



Order F23-73

THOMPSON RIVERS UNIVERSITY

Alexander Corley
Adjudicator

September 13, 2023

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Summary: The applicant requested records related to TRU's internal discussion and action concerning a document the applicant provided to TRU at TRU's request. TRU released some records to the applicant but withheld other records either in part or in their entirety under ss. 13(1) (policy advice and recommendations), 14 (solicitor-client privilege), and 22(1) (unreasonable invasion of privacy). However, only ss. 13(1) and 14 were in issue during the inquiry. The adjudicator confirmed that TRU is authorized to withhold all the information in dispute under s. 14 and it was not necessary to consider the application of s. 13(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] c. 165, ss. 13(1), 14, and 22(1).

INTRODUCTION

[1] A former employee and faculty member (applicant) of Thompson Rivers University (TRU) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to TRU for copies of records related to internal actions TRU took based on a document the applicant provided to TRU in 2019 at the request of TRU's Human Resources director.¹

[2] In response, TRU disclosed some records but withheld other records either in part or in their entirety under ss. 13(1) (policy advice or recommendations), 14 (solicitor-client privilege), and 22(1) (unreasonable invasion of privacy) of FIPPA.

[3] The applicant requested a review by the Office of the Information and Privacy Commissioner (OIPC). Mediation by the OIPC resolved the s. 22(1)

¹ Access Request dated April 18, 2021; Applicant's Response Submission dated March 6, 2023 at p. 1.

matter and that information is no longer in issue.² However, mediation did not resolve the remaining issues and the applicant requested that the matter proceed to an inquiry.

ISSUES

[4] At this inquiry, I must decide:

1. Whether s. 14 authorizes TRU to withhold the information at issue.
2. Whether s. 13(1) authorizes TRU to withhold the information at issue.

[5] Under s. 57(1) of FIPPA, TRU bears the burden proving that the applicant has no right of access to the information TRU has withheld under ss. 13(1) and 14.

DISCUSSION

Background

[6] TRU is a public post-secondary institution located in Kamloops, British Columbia and governed by the *Thompson Rivers University Act*.³ TRU has approximately 2000 faculty and staff members and 25,000 students.⁴ TRU provides both undergraduate and graduate programming and offers other non-degree education and training opportunities to students, as well as carrying out research and facilitating the production of works of scholarship.⁵

[7] The applicant is a former employee and faculty member of TRU.⁶

Records in dispute

[8] As I explain below, TRU did not provide the records in dispute for my review. Instead, TRU provided affidavit evidence from TRU's General Counsel (General Counsel)⁷ and TRU's Access and Privacy Officer (the Privacy Officer)⁸ who is also in-house legal counsel for TRU.⁹ Both General Counsel and the Privacy Officer attest that the records are one partially severed page and 11 fully

² Investigator's Fact Report at para. 4; TRU's Initial Submission dated February 10, 2023, at para. 3. The applicant has also previously indicated that they already possess unredacted copies of some of the records and I find those records are not in dispute: see Applicant's Request for Review dated June 28, 2021, at p. 2.

³ [S.B.C. 2005, c. 17]; See TRU's Initial Submission at para. 9 and Affidavit #1 of M.S. at para. 3.

⁴ TRU's Initial Submission at para. 10; Affidavit #1 of M.S. at para. 3.

⁵ TRU's Initial Submission at para. 9; Affidavit #1 of M.S. at para. 3.

⁶ TRU's Initial Submission at para. 11; Affidavit #1 of M.S. at para. 4.

⁷ Affidavit #1 of J.S.

⁸ Affidavit #1 of M.S.

⁹ Affidavit #1 of M.S. at para. 1.

withheld pages of communications among TRU staff or between TRU and its in-house or external legal counsel.¹⁰ TRU asserts the same in its submissions.¹¹ The applicant does not challenge TRU's description of the records.

[9] Based on the evidence before me, including General Counsel's evidence that they reviewed the records when preparing their affidavit,¹² and the Privacy Officer's evidence that they reviewed both the records and TRU's internal files concerning the access request when preparing their affidavit,¹³ I accept TRU's description of the records.

[10] I find that the records at issue are one partially severed page and 11 fully withheld pages of communications among TRU staff or between TRU staff and TRU's in-house or external legal counsel (records).

Solicitor-Client Privilege – s. 14

[11] TRU has applied s. 14 to withhold all the information in dispute. Section 14 states that a public body may refuse to disclose information that is subject to solicitor-client privilege. The term "solicitor-client privilege" in the context of s. 14 encompasses both legal advice privilege and litigation privilege.¹⁴ TRU is only claiming legal advice privilege.¹⁵ I use the terms "solicitor-client privilege" and "legal advice privilege" interchangeably in the rest of this order.

Evidentiary basis for solicitor-client privilege

[12] TRU did not provide the records it withheld under s. 14 for my review. Instead, TRU provided sworn affidavits from General Counsel and the Privacy Officer to support its claim that the information in dispute is protected by solicitor-client privilege.¹⁶ Based on these affidavits, TRU submits that it has provided sufficient evidence to prove its claim of privilege and it is not obligated to disclose privileged records to the OIPC for inspection.¹⁷

[13] The applicant says he is concerned with how TRU has applied s. 14 to the records but does not argue that TRU needs to provide the records for my review.¹⁸

¹⁰ Affidavit #1 of J.S. at paras. 5 and 8; Affidavit #1 of M.S. at para. 8.

¹¹ TRU's Initial Submission at paras. 2 and 14.

¹² Affidavit #1 of J.S. at paras. 4 and 6.

¹³ Affidavit #1 of M.S. at para. 10.

¹⁴ *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.

¹⁵ TRU's Initial Submission at paras. 34-35.

¹⁶ TRU's Initial Submission at paras. 4 and 34-35.

¹⁷ TRU's Initial Submission at paras. 20, 23-25, and 34-35.

¹⁸ Applicant's Response Submission at pp. 1-2.

[14] The Commissioner has the power, under s. 44 of FIPPA, to order production of records over which solicitor-client privilege is claimed.¹⁹ However, given the importance of solicitor-client privilege, the Commissioner will only order production of records being withheld under s. 14 when it is necessary to decide the issues in dispute.²⁰

[15] For the reasons that follow, I determined that I have enough information to decide whether s. 14 applies to the records.

[16] I am satisfied that both General Counsel and the Privacy Officer reviewed the records before swearing their affidavits and therefore have direct knowledge of the content and context of the records.²¹ Further, in all but one case, General Counsel's evidence is that they were either directly involved in the communications that TRU has withheld under s. 14,²² or that those communications would reveal advice that General Counsel provided to TRU if disclosed.²³

[17] Regarding the one instance where General Counsel or their advice was not directly involved, General Counsel deposes that it is a communication between TRU's senior executive and TRU's external legal counsel.²⁴ I find that, given their role, General Counsel is well-placed to give evidence regarding this communication and has done so.

[18] Based on the above, I find that TRU's evidence is sufficient for me to decide whether s. 14 applies to the records and it is not necessary to order production of the records for my review. I turn next to the question of whether, on the evidence before me, TRU has made out its claim of privilege under s. 14.

Legal advice privilege

[19] TRU is withholding all the records in issue under legal advice privilege. Legal advice privilege applies to communications that:

1. Are between solicitor and client;
2. Entail the seeking or giving of legal advice; and

¹⁹ Section 44(1)(b) of FIPPA states the Commissioner may order the production of records, and s. 44(2.1) reinforces that such a production order may apply to a record that is subject to solicitor-client privilege.

²⁰ Order F19-21, 2019 BCIPC 23 at para. 61.

²¹ Affidavit #1 of J.S. at paras. 4 and 6; Affidavit #1 of M.S. at para. 8.

²² Affidavit #1 of J.S. at paras. 7(a), 7(c), and 7(d); pages 1-2, 6-7, and 8-11 of the records withheld in full.

²³ Affidavit #1 of J.S. at para. 5; page 6 of the partially severed records.

²⁴ Affidavit #1 of J.S. at para. 7(b); pages 3-5 of the records withheld in full.

3. Are intended by the parties to be confidential.²⁵

[20] Not every communication between a solicitor and their client is privileged; however, if the conditions above are satisfied, then legal advice privilege applies.²⁶

[21] Furthermore, it is not only the direct communication of advice between solicitor and client that may be privileged. The “continuum of communications” related to the advice, including information furnished by the client, that would reveal the substance of the advice, attracts the privilege.²⁷ The “continuum of communications” also includes internal client communications related to the legal advice received.²⁸

[22] Legal advice privilege applies equally to in-house counsel, provided they are acting in a legal capacity.²⁹ The Supreme Court of Canada has said that, “owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose.”³⁰ Non-privileged advice communicated by in-house counsel is commonly referred to as “business advice.”

TRU’s position on legal advice privilege

[23] TRU submits that each of the records are confidential communications between TRU as client and its in-house or external legal counsel for the purposes of seeking, formulating, or providing legal advice, or would reveal the same if disclosed.³¹

[24] Based on the evidence of General Counsel and the Privacy Officer, TRU asserts that the records at issue are:³²

²⁵ *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 [*Solosky*] at 837; Order F22-36, 2022 BCIPC 40 at para. 22.

²⁶ *Solosky*, *ibid* at 829 and 837.

²⁷ *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 [*Bilfinger*] at paras. 22-24. See also *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 [*Lee*] at paras. 32-33.

²⁸ *Bank of Montreal v. Tortora*, 2010 BCSC 1430 [*BMO*] at para. 12, citing *Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General)*, [1988] O.J. No. 1090 (Ont. S.C.J.). See also, *Bilfinger*, *ibid* at para. 24.

²⁹ *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 [*Pritchard*] at paras. 19-21. See also Order P22-07, 2022 BCIPC 64 at para. 22.

³⁰ *Pritchard*, *ibid* at para. 20. See also Order F20-56, 2020 BCIPC 65 at para. 29.

³¹ TRU’s Initial Submission at para. 34; Affidavit #1 of J.S. at paras. 5 and 8; Affidavit #1 of M.S. at paras. 8-9.

³² TRU’s Initial Submission at paras. 16 and 19; Affidavit #1 of J.S. at paras. 5 and 7; Affidavit #1 of M.S. at para. 8.

Record 1 - An internal e-mail between TRU employees which references prior confidential communications between General Counsel and TRU's senior executive in which General Counsel provided legal advice and which would reveal the substance of that legal advice if disclosed.³³ TRU says that solicitor-client privilege protects internal client communications which transmit or comment on privileged communications with lawyers.³⁴

Record 2 - A confidential communication between General Counsel and TRU's senior executive which sets out legal advice obtained from TRU's external legal counsel.³⁵

Record 3 - Confidential communications between a member of TRU's senior executive and TRU's external legal counsel for the purpose of seeking legal advice.³⁶

Record 4 - A communication between General Counsel and TRU's senior executive marked "PRIVILEGED AND CONFIDENTIAL" which sets out legal advice provided by General Counsel and references an intention to seek external legal advice which was later sought and received by TRU.³⁷ TRU says that prior OIPC Orders affirm that solicitor-client privilege applies to communications that reference an intention to seek legal advice where the legal advice is in fact sought and disclosure of the communication would reveal confidential communications between lawyer and client.³⁸

Record 5 - A communication between General Counsel and another of TRU's in-house legal counsel, S.B.,³⁹ marked "PRIVILEGED AND CONFIDENTIAL" wherein General Counsel requested that S.B. provide legal advice and S.B.'s legal opinion. TRU says this communication also references General Counsel or S.B.'s intention to seek external legal advice.⁴⁰

³³ Page 6 of the partially severed records.

³⁴ TRU's Initial Submission at para. 32, citing *BMO*, *supra* note 28 at para. 12, Order F17-53, 2017 BCIPC 58 at para. 20, and Order F14-31, 2014 BCIPC 34 at para. 16.

³⁵ Pages 1-2 of the records withheld in full.

³⁶ Pages 3-5 of the records withheld in full.

³⁷ Pages 6-7 of the records withheld in full.

³⁸ TRU's Initial Submission at para. 33, citing Order F19-07, 2019 BCIPC 9 at paras. 17-21 and Order F17-23, 2017 BCIPC 24 at paras. 46-50.

³⁹ See also Affidavit #1 of M.S. at para. 2 where M.S. confirms that S.B. is in-house counsel to TRU.

⁴⁰ Pages 8-11 of the records withheld in full.

Applicant's position on legal advice privilege

[25] The applicant's response submission does not specifically address the test for legal advice privilege. However, the applicant clearly objects to TRU relying on s. 14 to withhold or sever any of the records.⁴¹

Analysis

[26] In assessing the records, I first consider the communications directly involving General Counsel.⁴² Then, I consider TRU's senior executive seeking advice from TRU's external legal counsel.⁴³ Finally, I consider the internal e-mail between TRU staff.⁴⁴ I adopt TRU's ordering of the records.

[27] For the reasons that follow, I am satisfied that the information in dispute meets the criteria for solicitor-client privilege.

Communications Involving General Counsel

[28] There are three records that include direct communications with General Counsel:

- **Record 2** - General Counsel discussing advice received from TRU's external legal counsel with TRU's senior executive.⁴⁵
- **Record 4** - General Counsel communicating their own advice to TRU's senior executive.⁴⁶
- **Record 5** - General Counsel conferring with another of TRU's in-house legal counsel, S.B., to seek legal advice and a legal opinion.⁴⁷

[29] Based on General Counsel's affidavit evidence, which I accept, I find that General Counsel, S.B., and TRU's external legal counsel were each in a solicitor-client relationship with TRU at the time that these communications occurred. Further, based on the affidavit evidence of both General Counsel and the Privacy Officer, whose evidence I also accept, I find that each of these communications was intended by the parties to be confidential.⁴⁸ Given these findings, I primarily

⁴¹ Applicant's Response Submission at pp. 1-2.

⁴² Pages 1-2, 6-7, and 8-11 of the records withheld in full.

⁴³ Pages 3-5 of the records withheld in full.

⁴⁴ Page 6 of the partially severed records.

⁴⁵ Pages 1-2 of the records withheld in full.

⁴⁶ Pages 6-7 of the records withheld in full.

⁴⁷ Pages 8-11 of the records withheld in full.

⁴⁸ Affidavit #1 of J.S. at paras. 5 and 8; Affidavit #1 of M.S. at para. 9. I note as well that two of the communications are expressly marked "Privileged and Confidential." Pages 6-7 and 8-11 of the records withheld in full; Affidavit #1 of J.S. at para. 7.

address below whether the individual communications entail the seeking or giving of legal advice or otherwise fall within the “continuum of communications” protected by solicitor-client privilege.⁴⁹

[30] **Record 2**⁵⁰ - I find that this communication falls within the “continuum of communications” protected by solicitor-client privilege. As noted above, the continuum covers internal client communications regarding legal advice received by the client.⁵¹ General Counsel’s evidence is that this communication relates to an internal TRU discussion regarding confidential legal advice received from TRU’s external legal counsel.⁵² I accept this evidence and find that, if disclosed, this communication would reveal privileged legal advice.

[31] **Record 4**⁵³ - I accept General Counsel’s evidence that the purpose of this communication was to provide legal advice to TRU’s senior executive.⁵⁴ I owe some deference to that evidence⁵⁵ and find that there is nothing before me which challenges it. Further, I do not find anything in the evidence indicating that the advice in question was “business” as opposed to legal advice.

[32] **Record 5**⁵⁶ - General Counsel’s sworn evidence is that these communications would reveal legal advice and related information shared between General Counsel and another of TRU’s in-house counsel, S.B., if disclosed. It is well established that communications between lawyers who are working together to give legal advice to a client fall within the scope of a communication between a legal advisor and client.⁵⁷ I accept General Counsel’s evidence and find that these communications would reveal privileged legal advice if disclosed to the applicant.

Senior Executive Communicating with External Counsel

[33] **Record 3**⁵⁸ – I accept General Counsel’s evidence that TRU was in a solicitor-client relationship with TRU’s external legal counsel when these communications occurred, that these communications were intended to be confidential, and that the purpose of these communications was for TRU’s senior

⁴⁹ *Bilfinger*, *supra* note 27 at paras. 22-24. See also *Lee*, *supra* note 27 at paras. 32-33 and *BMO*, *supra* note 28 at para. 12.

⁵⁰ Pages 1-2 of the records withheld in full.

⁵¹ *BMO*, *supra* note 28 at para. 12. See also, *Bilfinger*, *supra* note 27 at para. 24.

⁵² Affidavit #1 of J.S. at paras. 7(a) and 8.

⁵³ Pages 6-7 of the records withheld in full.

⁵⁴ Affidavit #1 of J.S. at paras. 7(c) and 8.

⁵⁵ *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at paras. 85-86.

⁵⁶ Pages 8-11 of the records withheld in full.

⁵⁷ Order F20-16, 2020 BCIPC 18 at para. 65, citing Order F15-41, 2015 BCIPC 44 and Order F20-01, 2020 BCIPC 1.

⁵⁸ Pages 3-5 of the records withheld in full.

executive to seek legal advice.⁵⁹ Therefore, I find that these communications are privileged.

Internal E-mail Between TRU Staff

[34] **Record 1** - General Counsel attests that after reviewing Record 1 they concluded that “although the e-mail was not sent or received by me, it does contain information which, if disclosed, would reveal the substance of the confidential legal advice I provided [to TRU’s senior executive].”⁶⁰ As noted above, the courts have consistently held that legal advice privilege extends to internal client communications that discuss legal advice and its implications.⁶¹ Following this guidance and applying General Counsel’s evidence on point, I find that legal advice privilege applies to the communication between General Counsel and TRU’s senior executive referenced in Record 1 and, therefore, it also applies to Record 1.

Conclusion – Legal Advice Privilege

[35] Based on the above, I find that all three parts of the test for legal advice privilege are met for each of the communications in issue and TRU was authorized to withhold the records pursuant to s. 14.

TRU’s Exercise of Discretion

[36] The word “may” in s. 14 confers on the head of a public body the discretion to disclose information that it is otherwise authorized to withhold under that section. If the head of a public body has failed to consider exercising their discretion to disclose such information, the Commissioner can require the head to do so. The Commissioner can also order the head to reconsider the exercise of discretion where the decision to withhold records or information was made in bad faith or for an improper purpose, the decision took into account irrelevant considerations, or the decision failed to take into account relevant considerations.⁶²

Positions of the Parties

[37] TRU asserts that it properly exercised its discretion in withholding the records under s. 14.⁶³ In support of this assertion, the Privacy Officer attests that they reviewed the records and the associated TRU file in preparing their affidavit

⁵⁹ Affidavit #1 of J.S. at paras. 7(b) and 8.

⁶⁰ Affidavit #1 of J.S. at para. 5.

⁶¹ *BMO*, *supra* note 28 at para. 12.

⁶² Order F23-51, 2023 BCIPC 59 at para. 142, citing *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 52 and Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 147. See also Order F21-15, 2021 BCIPC 19 at para. 57 and FIPPA s. 58(2)(b).

⁶³ TRU’s Initial Submission at para. 44.

and further that they have had oversight of TRU's response to the access request since at or about the time it was received from the applicant.⁶⁴

[38] The Privacy Officer also states that TRU considered the following factors in exercising its discretion to withhold the records under s. 14:

- a) The purposes of the access provisions of FIPPA and section 14;
- b) Previous decisions of the courts and OIPC interpreting section 14 of FIPPA;
- c) The fundamental importance of solicitor-client privilege to the Canadian legal system;
- d) The sensitivity of the issues in the records;
- e) The applicant's interest in the records;
- f) TRU's past practice in asserting privilege over solicitor-client communications;
- g) The fact that TRU has no intention to waive the privilege; and
- h) Whether there was a compelling public interest in disclosing the records.⁶⁵

[39] The applicant does not address TRU's exercise of discretion in their response submission but does raise general concerns related to the good faith and professional conduct of TRU in-house counsel and other employees in communications with the applicant that pre-date the access request.⁶⁶ The applicant also raised several related issues in their request for review. For example, the applicant asserted that TRU is not properly considering whether to exercise its discretion in good faith but is inappropriately "routinely saying no" to releasing information.⁶⁷ Finally, the applicant invites me to review the content of another OIPC file between the applicant and TRU on the basis that it "likely contain[s]" further evidence that TRU may not have appropriately exercised its discretion in this and other cases.⁶⁸

⁶⁴ Affidavit #1 of M.S. at para. 10.

⁶⁵ Affidavit #1 of M.S. at para. 11.

⁶⁶ Applicant's Response Submission at pp. 1-2.

⁶⁷ Applicant's Request for Review at p. 3, citing *FOIPPA Policy and Procedures Manual*, "Exercise of Discretion" (<https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/exercise-discretion?keyword=discretion>). While the applicant refers to this document as created by OIPC, it is in fact a publication of the BC Government Ministry of Citizens' Services.

⁶⁸ Applicant's Request for Review at p. 3.

Analysis and Conclusion

[40] Based on the Privacy Officer’s affidavit evidence, I accept that TRU considered the factors set out above in applying s. 14 to sever and withhold the records. I am, therefore, satisfied that TRU exercised its discretion and that it did so having considered appropriate circumstances.⁶⁹

[41] Moreover, I find there is nothing in the records or the parties’ submissions that supports concluding that TRU exercised its discretion in bad faith or for an improper purpose or based on irrelevant considerations. Turning to the applicant’s general concerns with the good faith and professional conduct of TRU staff, the applicant does not explain how these concerns are relevant to TRU’s exercise of discretion in severing the records and, on the evidence before me, I find that they are not.

[42] Further, I am alive to the applicant’s concerns regarding a public body “routinely saying no” as opposed to properly considering its discretion but I also do not find those concerns to be substantiated on the evidence before me. The range of information that can be covered by solicitor-client privilege is broad.⁷⁰ Given this, the fact that TRU has withheld more information than the applicant feels is proper is not, on its own, evidence that TRU has acted in bad faith when exercising its discretion.

[43] Finally, it is well established that my role is to decide this inquiry based on the evidence in front of me and not based on evidence provided or requested in past inquiries or other OIPC matters.⁷¹ As such, it is not appropriate for me to review other OIPC files in search of potential evidence alleged to support the applicant’s position on this point.

[44] For these reasons, I find that TRU has appropriately exercised its discretion in deciding to not release the records TRU has withheld under s. 14.

Advice or Recommendations – S. 13(1)

[45] Because I have found that s. 14 applies to all the information in issue, it is not necessary for me to consider whether s. 13(1) also applies.

⁶⁹ See Order F23-51, *supra* note 62 at para. 145.

⁷⁰ *Bilfinger*, *supra* note 27 at paras. 22-24. See also *Lee*, *supra* note 27 at paras. 32-33.

⁷¹ See, for example, Order F23-33, 2023 BCIPC 39 at para. 20 and Order F23-65, 2023 BCIPC 75 at para. 13.

CONCLUSION

[46] For the reasons given above, under s. 58 of FIPPA, I confirm TRU's decision that it is authorized to refuse to disclose the information in dispute under s. 14.

September 13, 2023

ORIGINAL SIGNED BY

Alexander Corley, Adjudicator

OIPC File No.: F21-86562