OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F20-06

UNIVERSITY OF VICTORIA

Elizabeth Barker
Director of Adjudication

February 13, 2020

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Summary: A professor made two requests for records related to an investigation and to certain communications about him. The University of Victoria gave partial access to the records, but refused to disclose some information under ss. 14 (solicitor client privilege) and 22 (unreasonable invasion of third party personal privacy) of the *Freedom of Information and Protection of Privacy Act.* The adjudicator confirmed the University of Victoria's decision to refuse the applicant access under ss. 14 and 22.

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

INTRODUCTION

[1] A professor (applicant) made two requests for records to the University of Victoria (University). He asked for specific emails, meeting notes and committee records for an investigation about him that was launched by the University's Provost in November 2016.[1] He also asked for all communications about himself that the chair of his department (Department Chair) had with any of his current or former students or with faculty and administrative staff.[2]

[2] The University disclosed some information, but withheld complete records pursuant to ss. 14 (solicitor client privilege) and parts of other records pursuant to s. 22 (unreasonable invasion of third party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

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[1] OIPC file F17-71143.
[2] OIPC file F17-72012.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review both of the University's decisions. Mediation failed to resolve either matter and the applicant requested they proceed to an inquiry. The OIPC accepted some parts of the University's evidence and submissions *in camera*.

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 requests. That complaint is not included in the OIPC's notice of inquiry or the investigator's fact reports 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 this 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 such a late point in the process. Therefore, I am not persuaded that the complaint about the University's search for records 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 s. 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 s. 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).

DISCUSSION

Background

[8] Between 2015 and 2017, the University conducted three investigations into whether the applicant had breached the University's policies or the collective agreement governing his employment. The investigations were conducted by the

University's Associate Vice President, Faculty Relations (AVP). This is the applicant's third inquiry related to the above matters.[3]

Records at issue

[9] The records in dispute are as follows:

- 18 letters sent by the dean of the faculty. Each letter is addressed to a different individual and is a follow-up to his contacting them regarding the applicant's supervisory activities. The letters are three sentences and all of them say essentially the same thing. The only information withheld from them is the recipients' names and email addresses, which have been withheld under s. 22.

- 71 pages of emails between individuals and University administrators. The dates of the emails and the University administrators' names have been disclosed, but the individuals' identities and the body of each email has been completely withheld under s. 22.

- Two email strings (four pages total) that have been completely withheld under s. 14.[4]

Solicitor client privilege, s. 14

[10] 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.[5] The University is refusing to disclose two email strings on the basis that they are protected by legal advice privilege.

[11] 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.

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[3] Order F18-19, 2018 BCIPC 22 and F19-41, 2019 BCIPC 46.
[4] File F17-71143: Pages 0001-0002 and File F17-72012: pages 00018-00019.
[5] *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.

[12] 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.[6]

Section 14 records not produced for OIPC review

[13] The University did not produce a copy of the two email strings for my review. Instead, it provided an affidavit from its General Counsel, who describes the records. The General Counsel says that he is a practicing lawyer who is responsible for advising the University on legal issues pertaining to all aspects of the University's operations, and that he is also the head of the public body for the purposes of FIPPA.

[14] The applicant submitted that it is necessary for the University to give the records to the OIPC for examination during the inquiry. 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, so it is necessary that the records be reviewed by the OIPC.[7]

[15] The OIPC has the power pursuant to s. 44(1) of FIPPA to order production of records over which solicitor client privilege is claimed. However, given the importance of solicitor client privilege to the operation of the legal system as a whole, and in order to minimally infringe on that privilege, the OIPC will only do so when necessary to adjudicate the issues in an inquiry.

[16] I find that the General Counsel's affidavit evidence, which I will discuss in more detail below, is sufficient to decide if s. 14 applies to the records. The fact that the University reconsidered its application of s. 14 to a particular record is not sufficient reason for me to order production of the records it still claims are protected by privilege.[8] I conclude that it is not necessary to order the University to produce a copy of the two records for my review.

Parties' submissions and evidence

[17] The General Counsel says that the two records withheld under s. 14 are each a string of emails. He says that they both involve the communications of the University's (now former) AVP. He says that the AVP was at all material times a practicing lawyer and she provided the University with specialized legal advice on labour and employment matters regarding faculty members. She advised deans, chairs, directors and senior administrators on matters related to faculty, students

[6] Criteria from *R v B,* 1995 CanLII 2007 (BCSC) at para. 22. See also *Canada v Solosky*, [1980] 1 SCR 821 at p. 13.
[7] Applicant's submission at para. 22.
[8] I made the same finding in Order F19-41, 2019 BCIPC 46 at para. 34.

and academic policies and procedures. He says that the AVP was assisted in her duties by the Provost and other administrative staff who took her instructions and acted under her supervision. The General Counsel also says that he and the AVP met regularly to discuss work on shared files.

[18] The General Counsel says that the first email string[9] is between the AVP and the University's (now former) Provost, copying the Director of Faculty Relations. In it, he says, the AVP discusses her legal advice to the Provost and others. He provides the date and subject line of the email as well as the identity of the "others" *in camera*.

[19] The General Counsel says that the second email string[10] is between the AVP and a dean, an associate dean, the Department Chair and a professor.[11] He says that in this exchange the administrators seek, and the AVP offers, her legal advice with respect to certain actions taken by the applicant in respect to students. He provides the date and subject line *in camera*.

[20] The applicant submits that no one who was actually involved in the communications provided affidavit evidence and only their evidence "can prove the existence of legal consultation".[12]

[21] The University replies that the General Counsel is a practicing lawyer who is familiar with the University's processes and the role of legal advice in those processes. The University says that the General Counsel's legal training and experience, including his frequent collaboration with the AVP, is sufficient involvement for him to speak to the claim of privilege.[13]

[22] The applicant also submits that the University has the discretion not to apply s.14 and it could choose to disclose the records or sever them and disclose part.[14] The University says that it agrees that it has discretion to waive privilege but, in this case, it has elected not to do so. It submits that the applicant has not provided any reason why the University should be required to reconsider how it exerised its discretion. It says, "An adjudicator may only intervene and require a reconsideration of the exercise of discretion not to waive privilege if there is some evidence the public body has not exercised the discretion lawfully (in the sense that the exercise of discretion was made in bad faith or for an improper purpose, or the decision maker took into account irrelevant considerations)."[15]

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[9] Pages 0001-0002 in file F17-71143.
[10] Pages 00018-00019 in file F17-72012.
[11] He provides the names of all of these individuals in open evidence.
[12] Applicant's submission at para. 22.
[13] University's reply at paras. 6-8.
[14] Applicant's submission at paras. 4, 21, 23 and 43.
[15] University's reply at para. 13.

Findings, s. 14

[23] I have considered what the applicant has said about the General Counsel providing evidence about a communication that he did not participate in. While it might have been preferable to have affidavit evidence from the individuals who actually participated in the email strings, I find the General Counsel's affidavit evidence is sufficient to establish that legal advice privilege applies in this case. I accept that General Counsel has in-depth knowledge of the University's processes and an understanding of the legal work that the AVP did for the University. It is also clear to me that General Counsel has reviewed the records at issue considering his evidence is specifically about these records and sufficiently detailed. He identifies all the participants in the emails, the dates and subject line of the emails as well as the general area of law addressed by the legal advice (i.e., administrative, contract or employment law). I am, therefore, satisfied that General Counsel has sufficient personal knowledge of these particular emails and the circumstances surrounding these communications to provide reliable evidence about them.

[24] The General Counsel's evidence is that the two email strings are only between the University administrators and the AVP, who at that time was one of the University's lawyers, so I am satisfied that the emails were intended to be confidential communications between lawyer and client. There is also sufficient detail about the emails to indicate that the emails are communications about legal advice.

[25] The applicant submits that the University should have exercised its discretion to waive privilege over some or all of these two records. The University is correct that the decision to waive privilege is discretionary. There is nothing in this case to suggest that the University failed to exercise its discretion, or that it exercised it in bad faith or for an improper purpose, or that it took into account irrelevant considerations. This is not a situation, therefore, which requires me to order the head of the University to reconsider its decision.

[26] In conclusion, I find that the University has proven that legal advice privilege applies to the two email strings and it may refuse to disclose them to the applicant under s. 14.

Unreasonable invasion of third party personal privacy, s. 22

[27] The University withheld the rest of the information in dispute under s. 22. 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.[16] Numerous orders have considered the application of s. 22, and I will apply those same principles here.

Personal information

[28] 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." 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."[17]

[29] Based on my review of the information withheld under s. 22, I find that all of it is about identifiable individuals. None of it is contact information as defined by FIPPA.

[30] Most of the personal information is about third parties. It is their names and personal email addresses in letters and emails. It is also information about the third parties' studies and academic matters, their personal lives and how they feel about events. However, some of this third party personal information is also about the third parties' interactions with the applicant, so it is simultaneously also his personal information.

Section 22(4)

[31] 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, 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. The applicant's submission does not address this point. I have reviewed the personal information in dispute and none of it is the type of information listed in s. 22(4).

Presumptions, s. 22(3)

[32] 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 personal privacy. The University submits that s. 22(3)(d) applies to all of the third party personal information. Section 22(3)(d) states that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the

[16] 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.
[17] See Schedule 1 of FIPPA for these definitions.

personal information relates to employment, occupational or educational history. The applicant makes no submission about whether this presumption applies.

[33] The personal information withheld from the 18 letters in file F17- 71143 are names and email addresses. The body of each letter has been disclosed to the applicant. The University says that these letters were sent to students and former students the dean had previously contacted regarding the applicant's supervisory activities. Each letter references the dean's previous communication with the student and concludes by saying that the dean is writing, at the applicant's request, to inform them that the University did not find any wrongdoing by the applicant.

[34] The University says that the 71 pages at issue in file F17-72012 are the emails of the applicant's former students and University administrators concerning the former students' educational affairs. The names and email addresses of the former students and the body of each email has been withheld under s. 22. Only the dates of the emails and the University administrators' identities have been disclosed.

[35] The University provides an affidavit from the Department Chair who is a participant in the 71 pages of emails. She is responsible for department staff and faculty as well as its programs and courses. She says that she regularly collaborates with the Faculty of Graduate Studies on issues concerning graduate students. The Department Chair says that the 71 pages are her communications with a number of the applicant's former graduate students. She says that when they were still students under the applicant's supervision, they raised issues about how the applicant treated them and she attempted to assist them. After graduation, these same individuals continued to contact her for advice and assistance in ending the applicant's continuing unwanted contact and attempts to influence their careers.[18]

[36] I find that all of the information withheld under s. 22 pertains to the time the third parties spent as students and it reveals details about their own academic activities and experiences, including courses taken, their educational concerns and interactions with University personnel. For that reason, I conclude that their personal information relates to the third parties' educational history so s. 22(3)(d) applies.

Relevant circumstances, s. 22(2)

[37] 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,

[18] Department Chair's affidavit at paras. 15-17.

that the s. 22(3) presumption may be rebutted. The parties' submissions address the following s. 22(2) circumstances:

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

[38] The applicant says that there was an investigation into a complaint that he bullied and harassed the Department Chair and the University suspended him without pay for five months. He filed an appeal with the Board of Governors in November 2017. He says he needs the information in dispute to "cross check"[19] and make sure "that the information relevant to the Appeal is disclosed properly to the Applicant for appeal purposes."[20] He does not trust the University has given him all the significant information he needs for the appeal.[21]

[39] He says that it is not clear how the University chose the 18 people to write to because a 2010 report from the University says more than 30 students were contacted. He says that how that was handled greatly damaged his reputation and credibility in terms of student recruitment.[22]

[40] The applicant says that he already knows the identities, email addresses and educational histories of his students.[23] The applicant also says that according to University policy, he should be told about his students' complaints so he can work it out with them. He says he would not retaliate or interfere with students. He says he professionally supports students, current and former, regardless of whether they complained.[24]

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[19] Applicant's submission at para. 36.
[20] Applicant's submission at para. 41.
[21] Applicant's submission at para. 2.
[22] Applicant's submission at para. 34.
[23] Applicant's submission at para. 34.
[24] Applicant's submission at paras. 37 and 40.

[41] With regard to the third party personal information in the 18 letters, the University submits that disclosing the students' names and email addresses does not further the purpose of subjecting the University's activities to public scrutiny or promote public health, safety or the protection of the environment. The University also submits that it is clear from the content of the letters that there was no finding of wrongdoing on the part of the applicant, so there are no extant investigative or disciplinary proceedings for which he would require the students' names and email addresses.

[42] The University claims that the dean's interactions with the students would have likely occurred in confidence and the students would not have expected the fact that they were contacted to be shared with anyone, particularly the applicant. The University says the students' expectations of confidentiality are not outweighed by the fact that the applicant might already be aware that some of the individuals who received a letter were students at the University and had some involvement with him as a supervisor.

[43] Regarding the 71 pages related to student complaints and concerns, the Department Chair says the students informed her that their experiences with the applicant were traumatic for them. The Department Chair says that she has always treated students' communications about the applicant as strictly confidential. She did so due to the power imbalance between graduate students and their supervisors and to avoid further damaging their relationship with the applicant and placing their career prospects in jeopardy.[25] The Department Chair provides extensive evidence about the nature of graduate studies and the power imbalance between graduate students and their supervisors both during and after their studies.

[44] The University submits that the information in the 71 pages of emails is of a sufficiently private nature that the students could not have reasonably expected that they would be made known to the applicant. It also says that there are no pending or ongoing proceedings concerning the matters raised in the 71 pages of emails.

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

[45] 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). There is nothing in the parties' submissions and evidence that even remotely suggests that the third party personal information in dispute could play any role in helping the public scrutinize and understand the University's activities.

[25] Department Chair's affidavit at paras. 14, 18 and 19.

Public health and safety and the environment, s. 22(2)(b)

[46] The University mentioned this circumstance, but I find it is not relevant to consider. The third party personal information in this case has nothing to do with public health and safety or protection of the environment.

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

[47] The applicant says that he needs the third parties' personal information for his appeal filed in November 2017. He wants to cross check the evidence disclosed to him in the appeal and make sure he has all the significant information. Previous orders have said 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.[26]

[48] The applicant says the appeal was filed as a result of the University suspending him for bullying and harassing the Department Chair. The third party personal information at issue in the records is clearly not about the applicant's interactions with the Department Chair. The applicant has not explained how the third party personal information would have any bearing on, or significance for, the issues in the appeal. He also did not provide a persuasive explanation about why information that is about the students/former students concerns is necessary to prepare for an appeal about his interactions with the Department Chair.

Supplied in confidence, s. 22(2)(f)

[49] I find the personal information that the student/former students provided to the Department Chair in the 71 pages of emails was supplied in confidence. I accept that the Department Chair understood that the students were providing this information to her in confidence. The Department Chair says that she has always treated this type of student communication as strictly confidential. The emails also reveal that the students/former students were clearly feeling

[26] Order 01-07, 2001 CanLII 21561 (BC IPC) at para. 31.

vulnerable in their interactions with the applicant and they were seeking the assistance of University administrators. Some of what the students/former students say is sensitive because it reveals the emotional toll of events. The students/former students did not include the applicant in the emails, which suggests that they did not intend the information to be shared with the applicant. In one email the student/former student expressly says which administrators the Department Chair is permitted to share the information with and for what purpose. In addition, some of the emails contain language that indicates that the students/former students clearly do not want to have any communication with the applicant. All of the above circumstances satisfy me that the third party personal information in the emails was supplied in confidence to the University.

Applicant's existing knowledge

[50] The applicant says that he already knows the names, contact information and educational history of his students/former students. Previous orders have found that the fact that an applicant is aware of, or already knows, the third party personal information in dispute is a relevant circumstance in favour of disclosure.[27] In this case, however, there is nothing to suggest that the applicant knows the specific third party personal information in dispute in these records. While he may know the names of his students and former students, he does not know the identities of the third parties who communicated with the University in the 71 pages of emails or what they said. Nor does he know the third party personal information revealed in the 18 letters.

Conclusion, s. 22

[51] I find that all of the information withheld under s. 22 is personal information as defined by Schedule 1 of FIPPA. It is about identifiable individuals and it is not contact information.

[52] I find that the s. 22(3)(d) presumption applies to all of the third party personal information because it relates to the third parties' educational history.

[53] The relevant circumstances to consider in this case merely bolster the presumption that disclosure would be an unreasonable invasion of third party personal privacy. For instance, I find that the third parties supplied the personal information to the University in confidence and some of it is sensitive because it is about the emotional toll these events had on the third parties. I also conclude that the information is not relevant to a fair determination of the applicant's rights and disclosing it is not desirable for the purpose of subjecting the University's activities to public scrutiny or for promoting public health and safety or protection

[27] See, for example, Order F17-02, 2017 BCIPC 2; F17-06 2017 BCIPC 7; Order F15-42, 2015 BCIPC 45; Order F15-29, 2015 BCIPC 32; Order F15-14, 2015 BCIPC 14; Order F11-06, 2011 BCIPC 7; Order F10-41, 2010 BCIPC No. 61 and Order 03-24, 2005 CanLII 11964 (BC IPC).

of the environment. Finally, there is nothing to demonstrate that the applicant already knows the personal information.

[54] In conclusion, I find that disclosure of the personal information in dispute would be an unreasonable invasion of third party personal privacy and the University must refuse to disclose it to the applicant.

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

[55] Some of what the students/former students say in the 71 pages of emails is about the applicant, so it is also simultaneously 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, further severing is not reasonable for these records. The applicant's personal information is so closely intermingled with the witnesses' personal information that the pages cannot be further severed, in a meaningful way, without revealing the identity of the third party.

[56] 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 the case of these records, I conclude such a summary is not feasible. Therefore, I find there is no obligation on the University to provide a summary under s. 22(5).

CONCLUSION

[57] For the reasons given above, under s. 58 of FIPPA, I confirm the University's decision to refuse to disclose the information in dispute to the applicant under ss. 14 and 22(1) of FIPPA.

February 13, 2020

ORIGINAL SIGNED BY

Elizabeth Barker,
Director of Adjudication

OIPC Files: F17-71143 and F17-72012