Order F19-41

UNIVERSITY OF VICTORIA

Elizabeth Barker
Director of Adjudication

November 13, 2019

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Summary: A professor requested information about two University investigations into his work conduct. The University gave partial access to the records, but refused to disclose some information under ss. 13 (policy advice or recommendations), 14 (solicitor client privilege) and 22 (harm to third party personal privacy) of the *Freedom of Information and Protection of Privacy Act.* The adjudicator confirmed the University's decision regarding s. 14. The s. 13(1) and s. 22(1) decisions were confirmed in part. The University was ordered to disclose the information it was not authorized to refuse to disclose under ss. 13 and 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 4(2), 13(1), 14, 22(1), 22(2)(a), 22(2)(c), 22(2)(f), 22(3)(d), 22(4), 22(5).

Cases Considered: *John Doe v Ontario (Finance*), 2014 SCC 36; *Canada v Solosky*, [1980] 1 SCR 821; *R v Campbell*, 1999 1 SCR 565; *College of Physicians of BC v British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665; *Bank of Montreal v Tortora,* 2010 BCSC 1430; *R v B,* 1995 CanLII 2007 (BCSC).

INTRODUCTION

[1] A professor (applicant) of the University of Victoria (University) requested access to records from the University's disciplinary investigations into his conduct at work. The University disclosed some records but withheld other records and portions of records pursuant to ss. 13(1) (policy advice or recommendations), 14 (solicitor client privilege), 15(1)(l) (harm to security of property or system), 17(1) (harm to financial or economic interests of public body) and 22 (harm to third party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the University's decision. The University disclosed additional information during mediation, but the parties' dispute was not completely resolved and the applicant requested that it proceed to inquiry. Both parties provided inquiry submissions. The OIPC accepted some parts of the University's evidence and submissions *in camera*.

[3] During the inquiry, the University disclosed additional records. The University also withdrew its reliance on ss. 15(1)(l) and 17(1).[1] Therefore, that information and those issues are no longer in dispute in this inquiry.

Preliminary matters

[4] In his response to the University's initial submission, the applicant complains that the University did not conduct an adequate search for records responsive to his access request. That complaint is not included in the OIPC's notice of inquiry or the investigator's fact report as an issue to be determined in this inquiry. The University objects to any expansion of the issues and says that the adequacy of its search for records is outside the scope of the inquiry.

[5] Previous OIPC orders have consistently said that parties may only add new issues into the inquiry if permitted to do so by the OIPC. The applicant did not seek prior approval to add the complaint. He also does not explain why he is attempting to do so at this late point in the process after the public body has made its initial submissions. I am not persuaded that the complaint should be added into the inquiry, and I decline to do so.

ISSUES

[6] The issues to be decided in this case are as follows:

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

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

[7] Section 57(1) of FIPPA places the burden on the University to prove that the applicant has no right of access to the information being withheld under ss. 13(1) and 14. However, s. 57(2) says that the applicant has the burden of proving that disclosure of personal information in the records would not be an unreasonable invasion of third party personal privacy under s. 22(1) of FIPPA.

[1] University's initial submissions at para. 23.

DISCUSSION

Background

[8] This case relates to the University's two disciplinary investigations of the applicant. The first concerned the applicant's refusal to teach a course, and the second was about his conduct in the class he had refused to teach.[2] A lawyer (Lawyer) in the University's Office of the General Counsel conducted the first investigation and the University's Associate Vice-President Faculty Relations and Academic Administration (AVP) conducted the second investigation. As a result of the investigations, the University suspended the applicant without pay. The applicant appealed the suspension to the University's Board of Governors.[3] At the time of this inquiry, the appeal proceeding was underway.

[9] The applicant requested access to all communications involving University administrators, students, campus security officers and police regarding the investigations and the matters leading up to the investigations.

Records in dispute

[10] The University provided a table of the records listing the page numbers and the FIPPA exceptions applied. There are 1575 pages of records listed in the table. During the inquiry, the University clarified that certain pages I questioned had already been disclosed to the applicant, so they are no longer in dispute.[4]

[11] The records still in dispute are primarily emails. There are also memos and key message documents about communication matters, for instance what administrators should say to the media, faculty, students and the applicant about the incidents. There are two one page security officer incident reports, two versions of an acting dean's summary of events, several pages of an investigator's typed notes of what witnesses told her when interviewed, a thesis/dissertation approval form and the minutes of a department meeting.

Advice or recommendations - s. 13(1)

[12] Section 13(1) authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for

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[2] Two investigation reports were issued. They are not part of the records or evidence in this inquiry.
[3] He did not file a grievance regarding the discipline.
[4] University's October 24, 2019 letter regarding pages: 249, 250, 260, 355, 358, 360, 395, 411-412, 422, 424, 426, 431, 439, 441-443, 452, 475, 495, 497-499, 515, 639, 645, 659, 717-718, 796, 799, 807, 813, 866, 869-870, 893-894, 910-912, 924, 994, 1010, 1044, 1205, 1207, 1212, 1218-1219, 1224, 1226 and 1235-1236.

a public body or a minister. The following provisions in s. 13 are relevant to the discussion in this case:

> 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.
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> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material,
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> …
>
> (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.
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> (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

[13] The purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.[5] Section 13(1) applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate inferences about the advice or recommendations.[6]

[14] The BC Court of Appeal in *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)* [*College*], said that the term "advice" includes "an opinion that involves exercising judgment and skill to weigh the significance of matters of fact," including "expert opinion on matters of fact on which a public body must make a decision for future action."[7]

[15] The process for determining whether s. 13(1) applies to information involves two stages.[8] The first is to determine whether the disclosure of the information would reveal advice or recommendations developed by or for the public body. If it does, then one must decide if the information falls into the categories listed in s. 13(2). If s. 13(2) applies, the public body must not refuse to disclose the information under s. 13(1).

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[5] *John Doe v Ontario (Finance*), 2014 SCC 36 [*John Doe*] at paras. 45-51.
[6] Order 02-38, 2002 CanLII 42472 (BCIPC) and Order F10-15, 2010 BCIPC 24 (CanLII).
[7] *College,* 2002 BCCA 665 at para. 113.
[8] Order F07-17, 2007 CanLII 35478 (BC IPC) at para 18.

Parties' submissions

[16] The University says that the information withheld under s. 13(1) falls into the following four categories:

1. Information about the approach to dealing with media inquiries, including documents that advise administrators on the key messages to convey in media communications;[9]

2. Information about communicating with students, staff, faculty and the applicant regarding the disciplinary action against the applicant;[10]

3. Information about the steps to take in the investigations, including advice with respect to the content of reports related to the investigations. The University submits that s. 13(1) applies to this category of information because it demonstrates "the internal thinking of a public body on how to manage a series of specific issues around the applicant's employment."[11]

4. A recommendation about the structure of an academic course.[12]

[17] The University submits: "Overall, the Section 13 Records form part of the "internal dialogue" of senior university staff… The University administrators are entitled to a degree of confidentiality with respect to their internal decision making to deal with human resources issues of this nature."[13]

[18] The applicant disputes that the information in dispute is advice.[14] He also says that s. 13 "only protects the deliberation of the decision process, not the input and output of the decision process," which he says should be fully released, so the University can be held accountable for its decision.[15]

Findings, s. 13(1)

[19] I find that much of the withheld information reveals advice and recommendations about communicating with the applicant, staff, faculty, students and the media. Most of it is in emails between University administrators and the University's Associate Manager of Public Affairs. I also find that the various iterations of, and discussions about, a "key message" document are advice or recommendations. The surrounding emails provide context, from which it is evident that University administrators were working together with the Associate

[9] University's initial submission at para 32.
[10] University's initial submission at para. 33.
[11] University's initial submissions at para. 34.
[12] University's initial submission at para. 35.
[13] University's initial submission at para. 36.
[14] Applicant's submission at paras. 37-40. He does not say anything about "recommendations."
[15] Applicant's submissions at para. 34.

Manager of Public Affairs to develop the official messaging regarding the incidents involving the applicant. The key message documents reveal the recommended language to use as well as the precise information to share when communicating about the incidents. Previous BC orders have similarly found that s. 13(1) applies to advice or recommendations about such communication matters.[16]

[20] There are also several instances of opinions expressed by the AVP flowing from what she learned during her investigation that I find would reveal advice. She is providing these opinions in her role as the administrator in charge of investigating what took place, so that the University can decide how to respond. In my view, it is the type of opinion on matters of fact about which a public body must make a decision that *College* says is advice.

[21] There is also information in the minutes of a department meeting that is clearly recommendations about the structure of a graduate course.[17]

[22] However, for the reasons that follow, I find that the University has not established that the balance of the information withheld under s. 13(1) would reveal advice or recommendations developed by or for the University.

[23] The University submits that its administrators "are entitled to a degree of confidentiality with respect to their internal decision making to deal with human resources issues of this nature."[18] However, s. 13(1) is not a blanket exception that applies to all communications because they are confidential. The usual analysis applies and a public body may only withhold the information that would reveal advice or recommendations developed by or for a public body or a minister.

[24] In the present case, the information that I find would not reveal advice or recommendations is straightforward information of a narrative and factual type. It is about what was said and done, decisions made and instructions given. It is not communication from individuals whose advice or recommendations have been sought and provided about which course of action they think is preferable. The information does not reveal opinion, analysis or deliberation about facts, policy or other substantive matters. I am not persuaded that this information directly reveals advice or recommendations developed by or for the University, or that it would allow accurate inferences about such advice or recommendations.

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[16] For example: Order F17-51, 2017 BCIPC 56; Order F17-34, 2017 BCIPC 36 (CanLII); Order F15-56, 2015 BCIPC 59 (CanLII); Order 02-38 2002 CanLII 42472 (BC IPC); Order 04-37, 2004 CanLII 49200; Order F09-01, 2009 CanLII 3225 (BC IPC).
[17] Page 948.
[18] University's initial submissions at para. 36.

[25] For clarity, below is the information that I find does not reveal advice or recommendations.[19]

- The Acting Dean's two page report of events, which he sent to the Director, Faculty Relations.[20] I find that the report is a factual retelling of what occurred during the incident. It contains no advice or recommendations or any discussion, opinion or analysis about steps to be taken or decisions to be made.
- The Director, Faculty Relations' reply to the above mentioned report.[21] Her email does not contain advice or recommendation, rather it is her request/instruction that he correct the report.
- University administrators' factual comments and questions about investigation-related processes and teaching matters.[22]
- An email exchange in which the public relations person tells several administrators what he said to the media, how the media responded and he discusses process matters in a factual way.[23]
- A list of interview questions to be put to the applicant.[24] The list is attached to an email that the AVP sent to herself. The questions contain no answers, comments or notations. I cannot see how these questions would reveal any advice or recommendations the AVP may have developed or provided and the University's submissions and evidence do not explain.
- An email from a dean to a department chair commenting on, and questioning, the applicant's teaching preferences.[25]
- Factual statements and/or reasons for a decision related to an administrative process in an email from the Director, Academic and Faculty Relations to a faculty dean and the AVP.[26]
- Factual statements about what the writer is going to do and what others are invited to do in an email from a dean to a department chair.[27]

[26] Because I find that disclosing the above listed information would not reveal advice or recommendations, the University may not refuse to disclose it to the applicant under s. 13(1). For clarity, I have highlighted the information that I

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[19] Section 22 has been applied to some of this information as well. For the sake of brevity, I have not listed/described here the information that I ultimately determined s. 22 applies to.
[20] Pages 276-277.
[21] Pages 356-357.
[22] Pages 312, 320 and 388.
[23] Pages 479-480.
[24] Page 548-549.
[25] Page 716.
[26] Page 865.
[27] Page 922.

find the University is not authorized to refuse to disclose to the applicant under s. 13(1).

Section 13(2)

[27] The University submits that only s. 13(2)(a) and (n) are potentially relevant in this case and neither applies. The applicant does not make any submission about s. 13(2).

[28] I find that s. 13(2) does not apply to the information that I find would reveal advice or recommendations. For instance, it is not discrete "factual material" under s. 13(2)(a). Any facts that are included are an integral part of the advice and recommendations. In addition, none of the advice and recommendations is a decision, including reasons that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant, so s. 13(2)(n) does not apply.

Solicitor client privilege, s. 14

[29] Section 14 of FIPPA states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege. The law is well established that s.14 of FIPPA encompasses both legal advice privilege and litigation privilege.[28] The University is refusing to disclose 1216 pages of records under s. 14, which it submits are protected by legal advice privilege.

[30] When deciding if legal advice privilege applies, BC orders have consistently applied the following criteria:

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.

[31] Not every communication between client and solicitor is protected by solicitor client privilege. However, if the four conditions set out above are satisfied, then legal advice privilege applies to the communications and the records relating to it.[29]

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[28] *College, supra* note 7 at para. 26.
[29] *R v B,* 1995 CanLII 2007 (BCSC) at para. 22. See also *Canada v Solosky*, [1980] 1 SCR 821 at p. 13.

Section 14 records not produced for review

[32] The University did not produce the records being withheld under s. 14 for my review in this inquiry. Instead, it provided an affidavit from the Lawyer who is employed in the University's Office of the General Counsel. Her affidavit includes a table of the records that provides for each record: the page number, record type, date, who was involved in the communication, the subject line of the email (or name of the record), and an explanatory note with broad information about the nature of the communication and how the test for privilege is engaged. Some of the information in the table is provided *in camera*.

[33] The Commissioner can order production of records for his review pursuant to s. 44(1) of FIPPA, but he will only do so when absolutely necessary to decide the issues in the inquiry. I find that this is not necessary in this case. The Lawyer's affidavit plus the table of records provide sufficient evidence for me to make a determination about whether s. 14 applies without needing to order production of the records for my review pursuant to s. 44.

[34] The applicant submits the University should be ordered to provide the records for my review. He says the University disclosed a record to him that it had previously withheld under s. 14 and it is obvious to him that s. 14 was wrongly applied.[30] In my view, the fact that the University reconsidered its application of s. 14 to a particular record is not a reason for me to order production of records it still claims are protected by privilege.

Submissions and evidence

[35] The Lawyer says that throughout her tenure as legal counsel to the University, she has provided legal advice through the Office of the General Counsel, including providing legal advice and support to the AVP as needed. She says that the AVP provides legal advice to deans, chairs, directors and senior administrators. The Lawyer says that on occasion the AVP is called upon to investigate and provide a legal opinion concerning whether a faculty member is in breach of the University's policies or the collective agreement.

[36] The Lawyer says that, at the AVP's request, she conducted the first investigation into the applicant's conduct. She says that the AVP conducted the second investigation at the request of the University provost. The Lawyer names the senior administrators who she says were the "instructing clients" with respect to the two investigations.[31]

[37] The Lawyer says that most of the records are written confidential communications between the AVP and the instructing clients for the purpose of

[30] Applicant's submissions at para. 43.
[31] Lawyer's affidavit at para. 17.

providing legal advice related to the investigations, the underlying events and the appropriate University response to those events.[32] She explains that the instructing clients sought the AVP's legal opinion on various matters and the AVP provided her legal opinion and advice on those matters.[33]

[38] The Lawyer says that other records reveal the content of legal advice because they show what the administrators said to each other about the legal advice for the purpose of sharing and acting upon the legal advice.[34] The Lawyer also says that one email string is between herself and a senior administrator in which the Lawyer gathers information necessary to provide administrators with accurate legal advice concerning the investigation and disciplinary issues.[35]

[39] The Lawyer identifies other records that are communications between the University's lawyers. For instance, some are between the Lawyer and the AVP, and occasionally their administrative staff, regarding the investigation and the provision of legal advice. Others are between the AVP and an external lawyer who was asked to provide an independent legal opinion.[36]

[40] The applicant says that it is questionable that s. 14 applies to the records. He also disputes that the AVP and the Lawyer were acting in a capacity as lawyers because they did not tell him at the time that they were practicing lawyers and were investigating in order to provide a legal opinion to the University. The applicant says that he doubts all the communication is privileged and he thinks most of the records could be severed. He points out that some of the communications are just between administrators and do not include a lawyer. He also says that if the AVP and the Lawyer provided legal advice to the administrators then they were not impartial or fair investigators. The applicant agrees that solicitor client privilege applies to the communication with the outside legal counsel.[37]

Findings, s. 14

[41] Not everything done by a lawyer attracts solicitor client privilege and whether solicitor client privilege applies depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.[38] The BC Court of Appeal said the following about lawyers investigating:

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[32] Lawyer's affidavit at para. 23. In her evidence about the records, the Lawyer references the specific page numbers in the table.
[33] Lawyer's affidavit at paras. 23-24.
[34] Lawyer's affidavit at para. 27.
[35] Lawyer's affidavit at para. 25.
[36] Lawyer's affidavit at para. 26 and 28.
[37] Applicant's submission at para. 54.
[38] *R v Campbell*, 1999 CanLII 676 (SCC) at para. 50.

> Legal advice privilege arises only where a solicitor is acting as a lawyer, that is, when giving legal advice to the client. Where a lawyer acts only as an investigator, there is no privilege protecting communications to or from her. If, however, the lawyer is conducting an investigation for the purposes of giving legal advice to her client, legal advice privilege will attach to the communications between the lawyer and her client….[39]

[42] The University's submissions and evidence satisfy me that the records at issue in this case pertain to the AVP and the Lawyer acting in the role of lawyers investigating for the purpose of giving legal advice to the University.[40]

[43] Based on the Lawyer's affidavit evidence with its attached table of records, I find that disclosing the records would reveal communications the University had with its lawyers that were directly related to seeking, formulating or providing legal advice. This also includes the communications that were exclusively between administrators because the evidence establishes that the administrators were discussing their communication with, and advice from, the University's lawyers.[41]

[44] Regarding the confidentiality of the communications, I can see from the table attached to the Lawyer's affidavit that the only individuals involved in the records were University administrators and the University's legal counsel, specifically the AVP, the Lawyer and the external legal counsel. There is no evidence that indicates other parties were included in their communications. I am satisfied that the records reveal confidential communications between the University and its legal counsel.

[45] Several of the withheld records are attachments to emails/email strings. In Order F18-19, which was also an inquiry involving the applicant and the University, I discussed the issue of attachments to privileged communications like emails. I will not repeat all of what I said there except to say that an attachment to a privilege communication is not automatically privileged. I must determine each attachment's connection to its accompanying email/email string to decide whether it would reveal communications that are protected by solicitor client privilege.

[46] In this case, some of the attachments evidently pre-date the email/email string to which they are attached and appear to have a non-privileged character outside the context of being subsequently appended to a privileged communication. This was a matter that I addressed in Order F18-19.[42] The University says that in light of what was said in Order F18-19, it reviewed its

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[39] *College, supra* note 7 at para. 32.
[40] I made the same finding in Order F18-19, 2018 BCIPC 22 (CanLII), which involved the applicant and the University.
[41] *Bank of Montreal v Tortora*, 2010 BCSC 1430 at para. 12.
[42] *Ibid* at paras. 36-44.

severing in this case and disclosed additional information to the applicant and all original, non-privileged versions of the attachments have been disclosed.[43]

[47] I have reviewed the evidence about the email attachments in the table of records. In my view, the attachments would allow accurate inferences to be made about the privileged communications in the emails to which they are attached. Further, some of the attachments, even outside the context of subsequently being appended to a privileged communication, are themselves privileged; for instance, legal memos from the external lawyer. I am satisfied that all of the attachments in this case are an integral part of their accompanying privileged email communication and so are also protected by legal advice privilege.

[48] In conclusion, I find that the University has established that disclosing the information it is refusing to disclose under s. 14 would reveal information that is protected by legal advice privilege.

[49] I have also considered whether the records could be severed and disclosed as the applicant suggests. Section 4(2) of FIPPA requires a public body to provide access to part of a record, if the information that is properly excepted from disclosure can reasonably be severed from the record. Based on my review of the evidence in the table, in this case I am not confident that the records can be severed in a way that would not disclose the information that is protected by legal advice privilege.

Disclosure harmful to personal privacy, s. 22

[50] The University withheld much of the information in dispute under s. 22. I will only consider whether s. 22 applies to the information that I have not already determined may be withheld under ss. 13 and 14.

[51] Section 22 requires public bodies to refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party's personal privacy.[44] Numerous orders have considered the application of s. 22, and I will apply those same principles here.

Personal information

[52] The first step in any s. 22 analysis is to determine if the information in dispute is personal information. Personal information is defined as "recorded information about an identifiable individual other than contact information."

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[43] University's initial submissions at paras. 20-21.

[44] Schedule 1 of FIPPA says: "third party" in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than (a) the person who made the request, or (b) a public body.

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".[45]

[53] Based on information disclosed elsewhere in the records, I conclude that two severed phone numbers are work phone numbers that are provided so the person can be reached at work.[46] Thus, they are contact information and not personal information. In addition, there is some information in the body of emails that does not identify anyone. This is not information about identifiable individuals, so it is not personal information.[47]

[54] The rest of the information withheld under s. 22(1) is about identifiable third parties, so it is their personal information. It is the following types of information:

- Names and personal contact information of University employees and students;
- Students' ID numbers, program affiliations, course selections, academic concerns and employers;
- University employees' dates of birth, gender, travels and activities in their home lives;
- Information about how certain University employees performed their duties, their training and experience level;[48] and
- Information about third parties' involvement, observations and thoughts about the incidents under investigation.

[55] In addition, there is also some information in dispute which I find is both third party personal information as well as the applicant's personal information. Specifically, it is what the third parties said about their interactions with the applicant as well as their opinions about the applicant and his behaviour.

[56] I note that in many of the records in dispute under s. 22, the University has already disclosed the substance of the third party personal information and only withheld the third party's name or other detail that would identify the third party. The applicant says that he does not want to know the third parties' identities, just what they have said about him.[49]

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45 See Schedule 1 of FIPPA for these definitions.
46 The phone numbers are on pp. 130 and 388.
47 Pages 404, 529 and 922.
48 Pages 44, 279, 380, 451 and 453.
49 Applicant's submissions at paras. 63-65.

Section 22(4) - Not unreasonable invasion of privacy

[57] The next step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If so, then its disclosure is not an unreasonable invasion of third party personal privacy. The University submits that none of the exceptions in s. 22(4) apply, and the applicant's submissions do not address this point. I have reviewed the personal information in dispute here and I find that it is not the type of information listed in s. 22(4).

Presumptions, s. 22(3)

[58] The third step in the s. 22 analysis is to determine whether s. 22(3) applies to the personal information. If so, disclosing that personal information is presumed to be an unreasonable invasion of third party privacy. The University submits that s. 22(3)(d), (g) and (h) apply. The applicant makes no submission about this.

[59] Sections 22(3)(d) and (g) and (h) state:

> 22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> …
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> (d) the personal information relates to employment, occupational or educational history,
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> …
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> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
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> (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,

[60] I find that s. 22(3)(d) applies to the personal information about students' courses, academic activities and concerns, degrees, other institutions they attended and their interactions with the University regarding those matters.[50] This is the type of information that previous orders have said relates to educational history under s. 22(3)(d).[51]

[50] Pages 90, 1200-1211, 1225 and 1233-1234.

[51] For similar finding, see Order F10-11, 2010 BCIPC 18 (CanLII) at paras. 17 and 19; Order F18-19, supra note 40 at para. 53.

[61] I also find that s. 22(3)(d) applies to information about University employees' training, experience level, teaching status, past assignments and how well they perform their duties.[52] This type of third party personal information is in emails as well as in the investigator's notes of interviews with third party witnesses.[53] There is also some information in an email about where a student works. I find that all of this is the type of third party personal information that previous orders have said relates to employment or occupational history.[54]

[62] However, I find that s. 22(3)(d) does not apply to some of the third party personal information that the AVP learned or third parties/witnesses provided to her and other administrators.[55] It is factual information about what the third parties observed, said and did in the context of their interactions with the applicant. This is undoubtedly their personal information. However, it is not information about the third parties' in the context of an investigation into *the third parties'* workplace conduct, so it is not about their employment, occupational or educational history.[56]

[63] I have considered whether s. 22(3)(g) applies in the two instances where the University says it does.[57] Past orders have interpreted s. 22(3)(g) as referring to formal performance reviews, job or academic references or an investigator's evaluative statements of a third party's performance in the workplace.[58] The personal information in the two instances here is what administrators said to each other about events and individuals. While there is some opinion about third parties, it is not personal recommendations or evaluations, character references or personnel evaluations about the third parties, so s. 22(3)(g) does not apply.

[64] The University submits that s. 22(3)(h) applies to the investigator's notes of what witnesses told her when she interviewed them.[59] This is information of a factual nature about what witnesses observed along with some opinions about the events and the applicant's behaviour. Section 22(3)(h) is intended to protect the identity of anyone who has, in confidence, provided the type of recommendations or evaluations in s. 22(3)(g).[60] The information the third parties provide on these pages is not that type of information, so I find that s. 22(3)(h) does not apply.

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[52] Pages 44, 279, 380, 440, 451, 453, 496, 947. This is not information about the applicant.
[53] Pages 376-377, 406-408, 418-419, 459-460, 482-483, 504-505, 643-645 and 654-655.
[54] For example: Order F17-02, 2017 BCIPC 2 (CanLII) at paras. 19-21 and Order F14-22, 2014 BCIPC 25 (CanLII) at para. 63.
[55] Pages 356-357, 359, 376-377, 385, 389-390, 393, 429, 451, 643, 644, 654 and 655.
[56] Former Commissioner Loukidelis made the same finding about similar facts in Order 01-53, 2011 CanLII 21607 (BC IPC) at para. 41.
[57] Pages 90 and 453.
[58] Order 01-53, supra note 56 at para. 44; Order 01-07, 2001 CanLII 21561 (BC IPC) at para. 21; Order F16-46, 2016 BCIPC 51 (CanLII) at para 33. F14-10, 2014 BCIPC 12 (CanLII) at para 19.
[59] Pages 376-377, 406-408, 418-419, 459-460, 482-483, 504-505, 643-645 and 654-655.
[60] Order 01-53, supra note 56 at para. 47; Order 01-07, supra note 58 at paras. 21-22; Order F10-11, 2010 BCIPC 18 (CanLII) at para 24.

Relevant circumstances, s. 22(2)

[65] The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those listed in s. 22(2). It is at this step, after considering all relevant circumstances, that the s. 22(3) presumption may be rebutted. The parts of s. 22(2) that play a role in this case are as follows:

> 22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> …
>
> (f) the personal information has been supplied in confidence,
>
> …

Public scrutiny, s. 22(2)(a)

[66] The University says that disclosing the third party personal information is not desirable for the purpose of subjecting the University's activities to public scrutiny. The applicant says:

> This FOI request is specifically based on the information the University sent to the public and media, which can not only facilitate the Applicant's Appeal but also keep the University honest and accountable, as the University's public releases and responses to media and its members contain factual errors about the interaction with the Applicant, his colleagues and students, Campus Security, Police, and Faculty Association (FA), before, during and after the Investigations and Suspension.[61]

[67] The applicant explains that he wants the information in dispute to set the record straight. He provides details in the University's investigation and findings that he disputes. For example, he disputes the number of students who complained, who called the police and whether they entered the classroom, whether the applicant interrupted an ongoing class, whether a substitute instructor was present and whether the University worked to lessen the impact of the applicant's suspension on his students.

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[61] Applicant's submissions at para. 14.

[68] In my view, disclosing the third party personal information in this case is not desirable for the purpose of subjecting the University's activities to public scrutiny. This is very clearly one person's employment dispute with his employer. The University investigated an employee's conduct and took disciplinary action. There is a grievance process and an appeal mechanism available, and the applicant is currently pursuing an appeal. I can appreciate how the third party personal information might be of interest to the applicant and the small circle of individuals who were involved in this specific dispute. However, the evidence does not suggest that anything larger is at stake or that the details of the third party personal information would add anything to the public's understanding of the University's activities. What the applicant says in his submissions does not persuade me that disclosing the third party personal information in this case is desirable for the purpose of subjecting the University's activities to public scrutiny under s. 22(2)(a).

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

[69] The applicant says that he wants to know what witnesses and third parties said about him in order to see if the information would be relevant to his appeal of his suspension. He also says he wants to "cross check the claimed evidence." The applicant suspects that the two investigators who investigated his conduct and what took place have misrepresented or inaccurately reported what witnesses said.

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

1. the right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
2. the right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
3. the personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
4. the personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.[62]

[71] The University concedes that parts one and two of the test are met in this case. It says that the applicant has a legal right under s. 60 of the *University Act* to appeal the suspension imposed by the President to the Board and such a proceeding is underway. However, the University says that the applicant has not demonstrated how the third party personal information has a bearing on the determination of his appeal, or is necessary to prepare for the proceedings, or to

[62] Order 01-07, supra note 58 at para. 31.

ensure a fair hearing.[63] The University says that the appeal is proceeding on the basis of the record that was before the President when he made his decision and that the applicant has been provided with a copy of that record.[64]

[72] In this case, I do not have enough information to conclude that the last two elements of the s. 22(2)(c) test have been met. The applicant has provided no information about what issues are to be decided in his appeal or why the third party personal information is necessary in order to prepare for his appeal or to ensure a fair appeal. Therefore, I am not persuaded that s. 22(2)(c) applies.

22(2)(f) supplied in confidence

[73] The University says that the applicant's desire to see the third party personal information does not outweigh the significant personal privacy concerns of the witnesses, who would expect confidentiality.

[74] Some of the personal information that students emailed to the University administrators is about the students' own studies and academic issues. This information is about their educational history, so it is protected by the s. 22(3)(d) presumption. Although there are no express requests by the students to keep this information in confidence, in my view, it is the type of information about the students' academic concerns and challenges that they would expect their academic institution to keep confidential. There is nothing to indicate that the University advised that the information would not be treated as confidential. I am satisfied that this is personal information that the students supplied to the University in confidence.[65]

[75] Several of the disputed records are the investigator's notes of her interviews with witnesses. There is no evidence about what the investigator may have told the witnesses about the confidentiality of the interview or investigation process and what the University's policies may be in that regard. The records themselves do not contain any express confidentiality statements. The University does not say if the interviews were conducted in confidence.

[76] In Order F18-19, I also made a decision about the confidentiality of third party personal information supplied during investigation interviews. The investigation in that case also involved the applicant's work conduct, and given the content and context, I concluded that the third party personal information was supplied in confidence. I make the same finding here. In light of what was going on between the parties, it is reasonable to conclude that the third parties would expect that the information they disclosed about themselves (i.e., what they did, said and their opinions) would be kept confidential, and that the investigator

[63] University's reply submission at para. 44-45.
[64] University's initial submissions at para. 90 and reply submission at para. 50.
[65] For example: pp. 1200-1211, 1225 and 1233-1234.

received the information on that basis. The witnesses are the applicant's co-workers as well as students taking courses in his program area, thus they would all expect to have interactions with him in the future. In my view, most people who provide their own personal information in the context of an investigation into the alleged misconduct of their co-worker or professor would expect the information to be held in confidence.

Sensitivity

[77] Section 22(2) is not an exhaustive list of factors. Past orders have also considered the sensitivity of the personal information and I have done the same here. I find that some of the personal information is sensitive because it relates to the emotions or feelings of third parties and it is likely that the applicant and the third parties are still in ongoing work or student relationships. Other personal information is sensitive, albeit to a lesser degree, because it contains evaluative comments or opinions about the quality of third parties' work, qualifications and temperament.

[78] The rest of the third party personal information is not sensitive as it is factual information with no emotional or evaluative tone about what was said and done at work and school. For instance, the third party witness interview notes contain this type of factual account of what third parties did or observed in relation to the events, and what they say is not sensitive.

Applicant's existing knowledge

[79] I have also considered the fact that it is evident that the applicant already knows some of the third party personal information. For instance, the gender of two University administrators who interacted with the applicant have been withheld in campus security incident reports. The administrators' names have been disclosed. I conclude that the applicant already knows the gender of these people.[66]

[80] There is some factual information about what the Director of Faculty Relations said and did when interacting with the applicant that has already been disclosed elsewhere in the records.[67] Further, it is information about the events that the applicant participated in, so he already knows what took place.

Conclusion, s. 22

[81] I find that some of the information withheld under s. 22 is not personal information as defined by Schedule 1 of FIPPA. It is either not about identifiable

[66] Pages 129-130.
[67] Pages 356-357.

individuals or it is contact information. Section 22 only applies to personal information.

[82] Some of the disputed information is third party personal information. Section 22(4) does not apply. Some of the third party personal information is also the applicant's personal information because it is about the third parties' interactions with the applicant and the third parties' observations and opinions about what the applicant did and said.

[83] I find that the s. 22(3)(d) presumption applies to some of the third party personal information, namely the information that relates to the third parties' employment, occupational or educational history. The only relevant circumstances that apply to this information merely bolster the presumption, specifically some of this information was supplied in confidence (s. 22(2)(f)) and some of it is sensitive. The circumstances that in some cases might weigh in favour of disclosure – ss. 22(2)(a) and (c) – do not apply to any of the personal information in this case. Therefore, having considered all the relevant circumstances, I find that the s. 22(3)(d) presumption has not been rebutted and the University must refuse to disclose that information under s. 22(1).

[84] The records also contain third party personal information whose disclosure is not presumed to be an unreasonable invasion of personal privacy under s. 22(3)(d). Some of it is personal information that reveals the identity of the third party witnesses and what they said to the investigator. I found that the third parties supplied their personal information to the investigator in confidence and this is a factor that weighs against disclosure. Some of the information is sensitive, as it relates to identifiable third parties' emotions or feelings, and this also weighs against disclosure. There are no relevant circumstances favouring disclosure. In conclusion, I find that the University must refuse to disclose the information that would identify the third party witnesses, including the information about their feelings.[68]

[85] However, I find that disclosing the rest of the personal information would not be an unreasonable invasion of third party personal privacy under s. 22(1). It is the personal information that the applicant already knows and it is not sensitive.[69] It is also four brief sentences that are third party personal information about innocuous administrative matters.[70]

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[68] For a similar finding see Order 01-07, *supra* note 58 at para. 47 and Order 01-53, *supra* note 56 at paras. 90 and 97.
[69] Pages 129-130 and 356-357.
[70] Page 855 and 922.

Section 4(2) reasonable severing and s. 22(5) summary

[86] As mentioned, the notes recording what the third party witnesses said in interviews include information about the applicant, so it his personal information. Section 4(2) requires a public body to provide access to part of a record, if the information that is properly excepted from disclosure can reasonably be severed from the record. In my view, reasonable severing is not possible for most of the interview notes related to the third party witnesses. The applicant's personal information in those particular interview notes is so closely intermingled with the witnesses' personal information that the notes cannot be severed – with meaningful information remaining – without revealing the identity of the third party.

[87] However, the interview notes for two third party witnesses who were students can be reasonably severed. Unlike the other third party witnesses, what the students said is not about their interactions with the applicant. Rather the students report what all the students in the classroom would have observed the applicant doing and saying. In my view, the information in the interview notes for the students can be severed in a way that does not reveal their identity.

[88] Under s. 22(5), a public body must give an applicant a summary of his personal information that was supplied in confidence by third parties - but only if the summary can be prepared without identifying the third party who supplied the personal information. In my view, where information about the applicant was supplied in confidence and I have found it must not be disclosed, a summary is not possible. Given the context of the events, the applicant would easily be able to identify those third parties. Therefore, I find that there is no obligation on the University to provide a summary under s. 22(5).

[89] For clarity, I have highlighted the information that I find the University is not required to refuse to disclose to the applicant under s. 22(1).

CONCLUSION

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

1. I confirm the University's decision to refuse to disclose information to the applicant under s. 14 of FIPPA.

2. Subject to paragraph 3 below, I confirm, in part, the University's decision to refuse to disclose information to the applicant under ss. 13(1) and 22(1) of FIPPA.

3. The University is not authorized or required under ss. 13(1) and 22(1) to refuse the applicant access to the information highlighted on the pages of the records that have been sent to the University with this order.

4. The University must give the applicant access to the highlighted information described in paragraph 3 immediately above.

5. The University must concurrently provide the OIPC's registrar of inquiries with a copy of the University's cover letter to the applicant and the relevant pages sent to him.

[91] Pursuant to s. 59 of FIPPA, the University is required to comply with this order by December 27, 2019.

November 13, 2019

ORIGINAL SIGNED BY

Elizabeth Barker, Director of Adjudication

OIPC File No.: F17-70094