



Order F22-22

UNIVERSITY OF BRITISH COLUMBIA

Jay Fedorak
Adjudicator

May 12, 2022

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Summary: An applicant requested from the University of British Columbia (UBC) copies of records relating to her applications to professional programs and the hiring of teachers. UBC released some of the information but withheld the rest under s. 13 (advice and recommendations) and s. 22 (unreasonable invasion of privacy). The adjudicator found that UBC had correctly applied s. 13(1). The adjudicator also found that UBC had correctly applied s. 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2)(a), 13(2)(k), 13(2)(m), 13(2)(n), 22(1), 22(2)(f), 22(3)(d), 22(3)(f), 22(3)(g), 22(3)(h), 22(4)(e).

INTRODUCTION

[1] A former applicant to professional programs (applicant) made a series of requests to the University of British Columbia (UBC) for copies of records relating to her unsuccessful application and matters relating to the hiring of teachers in the department under the *Freedom of Information and Protection of Privacy Act* (FIPPA). UBC provided access to the records withholding some of the information under s. 13 (advice and recommendations), and s. 22 (unreasonable invasion of privacy).

[2] The applicant requested a review by the Office of the Information and Privacy Commissioner (OIPC) of UBC's decision to withhold the information under ss. 13 and 22.

[3] Mediation by the OIPC did not resolve the outstanding matters and the applicant requested it proceed to an inquiry.

ISSUE

[4] The issues in this inquiry are:

1. Whether s. 13(1) authorizes UBC to withhold information; and
2. Whether s. 22(1) of FIPPA requires UBC to withhold information.

[5] Under s. 57(1) of FIPPA, UBC has the burden of proving that s. 13(1) applies to the information withheld. Under s. 57(2) of FIPPA, the applicant has the burden of proving that disclosure of the information in dispute would not be an unreasonable invasion of third-party personal privacy under s. 22(1) of FIPPA.¹

DISCUSSION

[6] **Background** – The applicant is a naturalized Canadian citizen who holds a professional designation in a foreign country. She applied repeatedly but unsuccessfully to enter professional programs at UBC to upgrade her credentials with a view to practicing her profession in Canada.

[7] **Information at Issue** – The responsive records contain a variety of information concerning the application evaluation process, including internal communications and the addresses, resumes and finances of third-party applicants. It also includes information in letters of reference from the applicant's referees.

[8] **Preliminary matters** – The applicant submits that UBC failed to provide some of the information that she had requested concerning the hiring of teachers. She also notes that she has copies of original correspondence between her and officials at UBC that UBC failed to provide in response to her request.² This implies that the applicant believes that UBC has failed to respond openly, accurately and completely in accordance with s. 6 of FIPPA. UBC submits that compliance with s. 6 is not at issue in this inquiry.³ The Notice of Inquiry that the registrar of inquiries issued for this hearing refers only to the application of ss. 13(1) and 22(1) to the personal information of a third party. The OPIC Investigator's Fact Report identifies as at issue only the application of ss. 13(1) and 22(1) This Fact Report makes no reference to missing documents or whether the search for records that UBC conducted was adequate.

¹ However, the public body has the initial burden to show that the information it is withholding under s. 22(1) is personal information: Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 9-11.

² Applicant's response submission, para. 9.

³ UBC's reply submission, para. 4.

[9] The Notice of Inquiry indicated the issues to be decided in this inquiry and stipulated that the adjudicator will only consider the issues in the investigator's fact report. The Notice of Inquiry also cites the OIPC's *Instructions for Written Inquiries*, which restrict parties from adding new issues without obtaining the prior consent of the OIPC before the date for initial submissions. Past OIPC orders have held that a party may only introduce a new issue into an inquiry with the permission of the OIPC.⁴

[10] Parties must have a valid reason to introduce new issues at the inquiry stage. Expanding the scope of the inquiry after the completion of the investigation and mediation phase of the FIPPA review process deprives the parties of the opportunity to resolve the matter informally or to determine if they warrant proceeding to inquiry.

[11] The applicant offers no explanation why she did not raise the issue of the missing records or adequacy of UBC's search for records earlier or why she did not request the OIPC's permission to add it into the inquiry. Nor has she provided reasons why it should be included at this late point. Therefore, I find that there is no justifiable reason for expanding the inquiry to encompass these new issues, and I decline to do so.

Section 13 – advice and recommendations

[12] UBC is withholding comments of officials and draft documents under s. 13(1), which states:

- 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
- (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,
 - ...
 - (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
 - ...
 - (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.

⁴ For a recent example see Order F20-38, 2020 BCIPC 44 (CanLII).

[13] The courts have described the purpose of protecting advice and recommendations from disclosure as to ensure public servants are able to provide full, free and frank advice, because some degree of deliberative secrecy can increase the effectiveness of the decision-making process.⁵ The term “advice” includes expert opinions on matters of fact on which a public body must make a decision for future action.⁶ The courts have also found it includes policy options prepared in the course of the decision-making process.⁷ Previous orders have upheld the application of s. 13(1) both when information reveals advice or recommendations and when it would enable a reader to draw accurate inferences about advice or recommendations.⁸

[14] Order F21-16 sets out the process for determining if s. 13(1) applies:

The s. 13 analysis involves two steps. First, I must determine if disclosure of the information in dispute would reveal advice or recommendations developed by or for the public body. If it would, then I must determine whether the information falls into any of the categories listed in ss. 13(2) or 13(3). If it does, the public body cannot refuse to disclose it. Section 13(2) lists categories of information that public bodies cannot withhold under s. 13(1).⁹

[15] In arriving at my decision on s. 13(1), I have considered the principles for applying s. 13(1) set out in the court decisions and orders cited above.

[16] UBC submits that it has applied s. 13(1) to the scores and evaluations that each of the assessors assigned to candidates, including the applicant, competing for the professional programs; deliberations over how to communicate the results to the applicant; and reference letters that third-party referees provided. UBC submits that this information constitutes the expert opinions and advice of the assessors and referees to UBC in accordance with s. 13(1).¹⁰

[17] UBC identifies several previous cases that have found that evaluations and weightings of candidates and other deliberations by competition panels to be advice that qualified for protection.¹¹

⁵ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College of Physicians], para. 105; *John Doe v. Ontario (Finance)*, 2014 SCC 36 [John Doe], paras. 34, 43, 46, 47.

⁶ *College of Physicians*, para. 113.

⁷ *John Doe*, para. 35.

⁸ See, for example, Order F15-60, 2015 BCIPC 64 (CanLII), para. 12. See also Order F16-32, 2016 BCIPC 35 (CanLII). Order F15-52, 2015 BCIPC 55 (CanLII), also discusses the scope and purpose of s. 13(1).

⁹ Order F21-16, 2021 BCIPC 21 (CanLII), paras. 14 and 15.

¹⁰ UBC’s initial submission, para. 43.

¹¹ Order F14-52, 2014 BCIPC 56 (CanLII); *Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254, paras. 54-58.

[18] UBC notes that the information it withheld under s. 13(1) does not fall within any of the exclusions under s. 13(2). It submits that any “factual” information withheld is intimately linked to the advice and recommendations.

[19] The applicant does not dispute the substance of UBC’s submission. She merely questions whether the communications on page 139 need to be withheld in their entirety.¹²

Analysis

[20] I have reviewed all the information to which UBC applied s. 13(1). I can confirm that this information meets the definition of advice and recommendations. The substance of the information in these records relates to competitions for access to professional programs. The responsibility of the assessors is to use their expertise to evaluate and recommend to UBC how to rank the candidates for entry. There are also passages involving advice and recommendations as to how to communicate to the applicant the results of the assessment.

[21] I find that UBC properly applied s. 13(1) to information that constitutes advice or recommendations. I see nothing to suggest that any of the provisions in s. 13(2) apply.

[22] Moreover, I note that UBC applied s. 13(1) line by line over the course of 175 pages of records. In most cases, it disclosed all information in particular records except for the portions that contain explicit advice. It has disclosed most of the factual and background information. It has provided a reasonable explanation of its exercise of discretion. My assessment is that UBC has correctly applied s. 13.

Section 22 – harm to third-party personal privacy

[23] The proper approach to the application of s. 22(1) of FIPPA has been the subject of analysis in previous Orders. A clear and concise description of this approach is available in Order F15-03, where the adjudicator stated the following:

This section only applies to “personal information” as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party’s personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those

¹² Applicant’s response submission, para. 7.

listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.¹³

[24] I have taken the same approach in considering the application of s. 22(1) here.

Step 1: Is the information “personal information”?

[25] Under FIPPA, “personal information” is recorded information about an identifiable individual, other than contact information. “Contact information” is “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.”¹⁴

[26] The information at issue includes the names and other identifying information about multiple third-party applicants to a university program.¹⁵ I find that the information at issue is personal information for the purposes of s. 22(1).

Step 2: Does s. 22(4) apply?

[27] UBC submits that none of the provisions of s. 22(4) apply. The applicant does not contest this point.

[28] There is no evidence before me that any provisions of s. 22(4) applies in this case, and none of them appear to me to apply. Therefore, I find that none of the information falls within s. 22(4).

Step 3. Does s. 22(3) apply?

[29] The relevant provisions read as follows:

- 22** (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
- ...
- (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,

¹³ Order F15-03, 2015 BCIPC 3 (CanLII), at para. 58.

¹⁴ FIPPA provides definitions of key terms in Schedule 1.

¹⁵ FIPPA defines a third party as any person, group of persons or organization other than the person who made the request or a public body. This can include employees of a public body when acting in their personal capacity, such as in relation to human resources matters. See Schedule 1.

- (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.¹⁶

[30] **Section 22(3)(d)** – UBC submits that the personal information of third-party candidates includes their educational and employment history, their home contact information, evaluations of them provided by their referees and members of the faculty Admissions Committee and its assessors.¹⁷ It cites several BC Orders that found information collected as part of an employment interview process to be subject to s. 22(3)(d), and that these findings should apply equally in the context of a competition for a professional program.¹⁸ The applicant made no submissions with respect to s. 22(3)(d).

[31] I have reviewed the information in dispute. I can confirm that it includes the names, personal email addresses and information about degree credentials of third-party candidates. It also includes the dates and times that they participated in interviews. In addition, there are assessments of the third-party candidates by their referees and members of the faculty Admissions Committee and its assessors. From the face of the records, it is clear that this information falls within s. 22(3)(d) and its disclosure is presumed to be an unreasonable invasion of the third parties' personal privacy.

[32] **Section 22(3)(f)** – UBC submits that s. 22(3)(f) applies to the information on pages 154-155 about the payment by one of the candidates of the required \$10,000 interview assessment fee, as it constitutes the financial information of the third party. The applicant made no submissions with respect to s. 22(3)(f).

[33] I find that the information at issue is financial information because it reveals an amount of money that a candidate paid to participate in the interview process. For this reason, s. 22(3)(f) applies and disclosure of the information at issue would be presumed to be an unreasonable invasion of the third parties' personal privacy.

¹⁶ The Legislature amended s. 22(3)(h) during the inquiry. My analysis applies equally to the amended version.

¹⁷ UBC's initial submission, para. 58.

¹⁸ UBC's initial submission, paras 59-62; Order F15-29, 2015 BCIPC 32 (CanLII); Order 00- 48, 2000 BCIPC 48 (CanLII); Order F16-28, 2016 BCIPC 30 (CanLII).

[34] **Section 22(3)(g)** – UBC submits that s. 22(3)(g) applies to the Admissions Committee and its assessors' recommendations and evaluations of the third-party candidates. UBC cites several BC Orders that have found that in the context of a selection committee or hiring process that the assessors' evaluations and notes about the qualifications of the candidates fall within s. 22(3)(g).¹⁹ The applicant made no submissions with respect to s. 22(3)(g).

[35] I note that the word “personal” in the phrase “personal recommendations or evaluations” refers to the subject of the assessment. In their professional capacities, the assessors and referees provide their recommendations and evaluations of candidates. The recommendations or evaluations are “personal” with respect to the candidates, rather than being personal with respect to the referees or the assessors. Therefore, s. 22(3)(g) can apply to recommendations and evaluations about third parties that referees and assessors provide in their professional capacities.

[36] I have reviewed the records and they include the Admissions Committee and its assessors' evaluations and notes about the qualifications and interview performance of the third-party candidates. I find that s. 22(3)(g) applies to that information because it is personal evaluations about the candidates. Disclosure of the information about these candidates would be presumed to be an unreasonable invasion of their personal privacy.

[37] **Section 22(3)(h)** – UBC submits that this provision applies to the contents of confidential letters of reference and appraisal for the candidates, including the applicant, if the applicant could reasonably be expected to know the identity of the person providing the appraisal.²⁰

[38] UBC argues that previous BC Orders have found that s. 22(3)(h) applies to protect the identity of third-party referees who supply in confidence evaluations of individuals, such as letters of reference, and the contents of the references.²¹ UBC provides affidavit evidence to support its submission that it treats letters of reference as supplied in confidence and does not disclose them to the candidates.²² In this case, UBC has disclosed the names of the referees who provided letters of reference about the applicant but withheld the content of the letters.

[39] UBC also argues that this provision “applies to the content of evaluations and assessments of the individual members of the Admissions Committee or assessors and their identities as the source of such evaluations and

¹⁹ UBC's initial submission, paras. 64-65; Order F14-26, 2014 BCIPC 29 (CanLII), paras. 36-37; Order F16-28, 2016 BCIPC 30 (CanLII), para. 95.

²⁰ UBC's initial submission, paras. 66-69.

²¹ UBC's initial submission, para. 93. Order F11-05 2011 BCIPC 5 (CanLII).

²² UBC's initial submission, para. 67; Affidavit of Freedom of Information specialist, para. 15.

assessments”²³. It has withheld the identity of a UBC assessor in an email in which the assessor provided in an evaluation of three candidates, including the applicant. UBC has disclosed most of what the assessor said about the applicant in that email.

[40] The applicant does not dispute the application of s. 22(3)(h).

[41] The purpose of this provision is to ensure that a person evaluating another feels free to provide a full and frank assessment without fear their identity will be revealed.

[42] It is clear on the face of the reference letters about the applicant that the withheld information constitutes personal evaluations of the applicant, in accordance with s. 22(3)(h). The affidavit evidence satisfies me that the referees supplied these letters of reference containing their evaluations of the applicant in confidence. As UBC has disclosed the names of the referees, the applicant could reasonably be expected to know the identity of the referee who provided each appraisal. Therefore, I find that s. 22(3)(h) applies to the referees’ letters about the applicant.

[43] I also find that s. 22(3)(h) applies to the name of the UBC assessor who sent the email on page 127. UBC withheld the assessor’s name but disclosed how the assessor evaluated the applicant, with the exception of some information UBC withheld under s. 13. Based on the context provided by the email, I find that disclosure of the assessor’s name would reveal the identity of an individual who supplied, in confidence, a personal evaluation of the applicant’s candidacy.

[44] Given that s. 22(3)(h) applies to the above described information, disclosure is presumed to be an unreasonable invasion of third-party personal privacy.

Step 4: Do the relevant circumstances in s. 22(2) rebut the presumption of invasion of privacy?

[45] The relevant provisions are these:

- 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
- ...
- (f) the personal information has been supplied in confidence,

²³ UBC’s initial submission, para. 68.

[46] **Section 22(2)(f) supplied in confidence** – UBC submits that s. 22(2)(f) is a relevant factor, as some personal information was submitted in confidence. It asserts that it treats all application materials and assessments of candidates as supplied in confidence and it provides affidavit evidence in support. It cites several previous BC Orders that have found that resumes and other application materials have been supplied in confidence in accordance with s. 22(2)(f).²⁴ The applicant does not dispute the application of s. 22(2)(f).

[47] The affidavit evidence that UBC provided persuades me that it receives all letters of reference and other evaluations of candidates in confidence.

[48] I find that s. 22(2)(f) applies to the application materials and assessments of candidates were supplied in confidence, and this is a relevant factor supporting the withholding of the information.

[49] **Other relevant circumstances** – The applicant submits that the name of the assessor who sent the email on page 127 should be disclosed because disclosing the name of an employee operating on behalf of the public body generally is not an unreasonable invasion of their privacy.²⁵ UBC does not contest this point, other than to reiterate its arguments with respect to the application of ss. 22(3)(g) and (h).²⁶ Based on the content and context of this email, I find the assessor was carrying out their work functions on behalf of their employer when they sent this email and this is a relevant circumstance favouring disclosure.

[50] I note that UBC withheld a small amount of the personal information of the applicant in the email on page 127 under both ss. 13(1) and 22(1). However, I have already found that s. 13 applies to that information, so I do not need to determine whether s. 22(1) also applies.

[51] The parties do not argue the application of any other relevant circumstances in this case, and I find that none apply here.

Conclusion on s. 22(1)

[52] I found above that the information in dispute constitutes personal information. I have found that none of the provisions in s. 22(4) apply that would have excluded the application of s. 22(1).

[53] I find that some of the personal information constitutes the educational history of third parties, in accordance with s. 22(3)(d), and that its disclosure is

²⁴ UBC's initial submission, para. 71-72; Order F16-28, 2016 BCIPC 30 (CanLII); Order F14-41, 2014 BCIPC 44 (CanLII), para 100.

²⁵ Applicant's response submission, para. 8.

²⁶ UBC's reply submission, para. 2.

presumed to be an unreasonable invasion of third-party personal privacy. I also find that the information about the payment by a third-party candidate of their fee is their financial information subject to s. 22(3)(f) and that disclosure is presumed to be an unreasonable invasion of privacy.

[54] I find that s. 22(3)(g) applies to information in the third-party recommendations and evaluations of the Admissions Committee and its assessors of the third-party candidates and that disclosure is presumed to be an unreasonable invasion of privacy. I also find that other information constitutes personal evaluations of the applicant that third parties have supplied in confidence, in accordance with s. 22(3)(h), and that disclosure of the personal evaluations is presumed to be an unreasonable invasion of third-party personal privacy.

[55] I find that the fact that the assessor at issue on page 127 was acting in their capacity as an employee of UBC is a relevant factor, but it does not rebut the presumption that disclosure of their name would be an unreasonable invasion of privacy in accordance with s. 22(3)(h). This is because protecting this identity is necessary for the greater purpose of ensuring the effectiveness of the evaluation process, which requires full and frank assessments. I also note that UBC disclosed the substance of the evaluation.

[56] I find that none of the other relevant factors in s. 22(2) apply to rebut the presumptions that disclosure would be an unreasonable invasion of third-party personal privacy.

[57] I find that the third parties provided in confidence their personal information at issue, in accordance with s. 22(2)(f). This argues in favour of withholding the information.

[58] In assessing the relevant circumstances supporting disclosure against those supporting the withholding of the information, I find that the latter outweigh the former. Therefore, the relevant circumstances in this case do not rebut the presumption that disclosure would be an unreasonable invasion of privacy.

[59] I also find that the applicant did not make a case that disclosure of this third-party personal information would not be an unreasonable invasion of privacy of the third parties. The burden of proof lies with the applicant on this issue, and she has not met her burden of proof.

[60] In conclusion, I find that s. 22(1) applies to the personal information at issue and UBC must withhold it.

CONCLUSION

[61] For the reasons given above, under s. 58 of FIPPA, I make the following orders:

1. I confirm the decision of UBC to withhold information under s. 13(1).
2. I require UBC to refuse access, under s. 22(1), to the personal information it withheld under s. 22(1).

May 12, 2022

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

OIPC File No.: F19-81342