Order F24-17

THOMPSON RIVERS UNIVERSITY

Lisa Siew
Adjudicator

March 12, 2024

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant requested Thompson Rivers University (University) provide access to records related to allegations the applicant made against several University employees. The University provided the applicant with responsive records but withheld information or entire pages of records under one or more FIPPA exceptions to access. The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the University's decision. The OIPC adjudicator determined the University was required or authorized to withhold some of the information at issue under s. 14 (solicitor client privilege), s. 13(1) (advice and recommendations) and s. 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA. However, the adjudicator required the University to provide the applicant with access to information that the University had incorrectly withheld under ss. 14, 13(1), 22(1) or s. 12(3)(b) (local body confidences).

Statutes and sections considered in the order: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 12(3)(b), 13(1), 13(2)(a), 13(2)(k), 13(2)(n), 13(3), 14, 22(1), 22(2)(a), 22(2)(c), 22(2)(e), 22(2)(f), 22(2)(h), 22(3)(d), 22(4)(e), 22(4)(h), Schedule 1 (definitions of "contact information", "educational body", "local public body", "personal information" and "third party"). *Labour Relations Code*, RSBC 1996, Ch. 244, ss. 12, 13. *Thompson Rivers University Act*, S.B.C. 2005 c. 17, s. 7. *University Act*, RSBC 1996, c. 468, s. 27(2)(c).

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant requested Thompson Rivers University (University) provide them with access to records associated with allegations the applicant made against several University employees.

[2] The University provided the applicant with partial access to the responsive records but withheld information in those records under one or more FIPPA exceptions to access. The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the University's decision.

[3] Sometime after the OIPC's involvement, the University disclosed a small amount of information to the applicant that it previously withheld from a record. However, the OIPC's investigation and mediation process did not resolve the dispute between the parties and those matters proceeded to this inquiry.

[4] During the inquiry, the University reconsidered part of its decision to refuse access and disclosed some additional information to the applicant.[1] Therefore, I conclude that information is no longer at issue in this inquiry.

ISSUES AND BURDEN OF PROOF

[5] The issues I must decide in this inquiry are as follows:

1. Is the University authorized to refuse to disclose the information at issue under s. 14?

2. Is the University authorized to refuse to disclose the information at issue under s. 13(1)?

3. Is the University required to refuse to disclose the information at issue under s. 22(1)?

4. Is the University authorized to refuse to disclose the information at issue under s. 12(3)(b)?

[6] Section 57(1) of FIPPA places the burden on the University to prove the applicant has no right of access to the information withheld under ss. 12(3)(b), 13(1) and 14.

[7] On the other hand, s. 57(2) of FIPPA places the burden on the applicant to establish that the disclosure of the information at issue would not unreasonably invade a third-party's personal privacy under s. 22(1). However, the University has the initial burden of proving the information at issue qualifies as personal information.[2]

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[1] Correspondence from the University's legal representative for this inquiry to applicant dated February 7, 2024.
[2] Order 03-41, 2003 CanLII 49220 (BCIPC) at paras. 9–11.

DISCUSSION

Background

[8] The University is a post-secondary educational institution located in Kamloops, British Columbia.[3] The University employs 2,000 faculty members and staff who provide training, education and other services to approximately 25,000 students. The University is governed by the *Thompson Rivers University Act* which authorizes the University's board of governors to manage, administer and control the property, revenue, and business of the University.[4]

[9] In or around May 2014, the University's board of governors implemented a policy known as the "Whistle Blower Policy."[5] The purpose of this policy was to provide members of the University community with a process to report improper activity on the part of the University or its employees without fear of retaliation. The term "improper activity" is partly defined in the policy as any activity that "is a serious violation of University policy" or "involves gross misconduct, gross incompetence or gross inefficiency."[6] The policy also specifies that members of the University community should report, in writing, any incidents of improper activity to the Audit Committee who is then responsible for investigating and addressing each complaint.

[10] The applicant is a former University faculty member. During their employment with the University, the applicant reported several incidents of alleged improper activity under the Whistle Blower Policy. The applicant submitted their allegations by way of two separate letters. The applicant's allegations implicated two faculty members and other University employees.

[11] The University's Audit Committee reviewed the allegations and closed its files on those matters without taking any action against the individuals named in the applicant's letters. The Chair of the Audit Committee (Chair) informed the applicant of the Audit Committee's decision for each allegation by sending two separate letters. The applicant is now seeking access to all records related to their two whistleblower letters and the Chair's two response letters.

Records and information at issue

[12] The records responsive to the applicant's access request total 209 pages, with approximately 78 of those pages containing the information at issue. The records in dispute are emails, letters and memos.

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[3] The information in this background section is compiled from the parties' submissions and evidence and from information disclosed in the responsive records.
[4] *Thompson Rivers University Act*, S.B.C. 2005 c. 17 at s. 7(1), subject to certain exceptions which are not applicable here.
[5] Exhibit "B" to affidavit of Privacy Officer, which is located in the University's initial submission.
[6] Exhibit "B" to affidavit of Privacy Officer.

[13] For some records, the University withheld entire pages of records. For other records, the University provided the applicant with partial access by withholding only some of the information in those records. For most of the information withheld in the responsive records, the University applied more than one FIPPA exception to the same information.

Solicitor-client privilege – s. 14

[14] The University applied s. 14 to a large portion of the information that it withheld in the responsive records; therefore, I will consider s. 14 first. Section 14 states a public body may refuse to disclose information that is subject to solicitor-client privilege. It is well-established that s. 14 encompasses both legal advice privilege and litigation privilege.[7] The University is claiming legal advice privilege over the information withheld under s. 14.[8]

[15] Legal advice privilege applies to confidential communications between a solicitor and client for the purposes of obtaining and giving legal advice, opinion or analysis.[9] Generally, legal advice privilege can only be claimed "document by document" with each document being required to meet the following criteria:

1. A communication between a solicitor and client (or their agent);

2. Which entails the seeking or giving of legal advice; and

3. Which is intended by the parties to be confidential.[10]

[16] Legal advice privilege does not apply to all communications or documents that pass between a lawyer and their client.[11] However, if the conditions set out above are satisfied, then legal advice privilege applies to the communication and the records relating to it.[12]

[17] The courts have also found that legal advice privilege extends to communications that are "part of the continuum of information exchanged" between the client and the lawyer in order to obtain or provide the legal advice.[13] A "continuum of communications" involves the necessary exchange of

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[7] *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para. 26.
[8] University's initial submission at para. 29.
[9] *College*, *supra* note 7 at para. 31.
[10] *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 838, [1980] 1 SCR 821 at p. 13.
[11] *Keefer Laundry Ltd v. Pellerin Milnor Corp et al,* 2006 BCSC 1180 at para. 61.
[12] *R. v. B.*, 1995 CanLII 2007 (BCSC) at para. 22.
[13] *Huang v. Silvercorp Metals Inc*., 2017 BCSC 795 at para. 83; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 [*Camp Development*] at paras. 40-46.

information between solicitor and client for the purpose of obtaining and providing legal advice such as "history and background from a client" or communications to clarify or refine the issues or facts.[14] The continuum also covers communications after the client receives the legal advice, such as internal client discussions about the legal advice and its implications.[15]

Evidence provided by the University to prove s. 14 applies

[18] The University provided me with a copy of some records that allows me to see the information that it withheld under s. 14 and determine whether the University properly applied s. 14 to that information.

[19] However, the University chose not to provide the other records withheld under s. 14. Instead, along with its inquiry submissions and the s. 14 information that I can see, it relies on the following materials to support its s. 14 claim:

- An affidavit from an individual identified as the University's "Legal Counsel and Privacy and Access Officer" (Privacy Officer).
- An affidavit from an individual described as the University's "External legal counsel" (External Counsel).
- A table that provides a general description of the records at issue in this inquiry (Table of Records).
- Information in the records that the University already disclosed to the applicant.

[20] The University submits this combined information is sufficient to determine the validity of its claim that s. 14 applies to the information that it withheld in the responsive records. The University requests that it be given an opportunity to provide further submissions and evidence if I find this evidence is insufficient.

[21] Where a public body declines to provide the information or records withheld under s. 14, it is expected to provide a description of the information or records in a manner that, without revealing privileged information, enables the other party and the adjudicator to assess the validity of the claim of privilege.[16] Where affidavit evidence is relied upon to support a claim of solicitor-client

[14] *Camp Development, supra* note 13 at para. 40.
[15] *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 at paras. 22-24.
[16] *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para. 78.

privilege, the evidence should specifically address the documents subject to the privilege claim.[17]

[22] I find the University's evidence and materials sufficiently addresses and describes the information at issue. For the s. 14 records that it did not provide, the University gave a description of the withheld information in its materials, including a sworn affidavit from the Privacy Officer who describes some of the s. 14 information. It also provided a sworn affidavit from External Counsel who is a lawyer with direct knowledge of some of the relevant events and provided a detailed description of most of the s. 14 information. As a result, I conclude the University's description of the information at issue and its affidavit evidence is sufficient to allow me to determine whether s. 14 applies to the information that it did not provide for my review.

Parties' submissions on s. 14

[23] The University submits that it correctly applied s. 14 to withhold information in the relevant records. The University sorted those records into four categories which it describes as:

1) General Counsel communications: 18 pages of email communications, withheld in their entirety, between the University's in-house legal counsel (General Counsel) and one or more University employees.[18]

2) External Counsel communications: 42 pages of email communications, withheld in their entirety, between External Counsel and one or more University employees or emails between University employees.[19]

3) Severed Records: information withheld on 10 pages of email communications between External Counsel or General Counsel and one or more University employees or emails between University employees.[20]

4) Audit Committee Records: a small amount of information withheld on one page of "two reports" prepared for the Chair of the Audit Committee by the University's Director of Internal Audit (Director).[21]

[24] External Counsel attests to reviewing the General Counsel communications, the External Counsel communications and the Severed Records and they provide a detailed description of that information. Generally, External Counsel deposes that the disclosure of this s. 14 information would

[17] *Ibid* at para. 91.
[18] External Counsel's affidavit at para. 7.
[19] External Counsel's affidavit at para. 5.
[20] External Counsel's affidavit at para. 8.
[21] Privacy Officer's affidavit at para. 20(c).

reveal, either directly or indirectly, legal advice that they or General Counsel provided to the University in confidence. External Counsel did not address the Audit Committee Records. Instead, the Privacy Officer describes the s. 14 information in the Audit Committee Records as references "to legal advice obtained from the University's legal counsel."[22]

[25] The applicant questions whether s. 14 applies to all the information withheld by the University. The applicant notes External Counsel's affidavit references several records which are described as emails with attachments that are "third party communications on which that legal advice was based."[23] The applicant theorizes those third-party communications include responses from the individuals that the applicant reported under the Whistle Blower Policy. The applicant argues that information would not be privileged because External Counsel did not claim those communications "are themselves legal advice" and the third parties would not have written those communications "with the intention of obtaining legal advice."[24]

[26] In response, the University says any email attachments are privileged because those documents were provided to its lawyers for the purpose of seeking legal advice and, therefore, falls under the continuum of communications in which legal advice is sought and provided. The University submits the attachments are an integral part of the privileged communications it had with its lawyers. The University further argues the disclosure of the attachments would allow someone to "draw accurate inferences about the nature of the solicitor client privileged communication, such as the nature and subject matter of the advice being sought."[25]

Analysis and findings on s. 14

[27] Based on the University's submissions and evidence, I find the University is refusing to disclose information under s. 14 that would reveal the following:

- University employees and General Counsel talking about seeking legal advice from External Counsel about a matter.[26]

- A University employee instructing General Counsel to obtain legal advice from External Counsel about a matter.[27]

[22] Privacy Officer's affidavit at para. 20(b).
[23] Applicant's submission at p. 15. The applicant did not add page numbers or paragraph numbers to their inquiry submission. Therefore, any references to a page number regarding that material refers to the pages of the pdf file made of the applicant's inquiry submission.
[24] Applicant's submission at p. 15.
[25] University's reply submission at para. 47.
[26] External Counsel's affidavit at para. 5(j) and information located on p. 4 (duplicated on pp. 9, 14, 21, 27) of the Severed Records.
[27] External Counsel's affidavit at para. 8(e).

- University employees discussing the details of External Counsel's "engagement" or the specific matters for which External Counsel is being asked to provide legal advice.[28]

- University employees requesting or seeking legal advice from either External Counsel or General Counsel.[29]

- Legal advice that External Counsel or General Counsel provided to University employees.[30]

- External Counsel providing General Counsel with a status update on a matter.[31]

- University employees discussing or referring to legal advice given by External Counsel or General Counsel.[32]

- Emails between one or more University employees and one or both lawyers where information is exchanged or provided for the purposes of seeking or providing legal advice to the University.[33] Some of the emails include forwarded email conversations or attachments described as "third-party communications."[34]

[28] I will first consider whether there was a solicitor-client relationship between the University and External Counsel and then between the University and General Counsel. External Counsel deposes they were engaged by the University to provide legal advice in relation to the complaints made by the applicant under the Whistle Blower Policy. External Counsel also attests they provided legal advice about those matters and that they communicated with General Counsel and other University employees in their capacity as a legal advisor. I accept External Counsel's evidence that they were retained by the University to provide legal advice about certain matters. Therefore, I find there was a solicitor-client relationship between External Counsel and the University.

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[28] External Counsel's affidavit at para. 5(a). Information located on pp. 2 and 51 of the Severed Records.
[29] External Counsel's affidavit at paras. 5(e), 5(f), 5(g), 5(h), 5(k) and 7(d) and 8(a) and 8(b).
[30] External Counsel's affidavit at paras. 5(b), 5(d), 5(e), 5(g), 5(h), 5(i), 5(j), 5(k), 5(m), 5(n), 5(o), 5(p) and 7(a), 7(b), 7(c), 7(d) and 8(b), 8(c). Information located on pp. 12-15 of the Audit Committee Records.
[31] External Counsel's affidavit at para. 5(l).
[32] External Counsel's affidavit at para. 7(b). Privacy Officer's affidavit at para. 20(b).
[33] External Counsel's affidavit at paras. 5(c), 5(e), 5(f), 5(g), 5(m), 5(n), 8(b), 8(c).
[34] External Counsel's affidavit at paras. 5(c), 5(e), 5(f), 5(g), 5(n) and 8(b), 8(c). Information located on p. 51 of the Severed Records.

[29] Regarding General Counsel's role, solicitor-client privilege extends to communications with in-house counsel provided the lawyer is acting in a legal capacity and not as a business or policy advisor.[35] To determine whether General Counsel was acting in a professional legal capacity at the relevant time, I must consider general evidence of the nature of the relationship, the subject matter of the advice and the circumstances in which the advice was sought or rendered.[36]

[30] External Counsel confirms General Counsel provided legal advice to the University and assisted the University with obtaining legal advice.[37] External Counsel describes some of the emails as revealing General Counsel's legal advice to the University about matters related to the applicant or other issues, while other emails are described as General Counsel acting as the University's representative in communicating with External Counsel on those matters.[38] This distinction assists me in understanding General Counsel's role in the various communications. I also find it adds weight to External Counsel's description of the s. 14 information and what they say about General Counsel's participation in those communications. Therefore, I accept the University's claim that it consulted with General Counsel in their legal capacity and that there was a solicitor-client relationship between them.

[31] In terms of confidentiality, External Counsel deposes that some of the emails are marked with express statements of confidentiality such as the phrase "Privileged and Confidential."[39] Regarding the Audit Committee Records, the Privacy Officer says those records are marked "Draft Confidential."[40] I also find there is nothing that indicates the content of those discussions and communications were shared with people outside the solicitor-client relationship. Instead, the email participants or intended recipients are identified as University employees or one or both lawyers. As a result, I accept the parties intended those communications to be confidential and treated them in that manner.

[32] The last condition necessary for legal advice privilege to apply is that the communication must entail the seeking or giving of legal advice. I accept that some of the s. 14 information reveals University employees seeking legal advice from one or both lawyers, while other information reveals External Counsel or General Counsel's response to those requests or External Counsel's update about a legal matter. I conclude the information withheld in these records entails the seeking or giving of legal advice or reveals what was said about those matters.

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[35] *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et. al*., 2006 BCSC 1180 (CanLII) at para. 63.
[36] *R v. Campbell*, 1999 CanLII 676 (SCC) at para. 50.
[37] External Counsel's affidavit at para. 5.
[38] For example, External Counsel's affidavit at paras. 5(j) and 5(l).
[39] For example, External Counsel's affidavit at para. 7.
[40] Privacy Officer's affidavit at para. 20(b).

[33] I also accept that some of the s. 14 information reveals University employees discussing the terms of External Counsel's "engagement" with the University.[41] The Supreme Court of Canada has found that "a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential" whether they deal with "matters of an administrative nature such as financial means or with the actual nature of the legal problem."[42] I find the withheld information deals with matters of an administrative nature, specifically the terms of the legal representation between the University and External Counsel. Therefore, I conclude legal advice privilege applies to the information at issue here.[43]

[34] I further accept there is information in the records that reveals an intention to seek legal advice from External Counsel about a matter. Typically, the fact that there is information that reveals the intent or need to seek legal advice at some point in the future does not suffice on its own to establish that privilege applies. There must be evidence that disclosure of this information would reveal actual confidential communications between a lawyer and their client.[44] To establish such a claim, previous OIPC orders accept evidence that the public body eventually did seek and receive legal advice about the matter revealed in the withheld information.[45] I agree with that approach as the disclosure of this information would then reveal confidential communications that later occurred between a lawyer and their client.

[35] In this case, External Counsel confirms some of the s. 14 information reveals University employees discussing how they intend to ask External Counsel for legal advice and that a legal opinion was subsequently sought from and given by them.[46] I conclude, therefore, that legal advice privilege applies to this information since its disclosure would reveal subsequent communications made in confidence between a lawyer and a client related to the seeking and giving of legal advice.

[36] As well, I accept there were communications between University employees and one or both lawyers where information or documents were exchanged or provided for the purposes of seeking or providing legal advice to the University, including email attachments described as third-party communications. As previously noted, legal advice privilege extends to communications that are part of the continuum of information exchanged

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[41] External Counsel's affidavit at para. 5(a).
[42] *Descôteaux v. Mierzwinski*, 1982 CanLII 22 (SCC) at pp. 892-893.
[43] For a similar conclusion, see Order F19-01, 2019 BCIPC 1 (CanLII) at para. 20 regarding the terms of a retainer agreement.
[44] Order F17-23, 2017 BCIPC 24 (CanLII) at para. 49.
[45] Order F18-38, 2018 BCIPC 41 (CanLII) at para. 37 and Order F17-23, 2017 BCIPC 24 (CanLII) at para. 50.
[46] External Counsel's affidavit at para. 5(j).

between the client and the lawyer to obtain or provide the legal advice. I accept this information falls within the protected continuum of communications between the University and its lawyers.

[37] Regarding the email attachments, the University says disclosing the email attachments would allow someone to "draw accurate inferences about the nature of the solicitor client privileged communication, such as the nature and subject matter of the advice being sought."[47] External Counsel confirms the email attachments include third-party communications that University employees provided to them and General Counsel for the purpose of obtaining legal advice on those matters.[48]

[38] I understand the applicant disputes the applicability of s. 14 to any third-party communications. However, the fact that an email attachment may be a communication written by a third party does not prevent the application of s. 14. Legal advice privilege applies to an email attachment that would reveal the content or substance of privileged communications between a lawyer and their client.[49]

[39] I am satisfied by the University's submissions and evidence that University employees sent the email attachments to External Counsel and General Counsel for the purpose of seeking their legal advice on the content of those attachments. Therefore, I accept that legal advice privilege applies to the email attachments since they are directly related to the legal advice sought by the University and would reveal what the University specifically asked its lawyers to provide legal advice on.

[40] Lastly, I accept some of the s. 14 information reveals University employees discussing or referring to legal advice given by External Counsel or General Counsel. As previously noted, legal advice privilege extends to communications amongst the client that discusses the legal advice and its implications.[50] Therefore, I find legal advice privilege applies to this information since it is related to the continuum of communications between a lawyer and their client and would reveal legal advice that the lawyers provided to the University.

[41] Taking all of this into account, with one exception, I am satisfied the University withheld information under s. 14 that properly falls within the scope of legal advice privilege.

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[47] University's reply submission at para. 47.
[48] External Counsel's affidavit at paras. 5(c), 5(e), 5(f), 5(n).
[49] *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 (CanLII) at para. 111.
[50] *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 at para. 24.

[42] However, I find s. 14 does not apply to some information that the University withheld in an email between an individual implicated in the applicant's allegations and a University employee.[51] The University provided this information for my review. I can see that the individual references some information that the University submits would reveal confidential communications that occurred previously between a lawyer and a client. However, it is unclear how this information satisfies the legal advice privilege test.

[43] For instance, this information relates to prior communications with a lawyer, but there was no evidence from that individual. Moreover, it is not apparent that External Counsel or General Counsel were involved in those prior communications. Neither the University nor External Counsel discuss or identify the individuals involved in the relevant communications or explain their roles and responsibilities.

[44] Furthermore, there is insufficient evidence or explanation to establish the confidentiality of those communications, especially since the individual implicated in the applicant's allegations is freely sharing this information with a University employee. It is also unclear how the individual providing this information to the University employee obtained this supposedly privileged information. Therefore, without more, I am not satisfied that s. 14 applies to this information. The University also withheld this information under s. 22(1) so I will consider it again further below.

Future crime or fraud exception to solicitor-client privilege

[45] I found legal advice privilege applies to most of the information withheld by the University under s. 14. The applicant argues privilege does not apply to this information because the communications between the University and its lawyers may have been used to facilitate unlawful conduct. The applicant submits any legal advice obtained by the University to circumvent its own whistleblower policy would be unlawful conduct that invokes the future crime or fraud exception to privilege.

[46] The courts have said solicitor-client privilege does not protect communications where legal advice is obtained to knowingly facilitate the commission of a crime or a fraud.[52] This limitation on solicitor-client privilege is commonly referred to as the "future crime or fraud exception."[53] It includes acts that are not only criminal in nature, but contrary to law such as an abuse of the

[51] Information located on p. 4 (duplicated on pp. 9, 14, 21, 27) of the Severed Records.
[52] *R. v. Campbell*, 1999 CanLII 676 (SCC) at paras. 55-63, *Pax Management Ltd. v. A.R. Ristau Trucking Ltd.*, 1987 CanLII 153 (BC CA).
[53] Adam M. Dodek, *Solicitor-Client Privilege* (Ontario: LexisNexis Canada Inc., 2014) at §3.74: the author notes that this limitation is not an exception to privilege, but an exclusion or a "negation" of privilege. See also *Goldman, Sachs & Co. v. Sessions*, 1999 CanLII 5317 (BC SC) [*Goldman*] at para. 9.

court's process, torts and other breaches of duty.[54] Privilege does not apply to those communications because it is not part of a lawyer's professional duties to commit or facilitate a criminal or wrongful act, nor is it in the interests of justice to protect those communications.

[47] To invoke the future crime or fraud exception, the applicant must establish a "*prima facie* case."[55] To meet that threshold, the applicant needs to do more than assert that the lawyer's advice was sought in furtherance of an unlawful purpose. The applicant must clearly set out their allegations and they must support those allegations by providing evidence and identifying relevant facts and circumstances.[56] If the applicant is successful in establishing a *prima facie* case, then the decision-maker will order production of the records and review the documents in question to determine whether this exclusion to privilege applies.[57]

[48] To establish the University's wrongful conduct, the applicant cites affidavit evidence that the University provided in other OIPC inquiries and the actions of the University's legal representative in this inquiry. The applicant alleges the University "has a history of engaging disreputable lawyers" and discusses the actions of several lawyers who have provided affidavits in support of the University's position in this inquiry and other OIPC inquiries.[58] The applicant relies on this material to show the University and its lawyers cannot be trusted.

[49] The University disputes the applicant's allegations that it engaged in unlawful activity or that the legal advice that it obtained from External Counsel and General Counsel were for the purposes of facilitating the commission of a crime or a fraud. The University says the applicant did not provide any evidence to support their allegations and "denies that such evidence exists or that any such unlawful activity took place."[59] The University also says those allegations should be disregarded because they are "vague, speculative and highly inflammatory" and have no relevance to the issues in this inquiry or the application of the future crime or fraud exception.[60]

[50] I have considered the parties' arguments and evidence to determine whether there is some factual or evidentiary support for the applicant's allegations. There is nothing in the materials before me or the circumstances of this case to support the applicant's allegations and establish a *prima facie* case. I do not find the applicant's allegations about the University's legal representative in this inquiry or the actions of other lawyers in different inquiry proceedings

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[54] *Goldman, supra* note 53 at paras. 16-17.
[55] *Camp Development*, *supra* note 13 at para. 24.
[56] *McDermott v. McDermott*, 2013 BCSC 534 (CanLII) at para. 77. Order F18-26, 2018 BCIPC 29 (CanLII) at paras. 57-58.
[57] *Camp Development*, *supra* note 13 at para. 58.
[58] Applicant's submission at p. 16.
[59] University's reply submission at para. 51.
[60] University's reply submission at para. 54.

means the legal advice that the University sought from its lawyers in this case was obtained for an unlawful purpose. The applicant clearly distrusts the University, its employees and its representatives, but I find those suspicions on their own without any evidentiary support does not meet the necessary threshold to invoke the future crime or fraud exception. Therefore, I decline to order production of the s. 14 records and review those records to further consider whether the future crime or fraud exception applies.[61]

[51] To conclude, I find the University is authorized to withhold under s. 14 the information for which I found legal advice privilege applies.

Advice and recommendations – s. 13

[52] The University applied s. 13 to withhold information in emails, memos and letters. There was some overlap with the University's application of ss. 14 and 13(1) to certain information in those records. For that information, I will not consider under s. 13 the information that I found the University could withhold under s. 14. Where I have already determined that a FIPPA exception applies, it is not necessary for me to consider whether another FIPPA exception also applies to that information.

[53] 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 a public body or minister. A public body is authorized to refuse access to information under s. 13(1) when the information itself directly reveals advice or recommendations or when disclosure would permit accurate inferences about any advice or recommendations.[62] Previous OIPC orders recognize that s. 13(1) protects "a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations."[63]

[54] The analysis under s. 13(1) involves two stages. To determine whether s. 13(1) applies, I must first decide if disclosure of the withheld information would reveal advice or recommendations developed by or for a public body or minister. If so, then the next step is to determine whether any of the categories or circumstances listed in ss. 13(2) or 13(3) apply to that information. Subsections 13(2) and 13(3) identify certain types of records and information that may not be withheld under s. 13(1), such as factual material under s. 13(2)(a) and information in a record that has been in existence for 10 or more years under s. 13(3).

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[61] The Commissioner or their delegate has the power, under s. 44 of FIPPA, to order production of records over which solicitor-client privilege is claimed.
[62] Order 02-38, 2002 CanLII 42472 at para. 135. See also Order F17-19, 2017 BCIPC 20 (CanLII) at para. 19.
[63] For example, Order 01-15, 2001 CanLII 21569 at para. 22.

Step one: would disclosure reveal advice or recommendations?

[55] To determine whether s. 13(1) applies, I must first decide if disclosure of the withheld information would reveal advice or recommendations developed by or for a public body or minister.

[56] The term "recommendations" includes material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or inferred.[64] The term "advice" has a distinct and broader meaning than the term "recommendations."[65] "Advice" usually involves a communication, by an individual whose advice has been sought, to the recipient of the advice, as to which courses of action are preferred or desirable.[66] The term "advice" also includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact on which a public body must make a decision for future action.[67]

[57] The University submits s. 13(1) applies to information that it withheld in several emails, memos and letters. The University describes those records and the withheld information as:

- Emails between University employees that reveals "advice concerning committee membership" or "suggested advice and recommendations."[68]
- Emails between University employees "regarding Audit Committee update" that "contains internal policy advice."[69]
- Four "draft" letters about the whistleblower complaints where the final version has been disclosed as part of the responsive records.[70]
- Two "internal memos" about the whistleblower allegations that reveals "advice prepare[d] for Audit Committee on Misconduct Allegations."[71]

[58] During the inquiry, the University withdrew its application of s. 13(1) to the two "internal memos" prepared for the Audit Committee.[72] Therefore, I will not

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[64] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras. 23-24.
[65] *Ibid* at para. 24.
[66] Order 01-15, 2001 CanLII 21569 at para. 22.
[67] *College*, *supra* note 7 at para. 113.
[68] Description from table of record, referring to pp. 1, 8, 13, 27 and 121 of the Severed Records**.**
[69] Description partly obtained from table of record, referring to pp. 16-17 of the Audit Committee Records.
[70] Description from table of record, referring to pp. 1, 5, 8, 10 of the Audit Committee Records.
[71] Description from table of record, referring to pp. 12-15 of the Audit Committee Records.
[72] University's supplemental submission dated February 21, 2024 at para. 2, referring to pp. 12-15 of the Audit Committee Records.

consider whether s. 13(1) applies to the information withheld in those memos. I will consider it further below under s. 22(1) since the University is relying on that exception to refuse access to this information.

[59] Regarding the other records at issue under s. 13, the University submits that it is clear "on the face of those records" and from its description of those records that s. 13(1) applies to the withheld information.[73] I will discuss and consider these records and the information at issue below.

Emails between University employees

[60] The University withheld information under s. 13(1) in several emails located under the Severed Records. The Privacy Officer attests that the information withheld in these emails are between University employees and would reveal "policy, advice and internal deliberations" concerning the applicant's allegations and "the process to be followed in responding" to those allegations.[74]

[61] The University also withheld information under s. 13(1) in an email chain located under the Audit Committee Records. The Privacy Officer partly describes this record as "an email exchange setting out a status report on matters that were deliberated on at meetings of the Audit Committee."[75]

[62] As I will explain, I am satisfied that some but not all the information withheld by the University in the disputed emails reveals advice under s. 13(1). In three of the emails at issue, an individual implicated in the applicant's whistleblower allegations shares some information and concerns that they want brought to a named University official's attention.[76] In response, the named University official shares some information with this individual.[77] I find part of the University official's response to the individual would reveal advice that the University official received about a matter that they were deliberating on.[78]

[63] However, previous OIPC orders have found that information already disclosed or known to an applicant cannot be withheld under s. 13(1) since it would not "reveal" advice or recommendations for the purposes of s. 13(1).[79] I find that to be the case here. The University already disclosed a small amount of the information at issue in the University official's email to the applicant.[80] Therefore, I conclude the disclosure of this information would not "reveal" any advice or recommendations under s. 13(1).

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[73] University's initial submission at para. 45.
[74] Privacy Officer's affidavit at para. 11.
[75] Privacy Officer's affidavit at para. 20(c)
[76] Severed Records at pp. 8 (duplicated on p. 13) and 27.
[77] Severed Records at p. 1 (duplicated on p. 121).
[78] Information located on p. 1 (duplicated on p. 121) of the Severed Records.
[79] For example, Order F13-24, 2013 BCIPC 31 at para. 19.
[80] Information withheld on p. 1 but disclosed on p. 121 of the Severed Records.

[64] Regarding the other information at issue, I find none of the other information withheld in the disputed emails reveals advice or recommendations developed by or for the University. Instead, in the emails, I can see that the individual is conveying their concerns, providing an opinion, asking questions and exchanging information of a factual nature related to the whistleblower allegations. In response, the University employee provides the individual with information of a factual nature to answer some of their questions.[81] I find the sharing of information here between these individuals does not qualify as giving advice under s. 13(1) nor does it reveal any advice developed by or for the University.[82] None of this information was developed by a University employee to advise a decision-maker on a particular matter nor does it recommend a suggested course of action which will be accepted or rejected by a decision-maker. Therefore, I am not satisfied that disclosing this information would reveal advice or recommendations developed by or for the University under s. 13(1).

Draft letters

[65] The University submits s. 13(1) applies to information in four documents that it says are draft letters.[83] The Privacy Officer describes the letters as "draft copies of notices" issued to individuals who were implicated in the applicant's allegations.[84] The Privacy Officer says, "signed copies of some of those letters have been released to the Applicant and appear as part of the Severed Records."[85] The University argues it would be possible to infer advice and recommendations provided to the University by comparing the draft letters to the final version of those letters.[86]

[66] The applicant disputes the application of s. 13(1) to the letters. Citing Orders F19-27 and F19-28, the applicant argues prior OIPC orders have found "drafts do not necessarily qualify for redactions using Section 13 rationales."[87] In Order F19-27, the adjudicator clarified that "a document does not automatically contain advice simply because it is a draft" and that s. 13(1) will apply where the withheld information reveals advice "regardless of whether the document is finalized or still in the drafting stage."[88]

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[81] Audit Committee Records at pp. 16-17.
[82] For a similar conclusion, see Order F19-27, 2019 BCIPC 29 (CanLII) at para. 32.
[83] Records located at Audit Committee Records on pp. 1, 5, 8, 10. The University did not apply s. 14 to these records.
[84] Privacy Officer's affidavit at para. 20(a).
[85] Privacy Officer's affidavit at para. 20(a).
[86] University's initial submission at para. 46.
[87] Applicant's submission at p. 14. Order F19-27, 2019 BCIPC 29 (CanLII) at para. 34 and Order F19-28, 2019 BCIPC 30 (CanLII) at para. 14.
[88] Order F19-27, 2019 BCIPC 29 (CanLII) at para. 34.

[67] In this case, I can see that the University withheld information in four letters that are addressed to four individuals who have been implicated in the applicant's whistleblower allegations. The names of the intended recipients are stated in the letters; however, there is a placeholder for some anticipated information such as the contact information of the individuals, the University's official letterhead and the signature of a named University official. The University does not say so, but for argument's sake, I assume this University official has the decision-making authority to decide what the letters should say. Moreover, given the incomplete state of the letters, I am satisfied they are drafts.

[68] I also find comparing the draft and final versions of the letters shows that some information found in the draft letters was not included in the final version of those letters. Based on my review of the responsive records, I am also satisfied that a final and different version of the letters were sent to the named individuals and later disclosed to the applicant in response to their access request.[89]

[69] However, I do not see how the information withheld in these draft letters reveals any advice or recommendations developed by or for the University. As noted, previous OIPC orders have established that s. 13(1) does not apply to records simply because they are drafts and that "a public body can withhold only those parts of a draft which reveal advice or recommendations about a suggested course of action that will ultimately be accepted or rejected during a deliberative process."[90] In this case, I find none of the withheld information on its own reveals advice or recommendations to a decision-maker. It consists of information of a factual nature about the whistleblower allegations.

[70] While I find it is not the case here, it may be possible in some cases for someone to determine advice or recommendations developed by or for a public body from comparing the draft and final versions of a letter. In this case, it is not apparent how the differences between the two versions of the letter would allow accurate inferences about what advice or recommendations were given to the named University official. There is not enough explanation or context in the University's materials, or the responsive records provided for my review, that assists me in understanding who drafted the letters and whether someone advised the University official to make the changes between the draft and final versions of the letters. I find it equally plausible that the named University official decided on their own initiative to revise the draft letters without the input or advice of another person. As a result, given the insufficient explanation or evidence, I am not satisfied that the information withheld in these four letters would reveal advice or recommendations developed by or for the University.

[89] Information disclosed on pp. 17-18, 43-44, 58-59 and 61-62 of the Severed Records.
[90] Order F20-37, 2020 BCIPC 43 (CanLII) at para. 33.

[71] To conclude, I find disclosing a small amount of information in an email from a University official would reveal advice developed by or for a public body.[91] However, I find that disclosing the balance of the information withheld under s. 13(1), which is in the draft letters and the other University employee emails, would not reveal any advice or recommendations.

Step two: analysis and findings on ss. 13(2) and 13(3)

[72] The next step in the s. 13(1) analysis is to consider whether any of the circumstances under ss. 13(2) and 13(3) apply to the information that I found would reveal advice developed by or for the University in the University official's email.[92] Subsections 13(2) and 13(3) identify certain types of records and information that a public body may not withhold under s. 13(1).

[73] The University submits none of the categories listed under s. 13(2) apply. The applicant argues ss. 13(2)(a), 13(2)(k), 13(2)(n) are relevant. The parties did not identify any other s. 13(2) provisions for my consideration. I have reviewed the categories under s. 13(2) and conclude there are no other relevant provisions that may apply. Therefore, I will consider ss. 13(2)(a), 13(2)(k), 13(2)(n) below, along with s. 13(3).

Factual material – s. 13(2)(a)

[74] Section 13(2)(a) says the head of a public body must not refuse to disclose under s. 13(1) any factual material. The term "factual material" means materials that existed "prior to its use in service of a particular purpose or goal" and includes "source materials" accessed by an expert or background facts not necessary to an expert's advice or "the deliberative process at hand."[93]

[75] However, the term "factual material" under s. 13(2)(a) does not include facts that are an integral and necessary component of the advice or recommendations, specifically factual material that "is assembled from other sources and becomes integral to the analysis and views expressed in the document that has been created."[94] It also does not include facts compiled and selected by an expert, using their expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body.[95] The protection given to these integral facts ensures no accurate inferences can

[91] Information located on p. 1 (duplicated on p. 121) of the Severed Records.
[92] Email located on p. 1 (duplicated on p. 121) of the Severed Records.
[93] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at paras. 93-94.
[94] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52.
[95] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.

be drawn about the advice or recommendations developed by or for the public body.[96]

[76] The applicant cites s. 13(2)(a) in their submission but does not sufficiently explain how it applies here. Instead, the applicant says the University "usually does not concern itself with facts. Nonetheless, it is likely that they let some slip through."[97] It is unclear what the applicant means by this statement or how it applies to s. 13(2)(a). On the other hand, the University submits s. 13(2)(a) does not apply to any "factual information" that it withheld in the records because it "is integrated with and forms part of the advice and recommendations."[98]

[77] I found the University withheld a small amount of information in an email from a University official that would reveal advice given to that official.[99] I am satisfied that none of this information is factual material and instead it reveals the advice itself. Therefore, I find s. 13(2)(a) is not applicable to this information.

Report of a task force, committee, council or similar body – s. 13(2)(k)

[78] Section 13(2)(k) states the head of a public body must not refuse to disclose under s. 13(1) "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."

[79] On January 11, 2024, the OIPC released Order F24-03 which was the first order to fully consider s. 13(2)(k) and discuss the requirements needed to prove s. 13(2)(k) applies.[100] I offered the parties an opportunity to make additional submissions about s. 13(2)(k) since Order F24-03 was issued after the completion of the submission process for this inquiry.

[80] Both parties made additional submissions on the applicability of s. 13(2)(k) to all the information that the University initially withheld under s. 13(1).[101] However, I need only consider whether s. 13(2)(k) applies to the information in the University official's email that I found would reveal advice given to that official.[102]

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[96] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at para. 52.
[97] Applicant's submission at pp. 12-13.
[98] University's reply submission at para. 38.
[99] Information located on p. 1 (duplicated on p. 121) of the Severed Records.
[100] Order F24-03, 2024 BCIPC 4 (CanLII). I was the adjudicator who decided the inquiry that led to Order F24-03.
[101] It was also at this time that the University withdrew its application of s. 13(1) to the two internal memos prepared for the Audit Committee, but it still made submissions about the inapplicability of s. 13(2)(k) to those records.
[102] Information located on p. 1 (duplicated on p. 121) of the Severed Records.

[81] For s. 13(2)(k) to apply, the following three conditions must be proven:

1. The record in dispute must be a report.

2. It is the report of a task force, committee, council or similar body.

3. The task force, committee, council or similar body was established to consider any matter and make reports or recommendations to a public body.

[82] If any of these conditions are not satisfied, then s. 13(2)(k) does not apply and the University would be authorized under s. 13(1) to withhold the advice revealed in the University official's email, unless another s. 13(2) provision applies.

[83] I will first consider whether the record at issue is a report. Given the University's description of the s. 13 records, the applicant theorizes some records are a report under s. 13(2)(k). The University argues the opposite. Citing previous OIPC orders, the University submits a report under s. 13(2)(k) means a reporting on final "results" or "a final reporting document" and does not include documents or materials that "lack finality" or the "formality" required of a report such as draft meeting minutes, briefing notes or working papers.[103]

[84] I note there is no definition of the word "report" under FIPPA. However, previous OIPC orders have defined a "report" under s. 13(2)(k) as "a formal statement or account of the results of the collation and consideration of information"[104] and "an account given or opinion formally expressed after investigation or consideration."[105] Furthermore, as noted by the University, past orders have also found that s. 13(2)(k) requires the information at issue be contained in a record that has the formal structure of a report with the appropriate formatting and attention to grammar that one expects of a report.[106]

[85] I found a small amount of information in an email would reveal advice given to a University official.[107] However, I find this record is not a formal statement, account or opinion given after the collation and consideration of information. It is email correspondence related to the applicant's allegations where the email participants are discussing certain matters. I also find this record

[103] University's supplemental submission dated February 20, 2024 at paras. 16-22, citing Order F17-33, 2017 BCIPC 35 (CanLII) at paras. 17-18, Order 00-17, 2000 CanLII 9381 (BCIPC), Order F17-39, 2017 BCIPC 43 (CanLII) at paras. 46-47, Order F21-41, 2021 BCIPC 49 (CanLII) (mis-cited by the University as "Order F21-43"), Order 02-57, 2002 CanLII 42494 (BCIPC), Order No. 113-1996, 1996 CanLII 1404 (BCIPC) and Order No. 283-1998, 1998 CanLII 3584 (BCIPC).
[104] Order F17-33, 2017 BCIPC 35 (CanLII) at para. 17.
[105] Order F17-39, 2017 BCIPC 43 (CanLII) at para. 46.
[106] For example, Order F17-33, 2017 BCIPC 35 (CanLII) at para. 18.
[107] Information located on p. 1 (duplicated on p. 121) of the Severed Records.

lacks the structure and formatting ordinarily expected of a report. Therefore, I conclude s. 13(2)(k) does not apply since the disputed record is not a report. Given this finding, it is not necessary to consider the other conditions because all three conditions must be satisfied for s. 13(2)(k) to apply.

Decision affecting the applicant's rights – s. 13(2)(n)

[86] Section 13(2)(n) states that a public body must not refuse to disclose 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.

[87] The applicant contends the responsive records must include information and materials that fall under s. 13(2)(n) such as the opinion of the "university's Internal Auditor" about the whistleblower allegations and any "material recommending members" for the Audit Committee.[108]

[88] The University says the records at issue under s. 13(1) do not contain a decision made in the exercise of a discretionary power. It submits the only decision that may be relevant is the Audit Committee's decision about the applicant's allegations which was already released to the applicant.[109]

[89] Considering the information and record that I found reveals advice developed by or for the University, I am not satisfied s. 13(2)(n) applies. Section 13(2)(n) applies to records which contain a specific type of decision and its reasons.[110] The information and record at issue here does not include that type of information. It involves an email from a University official in which the official is sharing advice they received about a matter. This information is not a decision with reasons but consists of information related to a decision to be made by the University official. Previous OIPC orders have clarified that s. 13(2)(n) does not apply to this kind of record or information, specifically the records or materials related to a decision.[111] Therefore, I conclude s. 13(2)(n) does not apply to the information at issue here.

Information in existence for 10 or more years – s. 13(3)

[90] Under s. 13(3), any information in a record that has been in existence for 10 or more years cannot be withheld under s. 13(1). None of the parties made any submissions about s. 13(3). Nevertheless, I find s. 13(3) does not apply because I can see that the information in the disputed record dates back to 2021.

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[108] Applicant's submission at p. 14.
[109] University's reply submission at para. 40, citing pp. 35 and 36 of the Severed Records.
[110] Order F08-05, 2008 CanLII 13323 (BCIPC) at paras. 7-8 and Order F23-65, 2023 BCIPC 75 (CanLII) at para. 121.
[111] Order F14-57, 2014 BCIPC 61 (CanLII) at para. 21. Order F08-05, 2008 CanLII 13323 (BCIPC) at para. 8.

Therefore, at the time of this inquiry, this information has been in existence for under 10 years.

Unreasonable invasion of third-party personal privacy – s. 22

[91] Section 22(1) of FIPPA requires a public body to refuse to disclose personal information the disclosure of which would unreasonably invade a third-party's personal privacy. A "third party" is defined in Schedule 1 of FIPPA as any person, group of persons or organization other than the person who made the access request or a public body. Numerous OIPC orders have considered the application of s. 22(1) and I will apply the same approach in this inquiry.

[92] There was some overlap with the University's application of ss. 14, 13(1) and 22(1) to some of the same information in the responsive records. For that information, it is not necessary for me to consider the application of s. 22(1) to the information that I already found the University could withhold under ss. 14 or 13(1).

Personal information

[93] Section 22 applies only to personal information; therefore, the first step in the s. 22 analysis is to determine if the information at issue is personal information.

[94] "Personal information" is defined in Schedule 1 of FIPPA as "recorded information about an identifiable individual other than contact information." Information is about an identifiable individual when it is reasonably capable of identifying a particular individual, either alone or when combined with other available sources of information.

[95] "Contact information" is defined in Schedule 1 of FIPPA 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."

[96] The information withheld under s. 22(1) is found in the Severed Records and the Audit Committee Records. The University applied s. 22(1) to information in multiple emails, two memos and four draft letters. The University submits the information that it has withheld under s. 22(1) includes communications between the University and several third parties about the applicant's allegations and other records which set out the details of those allegations.

[97] Based on my review of the s. 22(1) records and the University's submissions, I find the information at issue under s. 22(1) consists of the following:

- A description or summary of the applicant's whistleblower allegations, which appears in four draft letters.[112]

- Background information and facts about the applicant's allegations made against two third parties withheld from copies of two memos from the Director.[113] The memos also include the Director's opinion and conclusions about the conduct of certain University employees implicated in the applicant's whistleblower allegations.

- An email exchange between two individuals in which one individual, who is a University employee, provides an update about certain activities and the actions of the Audit Committee.[114]

- What a third party implicated in the applicant's allegations said or thinks about those allegations, the actions of others and other matters.[115]

- Information about when certain University employees were not in the office and their other activities.[116]

[98] I am satisfied this information withheld under s. 22(1) is about several identifiable individuals, including University employees and people implicated in the applicant's allegations. This information includes their names, a description of their actions and their opinions about the allegation and other matters.

[99] I am also satisfied that none of the withheld information about these individuals is contact information because it is not intended to enable an individual at a place of business to be contacted. I also note the University has already disclosed information in the disputed records that may qualify as contact information such as the names and email addresses of the individuals involved in the email communications at issue. As a result, I conclude the information withheld by the University under s. 22(1) is the personal information of several individuals.

Section 22(4) – disclosure not an unreasonable invasion

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[112] Information located on pp. 1, 5, 8 and 10 of the Audit Committee Records.
[113] Information located on pp. 12-15 of the Audit Committee Records. I found s. 13(1) did not apply to this information.
[114] Information located on pp. 16-17 of the Audit Committee Records.
[115] Information located on pp. 2, 4 (duplicated on pp. 8-9, 14-15, 21, 27-28), 8, 19 of the Severed Records and pp. 16-17 of the Audit Committee Records.
[116] Information located on pp. 1 (duplicated on p. 121), 8 (duplicated on p. 14), 9, 33 of the Severed Records and p. 16 of the Audit Committee Records.

[100] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information or circumstances listed in s. 22(4). If it does, then disclosing this personal information is not an unreasonable invasion of a third party's personal privacy and the information cannot be withheld under s. 22(1).

[101] The University submits none of the provisions in s. 22(4) apply to the redacted information. However, the applicant contends ss. 22(4)(e) and 22(4)(h) apply. I will consider those provisions below. I have reviewed the other provisions under s. 22(4) and find there are no other provisions that may apply in this case.

A public body employee's position or functions - s. 22(4)(e)

[102] Section 22(4)(e) states a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff.

[103] Previous OIPC orders have found that s. 22(4)(e) applies to information that reveals a public body employee's name, job title, duties, functions, remuneration (including salary and benefits) or position.[117] Section 22(4)(e) has also been found to apply to information that relates to a public body employee's job duties in the normal course of work-related activities, namely objective, factual information about what the individual did or said in the course of discharging their job duties.[118]

[104] However, whether s. 22(4)(e) applies in a particular case depends on the context in which the information at issue appears. Section 22(4)(e) does not apply where the information at issue appears in a context that reveals more than just the third party's name, job title, duties, functions, remuneration, position or what they did in the normal course of their work or activities as a public body officer, employee or member.[119]

[105] The applicant submits s. 22(4)(e) applies because the responsive records are related to a complaint about a named University employee. The applicant says this University employee applied for and was successfully appointed to a specific University position. Therefore, the applicant contends "As it related to the position that [the employee] was awarded, it clearly concerns [their] position."[120] The applicant also says the University likely reimbursed this

[117] For example, Order F20-54, 2020 BCIPC 63 (CanLII) at para. 56 and footnote 45.
[118] Order 01-53, 2001 CanLII 21607 at para. 40. Order F18-38, 2018 BCIPC 41 (CanLII) at para. 70.
[119] Order F23-28, 2023 BCIPC 32 (CanLII) at paras. 42-43.
[120] Applicant's submission at p. 8.

University employee for "publication expenses incurred while at TRU."[121] Therefore, the applicant argues the employee's renumeration was involved.

[106] The University does not directly address the applicant's arguments about s. 22(4)(e). However, it generally submits the applicant has made "incorrect assumptions" about the nature of the information at issue.[122] The University describes the information as being related to a workplace-related complaint or investigation.[123]

[107] Contrary to the applicant's assumptions, the personal information at issue under s. 22(1) is not about a specific University employee's successful job application, appointment, remuneration or position. The University did not withhold that kind of information under s. 22(1). I also find none of this information is objective, factual information about what a public body employee did or said in the normal course of discharging their job duties.

[108] Instead, as described by the University, the information at issue involves a workplace-related investigation. I can see that some of the information at issue identifies University employees by name and position.[124] However, given the context in which this information appears, I find its disclosure would reveal additional information about the named individuals such as what they are being accused of and comments about their actions in relation to the University's investigation of the applicant's allegations. As a result, I find s. 22(4)(e) does not apply to that information.

Third party's travel expenses - s. 22(4)(h)

[109] Section 22(4)(h) states a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information is about expenses incurred by the third party while travelling at the expense of a public body.

[110] The applicant theorizes the s. 22 information "involves information related to travel expenses using public funds."[125] In support of their position, the applicant cites information that they obtained from other access requests such as a named individual's expenses incurred at an international conference. I understand the applicant is relying on this information to show an individual implicated in the whistleblower allegations travelled and attended a conference at the expense of the University.

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[121] Applicant's submission at p. 8.
[122] University's reply submission at para. 6.
[123] University's initial submission at para. 57.
[124] For example, information located on pp. 1, 5, 8, 10, 12-15 of the Audit Committee Records.
[125] Applicant's submission at p. 9.

[111] The University did not directly address the applicant's arguments about s. 22(4)(h). However, it generally submits the applicant has made "incorrect assumptions" about the nature of the disputed information.[126]

[112] Based on my own review of the disputed records, I can see some of the information at issue is about the expenses of two third parties. This information is found in copies of two memos that the University describes as "the findings of the Director Internal Audit concerning investigations into allegations of Misconduct made against two Third Parties."[127] Those misconduct allegations are described as two third parties attending certain conferences paid for by the University and which amounts to "a misuse of University funds."[128] Therefore, in a sense, the memos contain information about expenses incurred by the third parties while travelling at the expense of a public body.

[113] However, these travel expenses appear in the context of a document about a work-related investigation into the two third parties' conduct. Previous OIPC orders have found that information relating to a workplace investigation into a third party's behaviour qualifies as that third party's employment history and is presumed to be an unreasonable invasion of their personal privacy under s. 22(3)(d).[129] What then is the appropriate approach to determine whether ss. 22(4)(h) or 22(3)(d) should apply to this information?

[114] In a situation where both a s. 22(4) provision and a s. 22(3) presumption against disclosure may apply to the information at issue, I find it is important to consider the context of the record and what it reveals to reconcile any conflict between those provisions. In my opinion, it is not appropriate to find a s. 22(4) provision applies where the information at issue appears in a context that also reveals the type of information that would be protected by a s. 22(3) presumption.

[115] In that scenario, the s. 22(4) provision would not apply and it is then necessary to consider that information under s. 22(3) and s. 22(2) to determine whether the disclosure of this information would be an unreasonable invasion of a third party's personal privacy. This is the approach other OIPC adjudicators have taken in previous orders and I adopt it here.[130] I find this approach strikes the appropriate balance between the public accountability goals of some provisions under s. 22(4), including s. 22(4)(h), and the protection of personal privacy under s. 22(3).

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[126] University's reply submission at para. 6.
[127] University's initial submission at para. 56, referring to pp. 12-15 of the Audit Committee Records.
[128] University's initial submission at paras. 7, 14 and 19.
[129] For example, Order F08-04, 2008 CanLII 13322 at para. 24.
[130] For example, Order F10-21, 2010 BCIPC 32 (CanLII) at paras. 22-24.

[116] In the present case, some of the information in the memos is about two third parties' travel expenses paid for by the University. However, given the context in which this information appears, I find its disclosure would reveal more than just the fact those third parties incurred certain travel expenses paid for by a public body. Those expenses are being reviewed in relation to the misconduct allegations made by the applicant against the two third parties. Therefore, I find the withheld information in the memos is not solely about the third parties' travel expenses but reveals additional information about those individuals such as the appropriateness of their workplace-related actions. This is the type of information that may fall under s. 22(3)(d) and that I will address below. Therefore, I find s. 22(4)(h) does not apply to this information.

Section 22(3) – disclosure presumed to be an unreasonable invasion

[117] The third step in the s. 22 analysis is to determine whether any of the presumptions in s. 22(3) apply. Section 22(3) creates a rebuttable presumption that the disclosure of personal information of certain kinds or in certain circumstances would be an unreasonable invasion of third-party personal privacy. The University submits the presumption under s. 22(3)(d) applies. I will consider s. 22(3)(d) below. I have reviewed the other presumptions under s. 22(3) and find there are no other presumptions that may apply.

Employment history - s. 22(3)(d)

[118] Section 22(3)(d) creates a rebuttable presumption against disclosure where the personal information relates to the employment, occupational or educational history of a third party.

[119] Citing two previous OIPC orders, the University says s. 22(3)(d) applies to the information that it withheld under s. 22(1) because "an individual's participation in a workplace complaint or investigation process constitutes information falling within the scope of this presumption."[131] The University also submits the applicant's submissions "substantiate the University's position that the Disputed Records contain sensitive employment history information the disclosure of which can reasonably be expected to give rise to an unreasonable invasion of personal privacy."[132]

[120] The applicant did not directly address the University's arguments about s. 22(3)(d). The University interprets the applicant's lack of arguments on this matter to mean the applicant does not dispute that the presumption under s. 22(3)(d) applies. However, considering the applicant cannot see the information at issue under s. 22, I am not persuaded that silence on the

[131] University's initial submission at paras. 61-62, citing Order F15-12, 2015 BCIPC 12 (CanLII) at paras. 17-18 and Order F14-10, 2014 BCIPC 12 (CanLII) at para. 18.
[132] University's reply submission at para. 7.

applicant's part means they accept the presumption under s. 22(3) applies. Moreover, the mandatory nature of s. 22(1) and the privacy interests that it protects still requires me to review the information at issue to determine whether s. 22(3)(d) applies.

[121] Based on my review of the disputed records, I find s. 22(3)(d) applies to some information in an email between a University employee and a third party implicated in the applicant's allegations. This information reveals certain details about that third party's work history.[133]

[122] I am also satisfied s. 22(3)(d) applies to some but not all the information that the University withheld in the four draft letters, the two memos and a third party's email.[134] Section 22(3)(d) applies to descriptive information about a third party's behavior or actions in the context of a workplace complaint investigation involving that third party.[135] The University withheld a description or summary of the allegations that the applicant made about several individuals.[136] The University also withheld what a named third party said or thinks about the actions of others and other matters related to the applicant's allegations.[137] This information describes the work-related behaviour of those individuals in the context of an investigation, conducted by the University, into their actions. Therefore, I am satisfied s. 22(3)(d) applies to this information.

[123] However, I am not satisfied s. 22(3)(d) applies to the rest of the information withheld by the University. The University withheld some information in the two memos that only reveals process-related information about the investigation. None of this information reveals anything about the workplace actions of a third party who is under investigation for a work-related complaint. I, therefore, conclude s. 22(3)(d) does not apply to this information.

[124] The University also withheld information that reveals when a named University employee was away from the office.[138] Previous OIPC orders have found that information about an employee's leave entitlement relates to employment history under s. 22(3)(d).[139] However, I find s. 22(3)(d) does not apply to the information at issue here because it reveals nothing about a third party's leave entitlements.

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[133] Information located on p. 4 (duplicated on pp. 9, 21, 27-28) of the Severed Records.
[134] Letters located on pp. 1, 5, 8, 10 of the Severed Records and memos located on pp. 12-15 of the Audit Committee Records.
[135] Order F20-13, 2020 BCIPC 15 (CanLII) at para. 54. Order 01-53, 2001 CanLII 21607 at paras. 32 and 41.
[136] Information located on pp. 1, 5, 8, 10, 12-15 of the Audit Committee Records.
[137] For example, information located on pp. 2, 4 and 8 of the Severed Records.
[138] For example, information located on pp. 1, 8 and 33 of the Severed Records.
[139] Order F20-20, 2020 BCIPC 23 (CanLII) at paras. 130-131 of the records.

[125] Instead, the withheld information only reveals a person's whereabouts such as when they were not in the office. Past adjudicators have found that s. 22(3)(d) did not apply to similar information that describes how an employee spent their vacation, factual statements about a third party's whereabouts and generic details about when various individuals went on vacation or were not in the office.[140] I agree with that approach and find the information here is only about a person's whereabouts and when they were not in the office. Therefore, without more, I find this type of information is not sufficiently connected to a person's employment to qualify as their employment history under s. 22(3)(d).

Section 22(2) – relevant circumstances

[126] The final step in the s. 22 analysis is to consider the impact of disclosing the personal information at issue by taking into account all relevant circumstances. Section 22(2) requires a public body to consider the circumstances listed under ss. 22(2)(a) to (i) and any other relevant circumstances to determine whether disclosing the personal information at issue would be an unreasonable invasion of a third party's personal privacy. One or more of these circumstances may rebut the s. 22(3)(d) (employment history) presumption that I found applies to some of the information at issue under s. 22(1).

[127] The applicant submits ss. 22(2)(a) (public scrutiny) and 22(2)(c) (fair determination of the applicant's rights) weigh in favour of disclosure. The University disputes the applicability of those provisions and submits ss. 22(2)(e) (unfair exposure to harm), 22(2)(f) (supplied in confidence) and 22(2)(h) (unfair damage to reputation) favour withholding the information at issue.

[128] I have considered whether there are any other circumstances, including those listed under s. 22(2), that may apply. Based on my review of the withheld information, I find there is one other relevant circumstance to consider. I find it relevant that the applicant already knows some of the information withheld under s. 22(1). I will consider all the above-noted circumstances below. There were no other relevant circumstances for consideration.

Subjecting a public body's activities to public scrutiny – s. 22(2)(a)

[129] Section 22(2)(a) requires a public body to consider whether disclosing the personal information is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny. Where disclosure would foster the accountability of a public body, this may be a relevant circumstance that weighs in favour of disclosing the information at issue.[141]

[140] F20-38, 2020 BCIPC 44 at paras. 77 and 79, Order F20-20, 2020 BCIPC 23 (CanLII) at para. 131, Order F21-32, 2021 BCIPC 40 (CanLII) at para. 101.
[141] Order F05-18, 2005 CanLII 24734 at para. 49.

[130] One of the purposes of s. 22(2)(a) is to make public bodies more accountable.[142] Therefore, for s. 22(2)(a) to apply, the disclosure of the information at issue must be desirable for subjecting the public body's activities to public scrutiny as opposed to subjecting an individual third party's activities to public scrutiny.[143]

[131] The applicant submits s. 22(2)(a) is a relevant circumstance in this case because the responsive records relate to alleged misconduct by several senior University employees. The applicant submits if any of the information at issue reveals certain actions or denials about that conduct by the University such as supporting or condoning that behaviour, then that information deserves public scrutiny.[144]

[132] The applicant also submits the University's process for handling whistleblower complaints should be subject to public scrutiny. The applicant alleges several senior University employees acted improperly in investigating and addressing the whistleblower complaints, such as allegedly ignoring or condoning a conflict of interest that the applicant brought to their attention.

[133] The applicant further alleges that, in response to their whistleblower complaints, a named University employee inappropriately retaliated by filing a harassment complaint against the applicant. The applicant assumes some of the information withheld by the University under s. 22(1) is about the harassment complaint, which the applicant alleges was sanctioned by senior University employees. Therefore, the applicant argues disclosure of the information at issue would be desirable for public scrutiny.[145]

[134] In response, the University submits the applicant is incorrectly assuming the withheld information "contains evidence of impropriety by the University."[146] The University submits it is clear to anyone who reviews the responsive records that it did not engage in any improper behaviour in addressing the applicant's allegations and administering its whistleblower policy.

[135] The University acknowledges that it received a harassment complaint about the applicant but submits its review of that complaint was done in accordance with its legal obligations as an employer. The University also submits that its consideration of the complaint cannot be considered retaliatory, as alleged by the applicant, because it ultimately decided not to pursue the matter

[142] Order F18-47, 2018 BCIPC 50 (CanLII) at para. 32.
[143] Order F16-14, 2016 BCIPC 16 (CanLII) at para. 40.
[144] Applicant's submission at pp. 6-7.
[145] Applicant's submission at p. 7.
[146] University's reply submission at para. 10.

and no disciplinary or other consequence for the applicant arose from its review of that harassment complaint.

[136] The University also argues s. 22(2)(a) does not apply because the information at issue is "of a personal nature and is not a character for which public scrutiny is appropriate or desirable."[147] The University says the information withheld under s. 22(1) is about individual employees and not about the University's activities.

[137] The University also notes there was widespread media coverage about the applicant's allegations and the applicant has raised the same allegations in other legal proceedings. Therefore, the University contends the disclosure of the information at issue under s. 22(1) "will not contribute any new or meaningful information to the information that is already available to the public concerning these matters."[148]

[138] As I will explain, I find none of the information withheld by the University under s. 22(1) is desirable for subjecting the activities of the University to public scrutiny. The information at issue is mostly about an individual's activities such as a named third party's response to the applicant's allegations, the appropriateness of expenses incurred by a third party or when a named University employee was not in the office. As previously noted, s. 22(2)(a) does not apply when disclosure would only subject an individual third party's activities to public scrutiny, which I find is the case with this information.

[139] There is some information in an email that the University describes as "an email exchange setting out a status report on matters that were deliberated on at meetings of the Audit Committee."[149] The withheld information identifies a decision made by the Audit Committee, which I can see was later disclosed to the applicant in another record, and includes a factual account of a University employee's activities. I do not find disclosing this information would hold the University accountable for any of the matters of concern to the applicant. Furthermore, contrary to the applicant's assumptions, none of the information withheld under s. 22(1) shows the University acted inappropriately in addressing the applicant's allegations and administering its whistleblower policy.

[140] Taking all of the above into account, I conclude s. 22(2)(a) is not a circumstance that favours disclosing the information at issue.

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[147] University's reply submission at para. 10.
[148] University's reply submission at para. 13.
[149] Privacy Officer's affidavit at para. 20(c).

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

[141] Section 22(2)(c) applies to personal information that is relevant to a fair determination of the applicant's rights. Previous OIPC orders have said that all four parts of the following test must be met 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 underway 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.[150]

[142] The applicant submits s. 22(2)(c) weighs heavily in favour of disclosure because the withheld information is required for several upcoming arbitrations scheduled between them and the University, one of which deals with the termination of their employment. The applicant provided a copy of three employment-related grievances filed on their behalf by the Thompson River's University Faculty Association (Faculty Association).[151]

[143] The applicant also submits they would be entitled to make a complaint against their union under the *Labour Relations Code* "in the unlikely event" the Faculty Association withdraws those grievances.[152] The applicant submits there is no "discovery process" for that process; therefore, their current access request is the "only means of receiving this information."[153]

[144] The University disputes the application of s. 22(2)(c) by focusing on the third and fourth requirements of the s. 22(2)(c) test. The University acknowledges the applicant may have identified some current grievance proceedings and a "highly speculative" union proceeding but it argues the applicant did not explain how the information at issue is relevant for a determination of the applicant's rights in those proceedings.[154] The University contends the information at issue is

[150] Order 01-07, 2001 CanLII 21561 at para. 31.
[151] Applicant's submission at Appendices D, E and F.
[152] Applicant's submission at p. 7.
[153] Applicant's submission at p. 8.
[154] University's reply submission at para. 23.

about the conduct of several third parties and has no significance for the applicant's rights or interests.

[145] The University also argues the information at issue is not necessary to prepare for the proceedings identified by the applicant. The University says the grievance proceedings have their own processes in place "to secure disclosure of relevant documents and information."[155] The University questions why the applicant cannot use that process to obtain evidence relevant to the pursuit of their rights in those proceedings.

[146] In terms of the potential union proceeding, the University argues the applicant has admitted this proceeding depends on an "unlikely event."[156] The University also says the applicant previously made a complaint against the union under the *Labour Relations Code* which was dismissed by the Labour Relations Board. Therefore, the University submits "the prospect that the Third Party Personal Information is needed or would even be relevant in such a theoretical complaint is highly speculative."[157]

[147] I will address the four elements of the s. 22(2)(c) test below.

Part one: legal right

[148] Part one of the s. 22(2)(c) test requires the right in question be a legal right drawn from the common law or a statute as opposed to a non-legal right based on moral or ethical grounds. I find the rights engaged here consist of: (1) the applicant's legal right to grieve an alleged breach of the collective agreement between the University and the Faculty Association; and (2) the applicant's statutory right to complain that their union breached a duty owed to the applicant under the *Labour Relations Code*.[158] Therefore, I am satisfied the first requirement of the s. 22(2)(c) test is met.

Part two: proceeding under way or contemplated

[149] Part two of the s. 22(2)(c) test requires the legal right be related to a proceeding which is either underway or contemplated but the proceeding in question must not already be completed. As well, it is not necessary for an applicant to have already decided to commence legal proceedings to satisfy this requirement.[159] Instead, prior jurisprudence has said that "part two of the

[155] University's reply submission at para. 21.
[156] University's reply submission at para. 23.
[157] University's reply submission at para. 23.
[158] The relevant sections are ss. 12 and 13 of the *Labour Relations Code*, RSBC 1996, Ch. 244.
[159] Order F16-36, 2016 BCIPC 40 (CanLII) at para. 47.

s. 22(2)(c) test is met where the evidence establishes that an applicant is intently considering the commencement of a proceeding."[160]

[150] The applicant submits the grievance proceedings and the potential union complaint proceeding satisfy part two of the s. 22(2)(c) test. In terms of the grievance proceedings, I find those proceedings are clearly underway. The parties do not dispute this fact and the applicant provided a copy of the relevant grievances which confirms the Faculty Association filed three employment-related grievances on the applicant's behalf. The applicant also says those proceedings are scheduled for arbitration this year and the University did not dispute this statement. Therefore, I accept the grievance proceedings have yet to be completed.

[151] Regarding the union complaint proceeding, the applicant submits this proceeding is a contemplated proceeding that may happen if the Faculty Association decides to withdraw the grievance proceedings. In terms of a contemplated proceeding, previous OIPC orders have found an applicant only needs to establish that they are contemplating, in other words intently considering or have in mind as a possibility or plan, the commencement of a proceeding.[161] The context of the situation must be considered in determining whether the applicant is contemplating the commencement of a proceeding.[162]

[152] In this case, the University provided evidence which shows the applicant previously filed a complaint against their union under this process.[163] Therefore, the context of the situation indicates the applicant has pursued this option before and supports the applicant's position that they are contemplating it again. Therefore, although this proceeding depends on a certain event, I accept the applicant is intently considering or has in mind the possible commencement of the union complaint proceeding. As a result, I am satisfied that the union complaint proceeding qualifies as a contemplated proceeding under s. 22(2)(c).

Part three: information has a bearing on the legal right

[153] Part three of the s. 22(2)(c) test requires that the personal information sought by the applicant have some bearing on, or significance for, a determination of the legal right in question.[164] The applicant must prove there is a "demonstrable nexus" or "connection" between the withheld information and the

[160] Order F16-36, 2016 BCIPC 40 (CanLII) at para. 47.
[161] For example, Order F16-36, 2016 BCIPC 40 (CanLII) at para. 50.
[162] Order F16-36, 2016 BCIPC 40 (CanLII) at para. 50.
[163] University's reply submission at para. 23 and the case cited there.
[164] Order F16-36, 2016 BCIPC 40 (CanLII) at para. 52.

legal right.[165] In other words, the personal information at issue must have some significance for the determination or implementation of the legal right.[166]

[154] As I will explain, it is unclear how any of the personal information at issue has any significance for the determination or implementation of the applicant's legal right to grieve an alleged breach by the University of the collective agreement or the applicant's statutory right to submit a complaint against their union under the *Labour Relations Code*.

[155] As noted, the personal information at issue in this case relates to the allegations the applicant made under the University's Whistle Blower Policy. Whereas I can see that the grievances filed on the applicant's behalf against the University are about a suspension imposed on the applicant, a warning letter issued to the applicant and the fact that the University terminated the applicant's employment. Based on the submissions and materials before me, it is unclear how any of those grievances are related to the whistleblower allegations made by the applicant.

[156] There is also insufficient explanation or evidence as to how the personal information at issue here has any significance for the applicant's ability to implement or pursue the legal rights engaged here. For instance, the applicant has already exercised their legal rights under the collective agreement without this personal information. They also already know who to pursue (the Faculty Association) and what to complain about (a failure to pursue the applicant's employment grievances) if the applicant makes a complaint under the *Labour Relations Code*. Therefore, without more, I am not satisfied that the third part of the s. 22(2)(c) test is met.

Part four: necessary to prepare for proceeding or ensure a fair hearing

[157] Part four is about determining whether the personal information is necessary to prepare for the proceeding or to ensure a fair hearing. The applicant must prove there is a connection between the personal information at issue and the proceeding that is underway or contemplated.[167] In the present case, the relevant proceedings are the existing grievance proceedings and a possible complaint proceeding before the Labour Relations Board.

[158] The University argues the information at issue is not necessary to prepare for those proceedings because they have their own document disclosure processes which the applicant may use to access any relevant information. However, previous OIPC orders have made it clear that this part of the s. 22(2)(c)

[165] Order F16-36, 2016 BCIPC 40 (CanLII) at paras. 52 and 62.
[166] Order F16-36, 2016 BCIPC 40 (CanLII) at para. 61, citing Order 02-23, 2002 CanLII 42448 (BCIPC) at para. 21.
[167] Order F16-36, 2016 BCIPC 40 (CanLII) at para. 62.

test may be satisfied even though the applicant could obtain the sought-after information by another means.[168] The applicant does not need to prove FIPPA and its processes are the only way they can access this information. Instead, to satisfy this part of the s. 22(2)(c) test, the applicant needs to prove that the personal information itself, rather than the FIPPA process, is necessary to prepare for the proceeding or to ensure a fair hearing.

[159] The personal information at issue under s. 22(1) includes a description or summary of the applicant's whistleblower allegations, the Director's findings and conclusions about some of the allegations, what a third party implicated in the applicant's allegations said or thinks about those allegations or about the actions of others, when certain employees were not in the office and an update about the Audit Committee's activities which identifies several individuals. It is not apparent how this personal information is necessary for the applicant to prepare for the relevant proceedings or to ensure a fair hearing of those matters.

[160] For instance, the applicant has already filed their employment-related grievances and there is insufficient explanation and evidence about how this information is relevant to any arguments or submissions that the applicant or their union wants to make about those matters. Ultimately, there is not enough explanation or evidence in the parties' materials that helps me understand the connection between this personal information and the relevant proceedings.

[161] To conclude, I find the s. 22(2)(c) test is not met because two of the required conditions were not proven. Therefore, I find s. 22(2)(c) is not a factor that weighs in favour of disclosing the personal information at issue.

Unfair exposure to financial or other harm – s. 22(2)(e)

[162] Section 22(2)(e) requires a public body to consider whether disclosure of a third party's personal information will unfairly expose the third party to financial or other harm. Without any further explanation or evidence, the University asserts that s. 22(2)(e) is relevant because it says the disclosure of the personal information at issue would unfairly expose several third parties "to actual and potential harm" including "mental distress" given the seriousness of the applicant's allegations about those individuals.[169] The applicant did not address the University's arguments about s. 22(2)(e).

[163] Based on the materials before me, I am not persuaded that disclosing any of the personal information at issue will unfairly expose a third party to harm. Previous OIPC orders have held that "other harm" for the purposes of s. 22(2)(e) consists of "serious mental distress or anguish or harassment."[170] There is

[168] For example, Order F16-36, 2016 BCIPC 40 (CanLII) at para. 56.
[169] University's initial submission at para. 74.
[170] Order F15-29, 2015 BCIPC 32 at para. 32.

insufficient explanation or evidence for me to conclude that disclosing the withheld information will unfairly expose a third party to this kind of harm. A public body's assertions alone about harm is not sufficient to establish that s. 22(2)(e) applies.

[164] There is also nothing in the records themselves or the surrounding circumstances to suggest the third parties will be exposed unfairly to the type or level of harm s. 22(2)(e) addresses. For instance, as previously noted, the personal information at issue includes a factual description or summary of the applicant's whistleblower allegations.[171] This description identifies the people implicated in the applicant's allegations and what they are being accused of. However, both the University and the applicant note there has been "significant" or "widespread" media attention about the applicant's allegations.[172]

[165] Therefore, it is unclear, and the University does not explain, how a subsequent disclosure of allegations which the parties say are already publicly known would unfairly expose those individuals to any of the harms contemplated under s. 22(2)(e). Any potential exposure would have already occurred when those allegations were publicized by the media. Therefore, given the existing exposure and the insufficient evidence or explanation, I am not satisfied that s. 22(2)(e) is a circumstance that favours withholding the information at issue.

Supplied in confidence - 22(2)(f)

[166] Section 22(2)(f) requires a public body to consider whether the personal information was supplied in confidence. For s. 22(2)(f) to apply, there must be evidence that a third party supplied personal information and, at the time the information was provided, that it was done so under an objectively reasonable expectation of confidentiality.[173]

[167] The University argues s. 22(2)(f) is a relevant circumstance which favours withholding the information at issue because the Whistle Blower Policy "provides for the confidentiality of proceedings" under that policy.[174] The University also says, "many of the records are marked as or noted to be confidential, and given the sensitivity of the information in issue it is also implicit from the circumstances that they were confidential in nature."[175] The applicant did not address the University's arguments about s. 22(2)(f).

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[171] Information located on pp. 1, 5, 8, 10 and 12-15 of the Audit Committee Records.
[172] Applicant's submission at p. 6 and University's reply submission at para. 12.
[173] Order F11-05, 2011 BCIPC 5 (CanLII) at para. 41, citing and adopting the analysis in Order 01-36, 2001 CanLII 21590 (BC IPC) at paras. 23-26 regarding s. 21(1)(b).
[174] University's initial submission at para. 76.
[175] University's initial submission at para. 76.

[168] I find s. 22(2)(f) applies to the information withheld in the Director's memos to the Audit Committee.[176] I find the Director supplied this information to the Audit Committee as part of their investigation and report about those allegations. I am also satisfied the Director provided this information in confidence because I can see there is an express notation of confidentiality on the document itself. I also find the Director's expectation of confidentiality was objectively reasonable considering the nature of the investigation which was to review allegations of misconduct against two third parties. Therefore, I find the Director supplied this information in confidence for the purposes of s. 22(2)(f).

[169] I also find s. 22(2)(f) applies to some of the information withheld in several emails written and sent by a third party to one or more University employees. This third party is one of the individuals implicated in the applicant's allegations and the withheld information reveals the third party's comments about the applicant's allegations and other matters. For one email, I am satisfied the third party provided the withheld information in confidence because the third party marked their email as confidential.[177] For the other emails, I find it reasonable to conclude the third party provided those comments in confidence considering the content of those emails and what the withheld information reveals about this third party and others.[178] Furthermore, I accept the University employees received this information in confidence and treated it in such a manner because there are no indications that it was widely shared with others. Therefore, I find the third party supplied this information in confidence for the purposes of s. 22(2)(f).

[170] As for the rest of the information in dispute, it is not obvious from the content and context of the remaining records that the withheld information was supplied in confidence by a third party. For some records, it is unclear and the University does not sufficiently explain whether it was a third party who supplied the information withheld from those records. For instance, the University withheld information in the draft letters under s. 22(1).[179] However, there is not enough explanation or context in the University's materials, or the responsive records provided for my review, that assists me in understanding who drafted the letters and whether the information in the letters was supplied in confidence by a third party.

[171] I understand the University is relying on a confidentiality clause in its Whistle Blower Policy to establish the expectation of confidentiality for individuals implicated in the allegations and any "proceedings" under that policy. However, the relevant clause speaks to protecting, if possible and where appropriate, the confidentiality of the person who reported the improper activity, which in this case

[176] Information located on pp. 12-15 of the Audit Committee Records.
[177] Information located on p. 17 of the Audit Committee Records.
[178] Information located on pp. 2, 4 and 19 of the Severed Records.
[179] Information located on pp. 1, 5, 8, 10 of the Audit Committee Records.

is the applicant.[180] There is nothing in the policy that expressly addresses the expectations of confidentiality for the individuals implicated in the applicant's allegations. Therefore, I do not find this policy sufficiently supports the University's arguments under s. 22(2)(f).

[172] For other records, there are no express statements about confidentiality in the records nor can an expectation of confidentiality be inferred from the context or content of the records. As an example, the University withheld information in a record that it describes as "an email exchange setting out a status report on matters that were deliberated on at meetings of the Audit Committee."[181] Some of the withheld information is a factual account of certain activities undertaken by the email author or decisions made by the Audit Committee. Although this information mentions several individuals by name, there is nothing particularly revealing or sensitive about this information to support an expectation of confidentiality, as argued by the University. Therefore, I am not satisfied that s. 22(2)(f) applies to this information.

[173] To conclude, I find s. 22(2)(f) favours the withholding of some but not all the information at issue under s. 22(1).

Unfair damage to reputation – s. 22(2)(h)

[174] Section 22(2)(h) requires a public body to consider whether disclosure of the personal information at issue may unfairly damage the reputation of a person referred to in the requested records. The University's concern in this case is about damage to a third party's reputation. Without any further explanation or evidence, the University asserts that the disclosure of the personal information at issue would unfairly "expose" several third parties "to actual and potential harm" including "reputational harm" because of the seriousness of the applicant's allegations about those individuals.[182]

[175] I note the University's submissions on s. 22(2)(h) were combined with its submissions on s. 22(2)(e) (unfair exposure to harm) even though the two provisions are different. Under s. 22(2)(e), it is the *exposure* to harm and not the likelihood of harm that matters.[183] Whereas s. 22(2)(h) requires establishing that the disclosure of the personal information at issue *may* unfairly damage the reputation of a person referred to in the requested records.

[176] Applying the standard under s. 22(2)(h) and based on my own review of the responsive records, it is unclear how disclosing any of the withheld information might damage anyone's reputation. It is also not apparent how the

[180] Privacy Officer's affidavit at p. 3 of Exhibit "B".
[181] Privacy Officer's affidavit at para. 20(c) describing pp. 16-17 of the Audit Committee Records.
[182] University's initial submission at para. 74.
[183] Order 01-37, 2001 CanLII 21591 (BCIPC) at para. 42.

alleged damage to anyone's reputation would be unfair as required under s. 22(2)(h). Contrary to the University's assertions, in my opinion, none of the information in the records at issue reflects poorly on any third parties.

[177] For instance, as previously noted, the personal information at issue includes a factual description of the applicant's whistleblower allegations which identifies the people implicated in the applicant's allegations and what they are being accused of. However, there is information disclosed in the responsive records that shows the Audit Committee subsequently reviewed the applicant's allegations and found in favour of the accused individuals.[184] Given this context, I am not persuaded that anyone who reviews those allegations would regard those third parties in a negative way. Therefore, I am not satisfied that s. 22(2)(h) is a circumstance that favours withholding the information at issue.

Applicant's existing knowledge

[178] An applicant's knowledge of the personal information at issue may be a factor that weighs in favour of disclosure where there is evidence, or the circumstances indicate, that an access applicant already knows or can easily infer the information at issue.[185]

[179] In several records, the University withheld a factual description or summary of the applicant's allegations. However, I find the applicant already knows this information since the applicant was the one who made the allegations against those individuals in their report to the University.

[180] I also find the applicant already knows or can easily infer some of the information that the University withheld in several emails. One email is described by the University as "a status report on matters that were deliberated on at meetings of the Audit Committee."[186] There is information released in the responsive records that indicates the Audit Committee already disclosed some of the withheld information in this email to the applicant when it informed the applicant about the outcome of its review.[187] The University also withheld information in three other emails, but I find that it disclosed information in the responsive records that would easily allow someone to accurately infer some of this withheld information.[188]

[181] Therefore, I find the applicant's knowledge of some of the withheld information weighs in favour of disclosing that information.

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[184] Information located on pp. 45 and 46 of the Severed Records.
[185] Order F23-13, 2023 BCIPC 15 (CanLII) at para. 184.
[186] Privacy Officer's affidavit at para. 20(c) describing pp. 16-17 of the Audit Committee Records.
[187] Information disclosed on pp. 36 and 46 of the Severed Records.
[188] Information withheld on p. 27 but disclosed on pp. 27 and 29 of the Severed Records. Information withheld on p. 4 (same info on pp. 8, 14, 21 and 27), but disclosed on pp. 20, 27 of the Severed Records.

Conclusion on s. 22(1)

[182] I am satisfied that the information withheld in the disputed records by the University is the personal information of several people, including University employees and individuals implicated in the applicant's allegations. I found there were no circumstances under s. 22(4) that would apply to this information.

[183] Taking into account all the relevant circumstances, I find it would not unreasonably invade a third party's personal privacy to disclose some information which summarizes the applicant's allegations, certain process-related information about the investigation into those allegations, part of a third party's response to the applicant's allegations, information about when certain University employees were not in the office and a factual account of certain activities undertaken by University employees or decisions made by the Audit Committee.[189] There were no circumstances that favored withholding this information from the applicant. Moreover, some of this information is already known to the applicant or easily inferable from information disclosed in the responsive records.

[184] I did find some of the third-party personal information is subject to the presumption under s. 22(3)(d) since it describes the work-related behaviour of several individuals in the context of a University investigation into their actions.[190] I also found the Director supplied this information to the Audit Committee in confidence in accordance with s. 22(2)(f). However, I find that circumstance is outweighed by the fact that the applicant clearly knows this information, the parties say there is already widespread media attention about the applicant's allegations and this information is limited to a factual account of those allegations. Therefore, considering all the relevant circumstances, I find the presumption under s. 22(3)(d) is rebutted for this information. As a result, I conclude it would not unreasonably invade a third party's personal privacy to disclose this information to the applicant.

[185] However, I find it would be an unreasonable invasion of a third party's personal privacy to disclose the rest of the information withheld by the University under s. 22(1). I found some of this information was supplied in confidence by a named third party to other University employees in accordance with s. 22(2)(f).[191] There were also no circumstances that favoured disclosing this information to the applicant or that would rebut the s. 22(3)(d) presumption that I found applied to information that reveals certain details about a third party's

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[189] Information located on pp. 1, 5, 8, 10, 12-15, 16 of the Audit Committee Records. Information located on pp. 1 (duplicated on p. 121), p. 4 (duplicated on pp. 8-9, 14, 21 and 27), 8 (duplicated on p. 14), 27 and 33 of the Severed Records.
[190] Information located on pp. 12-15 of the Audit Committee Records.
[191] Information located on pp. 2, 4 and 19 of the Severed Records.

work history. As well, the disclosure of all this information would only reveal an individual's activities and is, therefore, not desirable for subjecting the University or another public body's activities to public scrutiny under s. 22(2)(a). Therefore, I conclude the University is required to withhold the rest of the information at issue under s. 22(1) since its disclosure would be an unreasonable invasion of a third party's personal privacy.

Local public body confidences – s. 12(3)(b)

[186] I found the University is not authorized or required under ss. 13(1) and 22(1) to withhold some information in an email written by a University employee that includes an update about certain activities of the Audit Committee.[192] However, the University also applied s. 12(3)(b) to this information so I will now consider whether that exception to disclosure applies. The University submits s. 12(3)(b) applies to the information that it withheld in the disputed email because it would reveal the substance of the Audit Committee's deliberations.

[187] Section 12(3)(b) authorizes a local public body to refuse to disclose information that would reveal "the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public."

[188] The first question I must address under s. 12(3)(b) is whether the University is a local public body under FIPPA. Under schedule 1 of FIPPA, the term "local public body" is defined to include "an educational body", which in turn is defined to include "the Thompson Rivers University." Therefore, I conclude the University is a local public body under FIPPA.

[189] The next question is whether the Audit Committee is a committee of the University's governing body. The University says the *Thompson Rivers University Act* identifies the University's board of governors (Board) as its governing body and that the Board has the power to appoint committees under the *University Act*.[193] I note s. 27(2)(c) of the *University Act* allows the Board to appoint committees that it considers necessary to carry out the Board's functions.

[190] The Privacy Officer attests the Audit Committee is one of the Board's "standing committees."[194] The University also provided a copy of the Audit Committee's "Terms of Reference" which identifies the purpose of the Audit

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[192] Information located on p. 16 of the Audit Committee Records.
[193] University's initial submission at para. 85, citing s. 7 of the *Thompson Rivers University Act*, SBC 2005, c. 17 and s. 27(2) of the *University Act*, RSBC 1996, c. 468.
[194] Privacy Officer's affidavit at para. 15.

Committee and its duties and responsibilities.[195] I also note there is information in the responsive records that confirms there was an Audit Committee in place at the time of the email at issue here.[196] Taking all this into account, I am satisfied the Board is the University's governing body and that it appointed the Audit Committee. Therefore, I find the Audit Committee is a committee of the University's governing body for the purposes of s. 12(3)(b).

[191] The next stage of the s. 12(3)(b) analysis requires the University to prove the following conditions:

1. The Audit Committee had the statutory authority to meet in the absence of the public, that is, to meet *in camera*;

2. The meeting must have taken in place *in camera*; and

3. The information would, if disclosed, reveal the substance of deliberations at the *in camera* meeting.

[192] Previous OIPC orders have consistently found those three conditions must be met for a local public body to withhold information under s. 12(3)(b).[197] If a local public body fails to prove all three conditions are satisfied, then s. 12(3)(b) cannot be used as a reason to refuse access to the information at issue.[198] I agree with this approach.

[193] The parties made extensive submissions on s. 12(3)(b), but in this case I need only consider whether disclosing the information at issue would reveal the substance of the Audit Committee's deliberations. I have taken this approach because, as set out below, my findings about this third condition are determinative of the s. 12(3)(b) issue. Therefore, it is not necessary to consider the other conditions.

[194] The question I must consider at this point is whether disclosing the information at issue in the University employee's email would reveal the substance of the Audit Committee's deliberations. Previous OIPC orders have clarified that the phrase "substance of deliberations" under s. 12(3)(b) refers to what was discussed or decided at the *in camera* meeting such as the different views and various possible courses of actions that were expressed and suggested by the meeting attendees.[199] It does not include the topic of those deliberations or the materials or documents considered at the *in camera* meeting

[195] Exhibit "C" of Privacy Officer's affidavit.
[196] Information located on p. 16 of the Audit Committee Records.
[197] For example, Order 00-14, 2000 CanLII 10836 (BCIPC) and Order F20-10, 2020 BCIPC 12 (CanLII) at para. 8.
[198] Order 00-11, 2000 CanLII 10554 (BCIPC) at p. 5.
[199] Order F23-57, 2023 BCIPC 67 (CanLII) at paras. 27- 35, and the cases cited therein.

where it is not possible to conclude what the meeting attendees thought, said or decided about those materials.[200]

[195] The University submits the information at issue sets out what was discussed at an Audit Committee *in camera* meeting and that it is, therefore, "clear on the face of the records that the third requirement under section 12(3)(b) is satisfied."[201]

[196] The applicant questions whether the University properly applied s. 12(3)(b) and notes the "substance of deliberations" does not apply to the "basis" or "topic" of a committee's deliberations or information that does not reveal what committee members said or thought about the issues before them.[202] The applicant is confident that the University has incorrectly applied s. 12(3)(b) to this type of information.

[197] Based on my review of the information at issue, I find the University applied s. 12(3)(b) to information that would not reveal the substance of any deliberations by the Audit Committee. For instance, I can see that the University withheld information that only shows the subject matter or topic of the Audit Committee's deliberations. As noted, previous OIPC orders have made it clear that s. 12(3)(b) does not apply to this type of information.[203]

[198] The University also withheld a factual account of certain actions undertaken by the University employee who wrote the disputed email, the employee's general opening and closing remarks for their email and the first name of this employee even though the University disclosed their name and email address in the same record. I find none of this information reveals what the members of the Audit Committee said or thought about any issues under their consideration.

[199] I note there is some information in the email that indicates what the Audit Committee decided about a matter. However, as previously noted, I find the Audit Committee already disclosed this information to the applicant when it informed the applicant about the outcome of its review into their allegations.[204] Where a committee shares what it has decided about a matter with an applicant, I conclude s. 12(3)(b) does not apply to this information because the disclosure of this information would not *reveal* the substance of the committee's deliberations. It is not possible to "reveal" information under s. 12(3)(b), nor does

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[200] *Ibid*.
[201] University's initial submission at para. 92.
[202] Applicant's submission at p. 13, citing Order F12-11, 2012 BCIPC 15 (CanLII) at para. 12 and Order F19-18, 2019 BCIPC 20 (CanLII) at paras. 33-35.
[203] For example, Order F12-11, 2012 BCIPC 15 (CanLII) at para. 14.
[204] Information disclosed on pp. 36 and 46 of the Severed Records.

it make sense to withhold that information under s. 12(3)(b), when that information has already been disclosed to the applicant.

[200] All three conditions of the s. 12(3)(b) test must be satisfied for a local public body to refuse access under this provision. Given my finding that the third condition of the s. 12(3)(b) test has not been met, it is not necessary to consider the other conditions. Therefore, I conclude s. 12(3)(b) does not apply to the information at issue in the University employee's email.

CONCLUSION

[201] For the reasons discussed earlier, I make the following order under s. 58 of FIPPA:

1. Except for the information discussed under item 2 below, I confirm the University is authorized or required to refuse access to the information that it withheld under ss. 14, 13(1), and 22(1).

2. The University is not required under s. 22(1), nor is it authorized under ss. 12(3)(b), 13(1) or 14, to refuse access to the information that I have highlighted, in green, in a copy of the records that will be provided to the University with this order.

3. The University is required to give the applicant a copy of the records with the highlighted information unredacted. The University must concurrently provide the OIPC registrar of inquiries with proof that it has complied with the terms of this order.

[202] Under s. 59 of FIPPA, the University is required to give the applicant access to the information that it is not required or authorized to withhold by **April 25, 2024**.

March 12, 2024

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

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