external Advisory Committee members containing a proposed agenda for the upcoming meeting.[41] One of the items on the proposed agenda is "discussion/advice requested from committee on community and

[36] University submissions, para. 69, citing Order F10-15, 2010 CanLII 77326 (BC IPC).
[37] Records: p. 17, third paragraph.
[38] Order F14-44 2014 BCIPC 47 (CanLII), para. 32; Order F17-13 2017 BCIPC 14 (CanLII), para. 24.
[39] Order 15-33, 2015 BCIPC 36 (CanLII), para. 24.
[40] Order 15-33, 2015 BCIPC 36 (CanLII), para. 23; Order F17-32, 2017 BCIPC 34 (CanLII), para. 17.
[41] Records: p. 21; University submissions, para. 62.

industry involvement….” The applicant does not provide submissions on s. 13(1) but asserts that s. 13(2)(a) and (k) apply, which I will address below.

[39] I have reviewed the withheld information from these records and readily conclude that the majority of it reveals advice and recommendations within the meaning of s. 13(1). It contains opinions and recommendations and, in my view, is precisely the type of information s. 13(1) is meant to protect from disclosure. There is one short paragraph that I find would not reveal advice or recommendations if it was disclosed because it is information that simply communicates a process.[42] It is not apparent to me, and there is no evidence before me to explain how disclosure of this information would, either directly or by inference, reveal advice or recommendations. Therefore, the University is not authorized to withhold this information pursuant to s. 13(1).

Analysis and Conclusion on Section 13(2)

[40] I have found that some of the information withheld under s. 13(1) is advice or recommendations, and I will now consider whether any of the factors in s. 13(2) apply to that information. The applicant submits that s. 13(2)(l) applies to the email and attached draft contract and that s. 13(2)(a) and (k) apply to the Advisory Committee meeting minutes.

Email and attachment

[41] Section 13(2)(l) encompasses “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.” While the applicant submits that s. 13(2)(l) applies to this record, he does not expand on this argument.[43] The University submits that these records do not contain information captured by s. 13(2)(l). The University also says that even if this information could be construed as being a plan or proposal to establish a new program or activity, s. 13(2)(l) does not apply to plans or proposals during the deliberative process, but only to those approved or rejected by the head of a public body.[44]

[42] The applicant has not provided any persuasive evidence, and it is not apparent to me, that the information at issue is a plan or proposal, or that it is about a program or activity. Based on my review of the records, I find that the information in these three pages (most of which I have ordered disclosed because it is not advice or recommendations) consist of a discrete discussion about a specific contract used in conjunction with student projects generally, and it is not specific to the Launchpad Fund. In my view, a plan or proposal involves

[42] Records: p. 22, bullet point 4.
[43] Applicant’s second response submissions, para. 11.
[44] University’s second reply submissions, para. 13.

something more formal than a brief email discussing contract language.[45] Furthermore, even if I could conclude the information was a "plan or proposal" about a "program or activity", I have no information before me that confirms approval or rejection by the head of the public body. Therefore, I find that s. 13(2)(l) does not apply to the withheld information in this record and the University is authorized to withhold this information pursuant to s. 13(1).

Advisory Committee meeting minutes

[43] The applicant also submits that ss. 13(1)(a) and (k) apply to the Advisory Committee meeting minutes.[46] Section 13(1)(a) applies to factual material and s. 13(1)(k) applies to "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." The applicant states that there is evidence in the disclosed information from page 22 that there is "factual material" in this record. He specifically refers to a comment made by the Dean indicating that she would "like the Faculty to support the committee by providing correct facts and good replies to questions from the community about our developing program."[47] The applicant does not expand on his s. 13(1)(k) argument.

[44] The University submits that "factual material" under s. 13(2)(a) refers to "a cohesive body of facts which are distinct from advice or recommendations" and that it "does not refer to isolated statements of fact, or to the analysis of the factual material."[48] The University also says that the withheld information is not a "report" under s. 13(1)(k) because it is not "a formal statement or account of the results of the collation and consideration of information."[49]

[45] I will address s. 13(2)(a) first. The BC Supreme Court has stated that the "structure and wording of s. 13 mandate an interpretation whereby 'factual material' is distinct from factual 'information'" and that s. 13(2)(a) is a "narrow exemption from what is included in s. 13(1)."[50] There is a small amount of

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[45] See Order F17-03, 2017 BCIPC 3 (CanLII), para. 13. In that case, the adjudicator considered the meaning of "plan" and "proposal" in the context of s. 17 of FIPPA, and stated: "Past orders have interpreted a 'plan' as being "something that sets out detailed methods and action required to implement a policy. The dictionary definition of 'proposal' includes a 'suggestion' or 'plan,' for example, to reduce costs or on the implementation of insurance pricing."

[46] Applicant's second response submissions, para. 8.

[47] Applicant's second response submissions, para. 9; University's second reply submissions, para. 9.

[48] University's second reply submissions, para. 10, citing the BC Government's *FOIPPA Policy & Procedures Manual*, online: http://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual.

[49] University's second reply submissions, para. 11, citing the BC Government's *FOIPPA Policy & Procedures Manual*, online: http://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual.

[50] *Provincial Health Services Authority v. British Columbia (Information and Privacy* Commissioner, 2013 BCSC 2322 (CanLII), para 91.

withheld information that could be classified as being factual in nature. However, I find that this information is not "factual material" under s. 13(2)(a) because it is not separate and independent from the advice and recommendations. Rather, they are facts that are intermingled with, and are an integral part of, the advice and recommendations that are properly withheld under s. 13(1).

[46] I also find that the Advisory Committee Minutes are not a "report" as contemplated in s. 13(2)(k). The word "report" is not defined in FIPPA but was recently considered in Order F17-33.[51] In that case, the adjudicator adopted the definition accepted by the Ontario Information and Privacy Commissioner. Ontario orders have consistently held that in order for a record to be considered a report under Ontario's equivalent of s. 13(2)(k), it must "consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact."[52] This is the same interpretation that the BC Government's *FOIPPA Policy & Procedures Manual* uses, which the University urges me to apply in this situation.[53] It is also consistent with the *Canadian Oxford Dictionary's* definition of "report" as "an account given or opinion formally expressed after investigation or consideration."[54]

[47] As in Order 17-33, I adopt this interpretation for the word "report" in the context of s. 13(2)(k). Applying this interpretation to the records at issue, I am unable to find that minutes of a meeting, which summarize what the meeting attendees discussed, is the equivalent of a "report" under s. 13(2)(k). The minutes are mere recordings of what was said during the meeting and I find the records do not constitute a formal statement made as a result of collating and considering information. Moreover, the minutes are formatted using bullet points, with brief, inconsistently punctuated notes of what various committee members said during the meeting. I find that these minutes do not reflect the formality that is required in order for a record to be considered a "report". This decision is consistent with Order F17-33, where the adjudicator found that draft meeting notes do not contain the level of formality required of a "report" and "lack the attention to grammar and formatting one expects of a report."[55]

[48] In summary, I find that some of the information withheld under s. 13(1) would, if disclosed, reveal advice or recommendations, and there are no s. 13(2)

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[51] Order F17-33, 2017 BCIPC 35, para. 17.
[52] See, for example, Order PO-3560-I, 2015 CanLII 88780 (ON IPC), citing Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).
[53] While it is not a definitive interpretation tool, past orders of the OIPC have used the manual as an interpretive aid: Order F11-23, 2011 BCIPC 29 (CanLII), para. 19; Order F16-14, 2016 BCIPC 16, para. 41. The FOIPPA Policy and Procedures Manual can be located at http://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual.
[54] *Canadian Oxford Dictionary* (2nd ed.), Toronto: Oxford University Press.
[55] Order F17-33, 2017 BCIPC 35, para. 18.

exceptions that apply in these circumstances. Therefore, the University is authorized to withhold this information pursuant to s. 13(1). I have also found that the University is not authorized to withhold other information because it is not advice or recommendations, and I have highlighted this information in the records that will be sent to the University along with this order.

Section 14 – Solicitor Client Privilege

[49] Section 14 of FIPPA states that a public body may refuse to disclose information that is subject to solicitor client privilege. Section 14 includes both types of solicitor client privilege found at common law: legal advice privilege and litigation privilege.[56] The University is claiming legal advice privilege over the information it withheld under s. 14. The test for determining whether legal advice privilege applies has been articulated as follows:

> [T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
>
> 1. there must be a communication, whether oral or written;
> 2. the communication must be of a confidential character;
> 3. the communication must be between a client (or his agent) and a legal advisor; and
> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
>
> If these four conditions are satisfied then the communications (and papers relating to it) are privileged.[57]

[50] The above criteria have been consistently applied in OIPC orders, and I will consider the same criteria here.[58]

Analysis and Conclusion on Section 14

[51] The University submits that all of the records in dispute contain legal advice, or consist of correspondence between the University and its lawyer regarding draft contracts prepared for either the University or for the Launchpad winners.[59] The University also asserts that it has not waived privilege over any of the records.[60]

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[56] *College*, *supra*, para. 26
[57] *R. v. B.*, 1995 CanLII 2007 (BC SC), para. 22
[58] See, for example, Order F15-52, 2015 BCIPC 55 (CanLII), para. 10; Order F15-67, 2015 BCIPC 73 (CanLII), para. 12.
[59] University submissions, para. 48.
[60] University submissions, para. 50.

[52] The applicant submits that the records in dispute may have been improperly withheld under s. 14 "due to the University's demonstrated inconsistent and incorrect application of other sections of the Act [FIPPA]."[61] The applicant does not expand on this assertion.

[53] I have reviewed the information withheld pursuant to s. 14 and, for the reasons that follow, conclude that all of the records, with one exception, are privileged and the University is authorized to withhold them under s. 14. The records consist of emails exchanged between the University and its legal counsel, some of which contain attachments of draft contracts. I find that these communications are of a confidential nature, as they are only between the University's lawyer and her client, the Director. The legal counsel's email signature stipulates the confidential and privileged nature of the communications, and it is clear from the content of the information itself that the information was exchanged in confidence. I also find that the communications were directly related to the seeking, formulating, or giving of legal advice, mainly regarding contract language.

[54] Some of the emails exchanged between the Director and its legal counsel were forwarded to other University employees for their review. Courts have stated that privilege will extend to communications between employees discussing legal advice their employer received from its legal counsel.[62] In other words, legal advice remains privileged when it is discussed and shared internally by the client.[63] In my view, that is precisely what occurred in these circumstances. Therefore, I find that the communications exchanged between University employees reviewing or discussing legal advice are privileged and the University is authorized to withhold that information pursuant to s. 14.

[55] As noted above, there is one email that I find is not privileged. This is an email between the Director and legal counsel that is not related to seeking or obtaining legal advice.[64] It is a stand-alone record and disclosing it would not reveal, directly or through inference, any information related to seeking or providing legal advice. Therefore, the University cannot withhold this record under s. 14.

[56] The University also provided submissions regarding waiver of privilege. Courts have determined that the party asserting waiver bears the onus of proving it.[65] The applicant did not assert waiver, much less provide any arguments or

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[61] Applicant's response, para. 30.
[62] *Bank of Montreal v. Tortora*, 2010 BCSC 1430 (CanLII), para. 12, citing *Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General)*, [1988] O.J. No. 1090 (Ont. S.C.J.).
[63] See, for example, Order F10-20, 2010 BCIPC 31 (CanLII), para. 16.
[64] Records: p. 106.
[65] Order F16-28, 2016 BCIPC 30 (CanLII), para. 41, citing *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2007 BCSC 1420 (CanLII), para. 22; *Maximum Ventures Inc. v. de Graaf*, 2007 BCSC 1215 (CanLII), para. 40.

evidence to support a finding of waiver, so I do not have to consider whether the University waived privilege over any of the records in dispute.

[57] In conclusion, I find that the University has met its burden to establish that, with the one exception, the records in dispute are privileged, and it therefore has the authority to withhold these records pursuant to s. 14.

Section 17 – Harm to Financial Interests

[58] Section 17(1) allows a public body to withhold information on the basis that disclosing it would harm the public body's financial or economic interests. Subsections (a) – (f) provide specific examples of the kind of information that, if disclosed, could reasonably be expected to cause harm to the financial or economic interests of a public body. However, the legislation uses the word "including", which means that the examples in (a) – (f) are just that – examples. Disclosing information that does not fit into the enumerated examples can still constitute harm under s. 17(1).[66] The parts of s. 17(1) relevant to this case state:

> 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:
>
> …
>
> (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

[59] The standard of proof for exceptions that use the language "could reasonably be expected to harm" is set out by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground… This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will

[66] Order F16-38, 2016 BCIPC 42 (CanLII), para. 100.

> ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.[67]

[60] Although there is no need to establish certainty of harm, it is not sufficient to rely on speculation.[68] In Order F07-15, former Commissioner Loukidelis outlined the evidentiary requirements to establish a reasonable expectation of harm:

> …there must be a confident and objective evidentiary basis for concluding that disclosure of the information could reasonably be expected to result in harm… Referring to language used by the Supreme Court of Canada in an access to information case, I have said 'there must be a clear and direct connection between disclosure of specific information and the harm that is alleged'.[69]

[61] Further, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, Bracken, J. confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm, and that the burden rests with the public body to establish that the disclosure of the information in question could result in the identified harm.[70]

[62] I will apply the above approach to determine if the University has met its burden in applying s. 17 to the severed information.

Analysis and Conclusion on Section 17

[63] The University has withheld information from only one record pursuant to s. 17.[71] It submits that this information contains "details about an initiative that was never implemented by the University and is, therefore, protected from disclosure by sections 17(1)(c) and (d) of the Act [FIPPA]."[72] It does not expand on this argument or provide affidavit evidence in relation to this submission.

[64] The applicant submits that "only the name of the potential donor should be redacted, not the information on the initiative if it relates to the Launchpad fund…."[73] The donor names are withheld under s. 22, not s. 17, so I will address this in the s. 22 section, below.

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[67] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, para. 54.
[68] Order 00-10, 2000 CanLII 11042 (BC IPC), p. 10.
[69] Order F14-12, 2014 BCIPC 15 (CanLII), para. 15.
[70] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875, para. 43.
[71] Record 8.
[72] University submissions, para. 57.
[73] Applicant's second response submissions, para. 4.

[65] In its final reply, the University submits that information being withheld under s. 17 does not relate to the Launchpad Fund so it would be of no interest to the applicant.[74] However, the applicant does not expressly state that he is not interested in this information, and I have therefore considered the University's application of s. 17 to it.

[66] Based on my review of the submissions and the withheld information, I do not have a confident and objective evidentiary basis upon which I can conclude that disclosure of the information can reasonably be expected to cause financial or economic harm. The University provides no information or evidence about its financial or economic interests or how disclosure of the information is linked to, or could reasonably be expected to, harm those interests. Therefore, I find that the University has not met its burden and is not authorized to withhold this information pursuant to s. 17(1).

[67] Furthermore, the University provides no explanation or evidence that indicates that the withheld information involves "plans that relate to the management of personnel or the administration of a public body and that have not yet been implemented or made public." Past orders have interpreted a "plan" within the context of s. 17 as being "something that sets out detailed methods and action required to implement a policy."[75] I find that the withheld information is not a "plan" for the purposes of s. 17(1)(c), nor does it relate to personnel management or public body administration.

[68] It is also not apparent to me, and the University provides no explanation or evidence, that disclosure of the withheld information would result in harm due to the premature disclosure of a proposal or project, or would result in undue financial loss of gain to a third party. Previous orders have determined that a "proposal" means a record that sets out "detailed methods for implementing a particular policy or decision", and a "project" means a "planned undertaking."[76] Based on my review of the submissions and the withheld evidence, I am not persuaded that the information is either a "proposal" or a "project" within the meaning of s. 17(1)(d).

[69] In conclusion, I find that the University has not established that disclosure could reasonably be expected to cause the harms claimed, and it is therefore not authorized to withhold this information pursuant to s. 17.

Section 22 – Unreasonable Invasion of Privacy

[70] Some of the information withheld under s. 22 relates to University employees and University students and their projects, and the balance of it

[74] University's second reply submissions, paras. 3 and 4.
[75] See, for example, Order F17-03, 2017 BCIPC 03, para. 13, citing Order F12-02, 2012 BCIPC 2 (CanLII), para. 40.
[76] Order 326-1999, 1999 CanLII 4353 (BC IPC).

relates to individuals external to the University, namely the judges (i.e., the film industry members who provided recommendations on the University's shortlist of candidates), financial donors and external Advisory Board members.[77]

[71] Numerous orders have considered the application of s. 22, and I will apply those same principles in my analysis.[78]

Personal Information

[72] The first step in any s. 22 analysis is to determine if the information is personal information. "Personal information" is defined 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."[79]

[73] Based on my review, I find that almost all of the withheld information is personal information, as it is information that can be directly linked to identifiable individuals.

[74] There is also some information which would not normally be classified as personal information but, in these circumstances, it meets that definition. That is because the information is reasonably capable of identifying an individual or a small group of identifiable people, either alone or when combined with other available sources of information.[80] For example, there are several records that contain accounting and scheduling information for specific Launchpad Fund projects. Some of this information could, when combined with other available information, reveal personal information about specific individuals in these particular circumstances. I make this finding in part due to affidavit evidence that was properly submitted on an *in camera* basis, so I am limited in how much detail I can provide in this order.[81] However, I am persuaded by this evidence that disclosure of this information, combined with other information that has already been disclosed or is otherwise publicly available, would reveal personal information about individuals.

[75] However, there is other information that I find is not personal information because it is not about an identifiable individual. Rather, it is the names of companies or organizations that are not linked to a particular individual.[82] The

[77] In my analysis, I have separated out the external individual groups, as there is different evidence for each group.
[78] See, for example, Order 01-53, 2001 CanLII 21607, p. 7.
[79] See Schedule 1 of FIPPA for these definitions.
[80] See Order F16-38, 2016 BCIPC 42 (CanLII), para. 112.
[81] Director's affidavit, paras. 11 – 15.
[82] Records: pp. 2, 4, 5, 8 and 9.

University has provided no evidence to satisfactorily explain how the names of these companies or organizations are about any identifiable individual(s). Corporate bodies do not have personal privacy rights under FIPPA, and I find that the information about these corporations or organizations cannot be withheld pursuant to s. 22.[83]

[76] The University has disclosed the contact information of University employees to the applicant. However, the applicant submits that there is an instance where a University employee's personal cell phone number should also be disclosed because it was used for business purposes.[84] The University employee forwarded an email from a student to three other University employees and her personal cell number was revealed in a "sent from my iPhone" signature block at the bottom of the email. There are several other emails sent to or from this individual within the responsive records. I have reviewed these and see that the particular record that the applicant refers to is the only one that contains her personal cell phone number. In other words, the evidence before me is that this appears to have been the only instance where she used her personal cell phone for a business purpose, and the email was not widely circulated. Generally, disclosure of information in response to an FOI request is treated as disclosure to the world.[85] In these particular circumstances, I am not satisfied that this employee's personal cell phone number is a "business telephone number", and thus "contact information", for the purposes of FIPPA.[86]

[77] However, there is some information that I have determined is contact information because it explicitly contains information that enables an individual to be contacted at their place of business (i.e., a business name, street address and email address).[87] Therefore, the University is not required to withhold this information pursuant to s. 22.

[78] I have highlighted the information that I have determined is not personal information in a copy of the records that will be sent to the University along with this order. The University is not required to withhold this information under s. 22 and must therefore disclose this information to the applicant.

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[83] See, for example, Order No. 175-1997, 1997 CanLII 3724 (BC IPC).
[84] Records: p. 48.
[85] Order F03-25, 2003 CanLII 49204 (BC IPC), para. 24.
[86] This is in contrast to Order F13-20, 2013 BCIPC 27 (CanLII), where the adjudicator found that home and personal phone numbers were "contact information" because the service provider gave this information to the public body for the specific purpose of contacting him to obtain his services. These numbers were also widely disseminated amongst public body employees who might need to contact the service provider in the course of their employment duties.
[87] Records: pp. 2, 5, 9 and 20.

Section 22(4) – disclosure not unreasonable

[79] 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 it does, disclosure would not be an unreasonable invasion of personal privacy.

[80] The applicant submits that s. 22(4)(e) applies to the Advisory Committee members' and the judges' personal information.[88] The applicant says that the University already publishes the names of committee members, such as the Budget Advisory Committee (BAC), on its website. He says that a "reasonable person would expect that all of the university's committees be so published."[89] In response to this, the University says that unlike the members of the BAC, the individuals whose names are at issue in this case are not employees of the University, and the meetings they attend are not open to the public.[90]

[81] Section 22(4)(e) says that 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.

[82] Past orders have said that s. 22(4)(e) applies to the following:

> … any third-party identifying information that in some way relates to the third party's job duties in the normal course of work-related activities…. I refer here to objective, factual statements about what the third party did or said in the normal course of discharging her or his job duties, but not qualitative assessments or evaluations of such actions.[91]

[83] Section 22(4)(e) only applies to an officer, employee or member of a public body. Accordingly, I must determine whether the judges and the individuals involved in the Advisory Committee fit within these categories. "Employee" is defined in FIPPA as including a volunteer or a service provider.[92] "Volunteer" is not defined in FIPPA, but a "service provider" is defined as a person retained under a contract to perform services for a public body. Neither "officer" nor "member" is defined in FIPPA.

[84] The Supreme Court of Canada has affirmed many times that the modern approach to statutory interpretation requires that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously

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[88] Applicant's second response, paras. 6, 16 and 17. I have already determined that the University can withhold the advice and recommendations withheld from the Advisory Committee meeting minutes pursuant to s. 13, and the only other information withheld about the external Advisory Committee members is their names.
[89] Applicant's submissions, para. 29.
[90] University's final reply submissions, para. 14.
[91] See, for example, Order 01-53, 2001 CanLII 21607 (BC IPC), para. 40.
[92] See FIPPA, Schedule 1 for all definitions.

with the scheme of the Act, the object of the Act, and the intention of Parliament."[93] The purposes of FIPPA are set out in s. 2(1). This section states that the purposes are to "make public bodies more accountable" and to "protect personal privacy." These purposes are achieved by "giving the public a right of access to records" as well as by "specifying limited exceptions to the rights of access."[94] Turning to s. 22, its purpose is to prevent an unreasonable invasion of a third party's personal privacy. Applying s. 22 requires a measured approach to determine whether disclosure of the information will be an unreasonable invasion, and one of the factors to consider is public body accountability (s. 22(2)(a)).

[85] As noted above, the terms "member", "officer", "volunteer" and "employee" are not defined in FIPPA. Because these terms all appear in the context of s. 22(4)(e), their definitions influence each other and it is appropriate to consider their commonalities. The above terms are defined in the *Canadian Oxford Dictionary* as follows:

- An "employee" is "a person employed for wages or salary."[95]
- A "volunteer" is, *inter alia*, "a person who voluntarily takes part in an enterprise or offers to undertake a task" and "a person who works for an organization voluntarily and without pay."[96]
- A "member" is, *inter alia*, "a person or thing belonging to an organization, team, etc." and "a person formally elected to take part in the proceedings of certain organization (*Member of Parliament; Member of Congress*)."[97]
- An "officer" is, *inter alia*, "a person holding a position of authority or trust …" and "a holder of a post in a society or organization, e.g. the president or secretary."[98]

[86] In my view, the commonality to the above definitions is a formality and stability in the relationship between the individual and the public body. In other words, for an individual to be considered an employee, member or officer, there must be some sort of official, enduring relationship between the individual and the public body.[99]

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[93] See, for example, *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), para. 21.
[94] Sections 2(1)(a) and (c) of FIPPA.
[95] *Canadian Oxford Dictionary*, *supra*, p. 491.
[96] *Canadian Oxford Dictionary*, *supra*, p. 1742.
[97] *Canadian Oxford Dictionary*, *supra*, p. 966.
[98] *Canadian Oxford Dictionary*, *supra*, p. 1078.
[99] For example, an "employee" encompasses situations where an individual is made part of an organization through some sort of vetting and evaluation process, and is expected to remain an employee for at least a certain period of time. This process could include an interview and reference check process (in the case of employees receiving remuneration or volunteers who are

[87] With the above characteristics in mind, I find that s. 22(4)(e) applies to the names of the external individuals participating in the Advisory Committee meetings, as they are either employees or members of the University. In my view, there is an official, enduring relationship between the Advisory Committee members and the University. From the information in the records disclosed to the applicant, it is apparent to me that the individuals involved in the Advisory Committee receive an agenda prior to the meetings and regularly attend meetings where attendance and notes of the meeting are recorded (mainly consisting of discussions about the film studies program, including providing advice and recommendations to the University) and then distributed to all of the Advisory Committee members. As well, it appears that the Dean of Fine and Applied Arts attends the Advisory Committee meetings, which provides further evidence that these meetings have an official nature to them. Furthermore, in one of the records disclosed to the applicant, a University employee emails other employees and asks whether a person who attended a prior meeting as a guest "ever received an invitation letter from [University employee] to join."[100] I do not have any evidence before me regarding how individuals are selected to receive an invitation letter or what kind of language that letter contains, but this statement provides evidence supporting a finding that external Advisory Committee members receive a formal invitation to join the Advisory Committee.

[88] In summary, the evidence shows that the individuals selected to attend Advisory Committee meetings participate in an official University committee that formally meets, records its meetings, distributes meeting notes, and discusses and provides advice and recommendations about specific issues relevant to the University's film studies program. In my view, this evidence is sufficient to find that the external Advisory Committee individuals are either employees or members of the University and that their names relate to their position or functions as an employee or member of the University.[101]

[89] I have no evidence before me as to how, if at all, individuals taking part in Advisory Committee meetings are remunerated. However, since "employee" includes a "volunteer", I do not need such evidence to determine if the individuals are "employees" for the purposes of s. 22(4)(e) of FIPPA. I find that these are individuals who provide work for the University's benefit in an enduring, official capacity and are therefore "employees" for the purposes of s. 22(4)(e). In the alternative, I find that these individual are "members" of the University, because they were formally selected to take part in the proceedings of an official committee directly connected to, and formed for the benefit of, the University.

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not receiving remuneration) or a contract bidding or review process in the case of a service provider.

[100] Records: p. 19.

[101] I do not have enough information to determine whether the external Advisory Committee participants are "officers" within the meaning of s. 22(4)(e). In my view, the definition of "officer" suggests that the person would have a title or some other indication that they have been formally appointed or selected to hold a specific position within the public body.

[90] However, I find that s. 22(4)(e) does not apply to the information about the judges. The evidence before me is that the judges were involved in an ad hoc capacity on only the one occasion. There does not appear to be any lasting relationship between the judges and the University, and the communication between the University and the judges was brief, informal and, from the records I have reviewed, does not appear to have been shared outside of a small group of University employees. In my view, to be considered an officer, employee or member, these individuals would have to have a more substantive and continuing relationship with the University, as opposed to a one-off, ad hoc relationship where they provided limited recommendations about a specific project.

[91] I have considered the other factors listed in s. 22(4) and find that none of them apply in these circumstances.

Section 22(3) - presumptions in favour of withholding

[92] The third step in a s. 22 analysis is to determine whether any of the presumptions in s. 22(3) apply, in which case disclosure is presumed to be an unreasonable invasion of third party privacy. However, such presumptions are rebuttable.

[93] The University submits that s. 22(3)(a), (d), (f), (g) and (h) apply to the withheld personal information. Those sections state:

> (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,
> > …
> > (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,
> >
> > (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,

[94] The applicant asserts that the University has not applied the above-noted provisions correctly.

Section 22(3)(a) – medical condition

[95] The University has applied s. 22(3)(a) to a small amount of withheld information in an email. I find that this section does apply to the information at issue because the email sender and recipient are discussing a third party's medical issues. Therefore, there is a presumption that disclosure of this information would be an unreasonable invasion of that person's privacy.

Section 22(3)(d) – educational and employment history

[96] The University has applied s. 22(3)(d) to information related to students and their projects. This includes student names, personal contact information and descriptions of students and their projects (for example, what year of study the student is in and what particular projects they have worked on). This information is contained in emails sent by students to University employees, as well as emails between judges and the University about students' projects. The judges' names were also withheld under this section. The applicant submits that s. 22(3)(d) has not been applied properly. For example, he says that this section should not apply where the personal information appears in a "business communication" such as an internal University newsletter.[102]

[97] I find that that there is a presumption against disclosure of the majority of this information, as it is about individuals' educational history. This information is about specific projects the students have worked on, as well as projects they submitted for consideration for the Launchpad Fund competition. In my view, this is precisely the kind of information s. 22(3)(d) is intended to address.

[98] There is also a small amount of withheld information from an email sent to the Director from an individual who attended a different University and wanted to write an article about the Launchpad Fund.[103] Most of the information in the email has been disclosed to the applicant but the information that would identify the individual has been withheld. I find that some of this information is about the educational history of the individual and there is therefore a presumption against disclosure.

[99] Lastly, there is some information the University says relates to the employment history of one of its employees. Based on my review of the withheld information, I find that it is information related to the individuals' work performance and is part of that individual's employment history.[104] Therefore,

[102] Applicant's second submissions, para. 14.
[103] Records: pp. 258 and 259.
[104] Order F14-45, 2014 BCIPC 48 (CanLII), para. 52.

the s. 22(3)(d) presumption that disclosure of this information would result in an unreasonable invasion of personal privacy applies.

Section 22(3)(f) – financial history or activities

[100] The University has withheld names and other information about individuals in the film industry who were "actual" donors to the Launchpad Fund or were seen as "potential" donors. The applicant does not make any submissions about s. 22(3)(f).

[101] I find that the withheld information about the actual donors is information that describes their financial history and activities and there is therefore a presumption against disclosure. This is consistent with Ontario Information Commissioner orders that have found that donor names and the amount of their contributions constitute the donors' personal financial information and is therefore afforded the protection of the Ontario privacy legislation's equivalent of s. 22(3)(f).[105]

[102] However, I find that the names of the "potential" donors are not information that describes those individuals' financial history or activities. There is no financial information associated with these names and I find that s. 22(3)(f) does not apply to this information.

Section 22(3)(g) and (h) - recommendations or evaluations

[103] The University has withheld the judges' comments about student projects under s. 22(3)(g) and the judges' names under s. 22(3)(h). Sections 22(3)(g) and (h) are related and I will consider them together.

[104] Past orders have interpreted s. 22(3)(g) as referring to performance reviews and job or academic references.[106] This section can apply in an academic setting with respect to comments made in confidence by instructors about their students.[107]

[105] I find that the withheld information is not the kind of information that s. 22(3)(g) is intended to protect. The University asked members of the film industry to review the shortlisted projects and provide recommendations based on their opinions of those projects. The information does not reveal any "personal" recommendations or evaluations, and it is also does not contain character references or personnel evaluations about the candidates. Therefore,

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[105] See, for example, Order MO-2262, 2008 CanLII 1825 (ON IPC).
[106] Order F05-30, 2005 CanLII 32547 (BC IPC), para. 41. Section 22(3)(g) has also been found to apply to investigators' comments and opinions about workplace performance and behavior in the context of a complaint investigation. However, that is not the type of information at issue here.
[107] Order F10-11, 2010 BCIPC 18 (CanLII), para. 21.

I find that s. 22(3)(g) does not apply to the judges' comments and recommendations in this particular context.

[106] The purpose of s. 22(3)(h) is to protect the identity of someone who provided, in confidence, the type of information described in s. 22(3)(g).[108] Since I have found that s. 22(3)(g) does not apply to the withheld information, it follows that s. 22(3)(h) does not apply.

Section 22(2) - all of the relevant circumstances

[107] The next 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 University submits that s. 22(2)(f) applies to some of the withheld personal information.[109] The applicant submits that this section does not apply but s. 22(a) does. Those sections state:

> (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,
> > …
> > (f) the personal information has been supplied in confidence,

Section 22(2)(a) – public scrutiny

[108] The applicant states that s. 22(2)(a) should be given consideration but does not expand on this submission.[110] This provision provides that, in some circumstances, disclosure of third party personal information may not be an unreasonable invasion of privacy if it assists in fostering public body accountability.[111]

[109] I have reviewed all of the information withheld under s. 22 and am unable to conclude that disclosure of any third party personal information would meaningfully add to the public's understanding of the creation and application of the Launchpad Fund or any issues surrounding it. The applicant has not provided any compelling evidence or argument that this section favours disclosure of third party personal information in these circumstances, and I find it does not apply.

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[108] Order F05-30, 2005 CanLII 32547 (BC IPC), para. 42.
[109] I note that the University also submitted that s. 22(2)(g) applies to the information it withheld under s. 14. I have already determined that the University is authorized to withhold that information pursuant to s. 14 and so I do not have to consider it again in this analysis.
[110] Applicant's second submissions, para. 15.
[111] Order F05-18, 2005 CanLII 24734.

Section 22(2)(f) – supplied in confidence

[110] The University's position is that s. 22(2)(f) applies to the personal information related to the actual and potential donors and judges, as well as some personal information related to a student found in two records. I will address the donors' personal information first.

[111] The University provided affidavit evidence from the Director and he states the following:

> The project was not screened by Capilano University and, therefore, no web/publicity/screen credit recognition of individual donors was made public. Nor would any public recognition of individual donors be given without explicit consent being sought by Capilano University once a project was complete.[112]

[112] The University also submits that disclosure of donor information would be contrary to the University's policies regarding donor gifts (Gift Policy and Data Policy).[113] The purpose of the Gift Policy is to inform and assist donors who wish to support the Capilano University Foundation's activities on behalf of the University, and it states the following:

> All donors providing a future gift to the [Capilano University] Foundation are entitled to recognition in accordance with any current and existing Foundation guidelines established by such Foundation unless anonymity is requested by the donor.
>
> All donors will be treated respectfully and confidentiality covering the details of a donor's gift to the Foundation will be maintained at all times.

[113] The purpose of the Data Policy is to establish rules and guidelines for accessing and using accurate data managed by Development & Alumni relations, and it states:

> No giving or gift information will be given to any unauthorized individual outside of the Development & Alumni Relations office.
>
> No information will be given on a specific individual to anyone outside of Capilano University.

[114] The University says that "while donor recognition based on the level of the gift may be made public in an annual report or on the Foundation website, the details of a donor's gift are confidential."[114] The Manager, Capilano Foundation/ Development & Alumni Office (Manager) also provided an affidavit noting that the

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[112] University's submissions, paras. 34 – 40; Director's affidavit, para. 16.
[113] University's submissions, attachments "I" and "J".
[114] University's submissions, para. 37.

University website and the last Annual Report issued only lists the level of the donors' gift such as $1000+ or $5000+ (i.e., the actual amount is not published).[115] On its website the Foundation also features select donors, but the Manager says that these individuals provided their consent before this information was published.[116]

[115] In my view, the above evidence establishes that the University does not publish personal information about actual donors or otherwise provide their personal information to the public unless consent is first obtained from the individual. In particular, the evidence from both the Director and the Manager is that the University obtains donor consent before any donor information is published, and that the specific amount of the donation is not published at all.

[116] I am also persuaded by the language in the policies that the University maintains confidentiality of donor personal information unless it obtains donor consent to publish or distribute it. In my view, the overall language in the Gift Policy indicates that the donor's personal information will be held in confidence, and the Data Policy makes it clear that donor personal information will be held in confidence. I therefore find that the actual donors' personal information was supplied in confidence to the University and this is a factor to consider when determining whether its disclosure would result in an unreasonable invasion of privacy.

[117] However, I find that s. 22(2)(f) does not apply to the names of the potential donors (i.e., those solicited for donations where there is no evidence of an actual donation). I do not have any evidence before me about how the University obtained their contact information or whether these people actually made a donation. Therefore, I cannot conclude that their names and contact information was supplied to the University in confidence.

[118] I now turn to the personal information related to the judges. The University provided an affidavit sworn by the Director which states that the judges' names are not public information and the Director personally assured the judges that their names would remain confidential.[117] Furthermore, the withheld information itself convinces me that it is likely that these judges would not have supplied this information to the University if they had known that it would be made public. The above evidence persuades me that the judges supplied this information to the University in confidence.

[119] The applicant makes submissions about the personal information found in records 258 and 259, which imply that he knows this person did not supply their personal information in confidence.[118] The University has provided no evidence

[115] Manager's affidavit, paras. 6 – 8.
[116] Manager's affidavit, para. 9.
[117] University's submissions, paras. 41 – 44; Director's affidavit, paras. 8 and 10.
[118] Applicant's second submissions, para. 20.

that this information was supplied in confidence and the context of the information does not persuade me that it was.[119] I find that s. 22(2)(f) does not apply to the personal information on pages 258 and 259.

Other relevant considerations

[120] I also find it is relevant to consider the sensitivity of the personal information in question.[120] Where the sensitivity of the information is high (i.e., medical or other intimate information), withholding the information should be favoured. For example, there is a small amount of information in an email discussing a third party's medical issues. I find that this is particularly sensitive information and this factor weighs against its disclosure.

[121] In my view, much of the withheld information relating to the Launchpad winners and their work is sensitive information, including their accounting and scheduling-related information that I have determined, given the particular circumstances of this case, is personal information. The applicant's position is that "a reasonable person would have no expectation of privacy when submitting budget figures as part of the funding process."[121] However, I find that in these circumstances disclosure of this information, combined with other information already disclosed, would result in the disclosure of sensitive and potentially embarrassing information.

[122] There is also some personal information about University employees which are their opinions or comments about student projects or their own personal matters. I find that this information is sensitive and that disclosure could reveal details about individuals' professional and personal lives that are potentially embarrassing to the individuals involved. This is not, in my view, innocuous information or information that could be described as being about the individuals' position, function or remuneration under s. 22(4)(e).

[123] I also find that the personal information associated with the judges, as well as the comments they make about particular students and their projects, is sensitive in nature and this weighs against disclosure. This finding is based on my review of the withheld information, as well as some *in camera* evidence in the Director's affidavit.[122] Again, I am limited in how much detail I can provide about the *in camera* evidence, but I am persuaded that disclosure of information related to certain students would result in sensitive and potentially embarrassing information being made public.

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[119] The information contains questions posed for the stated purpose of writing an article, the intent of which was to be made publicly available.
[120] See Order F16-38, 2016 BCIPC 42, para. 136.
[121] Applicant's submissions, para. 28.
[122] Director's affidavit, paras. 11 – 15.

[124] Lastly, I find that the personal information about the actual and potential donors is sensitive information in these circumstances. The Manager provided affidavit evidence that one of the reasons it does not publish the details of donor gifts is because this would "reveal donor philanthropic focus and interest, which could result in unwanted solicitation."[123] I accept this evidence and find that this is a factor that weighs against disclosure of this information.

[125] The applicant has also made submissions that do not fall into any other category in s. 22 so I will address them here. The applicant submits that the names of the students who won the Launchpad Fund competition were disclosed in one record but withheld in others, and the applicant says that "if the students' names are revealed in one document they should be revealed in all documents within the document package."[124] Based on my review of the withheld information, I find that the University was consistent in its approach to severing this personal information, despite having disclosed the winners' personal information in some records but not in others. This is because disclosure of personal information in one context may not be an unreasonable invasion of privacy, and yet would be in another context. In this case, where the University has disclosed the winners' personal information, it is in the context of them winning the Launchpad Fund competition. Where the University has withheld the winners' personal information, it is in the context of discussion about those individuals and their project (e.g., their educational history).

[126] The applicant also says that the Director stated in emails that "when, and if, a project is chosen for funding we will make a big public splash about it." The applicant submits that this indicates an intent to publicly promote and spotlight winners and sponsors and "clearly set an expectation" for those individuals that their names would be made public.[125] I am not persuaded that the Director's statement could reasonably have been understood by candidates as a warning that they should expect their personal information to be made public without their prior consent. Further, the evidence before me is that there never was public recognition of either the donors or the Launchpad Fund winners.

[127] The applicant also submits that he knows the third party whose personal information was withheld in records 258 and 259, and he is also aware of the contents of the withheld information.[126] However, the applicant has not provided any sworn evidence to this effect or obtained the individual's consent to disclose this information. Therefore, I do not have any evidence before me upon which I can conclude that the third party's personal information and contents of the email are known to the applicant.

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[123] Manager's affidavit, para. 6.
[124] Applicant's submissions, para. 23.
[125] Applicant's submissions, para. 24.
[126] Applicant's second submissions, para. 20.

Section 22(1) – conclusion

[128] I have determined that most of the information withheld under s. 22 is personal information. I have also determined that the University is not required to withhold the names of the Advisory Committee members, as they meet the definition of "employees" or "members" in s. 22(4)(e) and disclosure of this information would not be an unreasonable invasion of their privacy.

[129] There is a small amount of withheld information related to University employees containing employee opinions and comments. I have determined that this is sensitive information and that this weighs against its disclosure. I find that there are no factors that weigh in favour of disclosing this information and that the applicant has not met his burden to establish that disclosure of this personal information would not be an unreasonable invasion of third party personal privacy. Therefore, the University is required to withhold employee personal information pursuant to s. 22.

[130] I also find that the small amount of information discussing a third party's medical issues is particularly sensitive information relating to a medical condition and the University is required to withhold it. There are no circumstances that I can see that weigh in favour of disclosing it or which rebut the s. 22(3)(a) presumption that disclosing it would be an unreasonable invasion of personal privacy. The University must refuse to disclose it. I also find that there is some sensitive information about an employee's work performance and, for the same reasons, the University is required to withhold it.

[131] I have also found that there is a presumption against disclosing personal information that is related to students, including comments made by external judges about student projects. This information constitutes the students' educational history and there is a presumption against disclosure. I have also found that much of this information is sensitive due to its particular context. The applicant has not provided any convincing evidence that he is entitled to this information, and I find that the University is required to withhold it.

[132] With regard to the actual donors who financially contributed to the Launchpad Fund, I find that this information constitutes financial history and activities of those individuals and that the personal information about them was supplied to the University in confidence. Therefore, there is a presumption against disclosure. There are no other relevant factors, and I find that the University is required to withhold all of the actual donor personal information. With regard to the potential donor names, I have found that this is sensitive information and there are no factors that weigh in favour of disclosing this information. In my view, disclosure of this information would result in an unreasonable invasion of personal privacy and the University is therefore required to withhold this information.

[133] I have also found that the personal information related to the judges was supplied in confidence and, given its context, I find that it is sensitive in nature. The University is therefore required to withhold it.

[134] There is also a small amount of personal information about a third party withheld from records 258 and 259. I have found that this information was not supplied to the University in confidence, and I do not have sufficient evidence to conclude that the applicant knows the contents of the withheld information. Further, I have found that some of this information contains the third party's educational history and there is therefore a presumption against disclosure of that information. The remaining withheld information is not particularly sensitive, but it is also not innocuous information such that I can conclude its disclosure would not be an unreasonable invasion of privacy. I am mindful that previous orders have stated disclosure of records to an applicant must be considered to be public disclosure, as there are no limits on further dissemination of the records.[127] Based on my review of the withheld information, this is not the type of information that a public body would routinely disclose without the third party's consent and I find that it would be an unreasonable invasion of privacy to order disclosure of this information.

[135] In conclusion, I find that the University is required to withhold the majority of the personal information withheld under s. 22. The applicant has not met his burden to overcome the statutory presumptions in favour of withholding the information, and there are no other factors that persuade me that disclosure would not result in an unreasonable invasion of personal privacy. I have highlighted the small amount of information that I have determined would not, if disclosed, be an unreasonable invasion of privacy in a copy of the records that will be sent to the University along with this order.

Severing Information

[136] Section 4(2) requires public bodies to sever information that is exempted from disclosure, if that can be reasonably done, and give the applicant access to the remainder of the requested record. Severance cannot be reasonably done where it would result in the document becoming meaningless, misleading, or unintelligible.[128]

[137] Based on my review of the records, it is not possible to simply sever individual names or other identifying information and disclose the remainder. That is because the identity of those individuals would still be easily discernible based on the context and public information about the Launchpad funding.

[138] There are also some emails between the Director and several students that the University has withheld in their entirety. Some information (for example,

[127] Order 01-52, 2001 CanLII 21606 (BC IPC), para. 73.
[128] Order F16-12, 2016 BCIPC 14 (CanLII), paras. 37-39.

the Director's name, date the email was sent and the email subject line) could be disclosed without revealing any student educational history. However, disclosing this information would be meaningless without the surrounding context, which I have already determined should be withheld because it constitutes educational history. Therefore, I find that it is not reasonable in these circumstances to require the University to disclose this information to the applicant.

CONCLUSION

[139] For the reasons given above, under s. 58 of FIPPA, I order that the University is:

1. Authorized to refuse to disclose most of the information in the records withheld under ss. 13 and 14, subject to paragraph 4, below; and

2. Not authorized to refuse to disclose the information in the records withheld under s. 17;

3. Required to refuse to disclose most of the information in the records withheld under s. 22, subject to paragraph 4, below; and

4. Required to give the applicant access to the information I have highlighted in the excerpted pages of the records that will be sent to the University along with this decision, by October 26, 2017 pursuant to s. 59 of FIPPA. The University must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

September 13, 2017

ORIGINAL SIGNED BY

Carol Whittome, Adjudicator

OIPC File No.: F15-61873