



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F24-77

THOMPSON RIVERS UNIVERSITY

David S. Adams
Adjudicator

August 21, 2024

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Summary: An applicant requested records from Thompson Rivers University (TRU) under the *Freedom of Information and Protection of Privacy Act* (FIPPA). TRU disclosed the responsive records to the applicant, but withheld some information in them under ss. 13(1) (advice or recommendations), 14 (solicitor-client privilege), and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA. The adjudicator found that TRU was authorized to withhold all of the information it withheld under s. 14 and most of the information it withheld under s. 13(1). The adjudicator also found that TRU was required to withhold most of the information it withheld under s. 22(1). The adjudicator ordered TRU to disclose to the applicant the information it was not authorized or required to withhold.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, ss. 13(1), 13(2)(a), 13(2)(k), 13(2)(n), 14, 22(1), 22(2)(a), 22(2)(c), 22(3), 22(4).

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant requested records from Thompson Rivers University (TRU), his former employer. The request was for communications sent to a named TRU staff member about TRU's response to media inquiries concerning the applicant.

[2] TRU disclosed the responsive records, but withheld some information in them under ss. 13(1) (advice or recommendations), 14 (solicitor-client privilege), and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA. The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review TRU's decision to withhold this information. Mediation by the OIPC did not resolve the issues and the applicant requested that the matter proceed to this inquiry.

Preliminary issue – information no longer in dispute

[3] TRU provided an affidavit from its legal counsel and privacy and access officer (Legal Counsel), who says that some of the withheld information that is the subject of this inquiry was already adjudicated in a previous inquiry.¹ TRU also refers to this overlap in its initial submission.²

[4] I wrote to TRU to request that it advise me which of the information in this inquiry had been adjudicated in the previous inquiry. TRU provided a new table setting out the information that appears in both inquiries. On my examination of the records in the previous inquiry, I am satisfied that the information described in this table has already been adjudicated. I therefore find it not to be in issue in this inquiry and will not consider it.³

ISSUES AND BURDEN OF PROOF

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

1. Whether TRU may refuse to disclose information under s. 13(1);
2. Whether TRU may refuse to disclose information under s. 14; and
3. Whether TRU must refuse to disclose information under s. 22(1).

[6] Under s. 57(1) of FIPPA, TRU has the burden of proving that the applicant has no right of access to the information it withheld under ss. 13(1) and 14. Meanwhile, s. 57(2) provides that the burden is on the applicant to prove that the disclosure of any third-party personal information TRU withheld would not be an unreasonable invasion of the third parties' personal privacy under s. 22(1). TRU, however, has the initial burden of proving that the information it has withheld under s. 22(1) is personal information.⁴

DISCUSSION**Background**

[7] The applicant was employed as a faculty member at TRU. During the applicant's employment, several disputes developed between the parties.

¹ At para 12; OIPC file no. F21-87726, decided as Order F24-12, 2024 BCIPC 16 (CanLII).

² At para 11.

³ The information already adjudicated is on pages 17-18, 19, 22, 58-60, 62-64, 149-150, and 152 of the records package.

⁴ Order 03-41, 2003 CanLII 49220 (BC IPC) at paras 9-11.

[8] Beginning in about 2018, TRU began to receive media inquiries about the applicant's employment. In 2019, the Canadian Association of University Teachers (CAUT) released a report concerning the applicant's academic freedom. TRU did not participate in the preparation of this report, but was asked for a response to it by journalists and bloggers. TRU asked its communications professionals and senior managers to strategize and prepare responses to these media inquiries.

[9] In July 2021, the applicant requested that TRU provide him with copies of any communications, prior to July 2, 2020, sent to a named TRU staff member that dealt with TRU's response to media inquiries about the applicant. TRU's response to this request is at issue in this inquiry.

Information in dispute

[10] The records responsive to the applicant's request total 167 pages, consisting of emails and attachments. TRU has withheld information on 142 of those pages. The records consist of TRU's internal discussions about its responses to media inquiries about the applicant, as well as a small number of related draft documents.

Solicitor-client privilege – s. 14

[11] TRU is relying on s. 14 of FIPPA to withhold several emails, either in whole or in part, and several attachments. Section 14 allows a public body to refuse to disclose information that is subject to solicitor-client privilege. The term "solicitor-client privilege" in s. 14 encompasses both legal advice privilege and litigation privilege.⁵ TRU does not explicitly say so, but I can infer from its submission that it is relying on the legal advice privilege branch of s. 14.⁶

Evidentiary basis for solicitor-client privilege

[12] TRU did not produce the records it withheld under s. 14 for my review. Instead, it provided an affidavit from the Legal Counsel, which includes, as an exhibit, a descriptive table of records (the Table).

[13] When read together, ss. 44(1)(b) and 44(2.1) of FIPPA allow me, as the Commissioner's delegate, to order the production of records over which privilege is claimed. However, because of the importance of solicitor-client privilege to the legal system, I will do so only when production is necessary to decide the

⁵ *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 26 [College].

⁶ For example, at paras 37-38 of its initial submission, TRU sets out the test for legal advice privilege. In addition, it does not make a submission about litigation privilege.

question of privilege.⁷ For the reasons that follow, I am not persuaded that it is necessary to order production of the information withheld under s. 14 in this case.

[14] TRU says that the Legal Counsel’s affidavit and the Table are sufficient for me to decide whether the information it withheld under s. 14 is privileged, since the Legal Counsel is a lawyer who has direct knowledge of the matters in issue and has reviewed each of the responsive records.⁸ The applicant does not say anything specifically about the sufficiency of TRU’s evidence regarding the information it withheld under s. 14.

[15] Having reviewed all the parties’ submissions and evidence, I find that the Legal Counsel’s affidavit and the Table provide sufficient evidence for me to decide whether the information TRU withheld under s. 14 is privileged. The Table contains a description of each record, the date each record was created or distributed within TRU, and the basis on which TRU claims privilege over the information withheld in it. Moreover, the Legal Counsel is a practicing lawyer who has a professional obligation to ensure privilege is properly claimed; some deference is owed to the lawyer claiming the privilege.⁹ I therefore find that it is appropriate for me to rely on the Legal Counsel’s evidence, and I decline to order production of the information over which TRU claimed privilege.

Legal advice privilege

[16] Legal advice privilege attaches to communications that are between solicitor and client (or their agent), that entail the seeking or giving of legal advice, and that are intended by the parties to be confidential.¹⁰ Not every communication between a solicitor and client is privileged, but if these conditions exist, legal advice privilege applies.¹¹

[17] Legal advice privilege promotes full and frank disclosure between solicitor and client, thereby promoting “effective legal advice, personal autonomy (the individual’s ability to control access to personal information and retain confidences), access to justice and the efficacy of the adversarial process”.¹²

⁷ *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 at para 15; Order F19-21, 2019 BCIPC 23 (CanLII) at para 61.

⁸ TRU’s initial submission at paras 27-29.

⁹ *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 [Finance] at para 86.

¹⁰ *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 at 837.

¹¹ *Ibid* at 829.

¹² *College*, *supra* note 5 at para 30.

[18] Legal advice privilege also applies to the “continuum of communications” related to the seeking and giving of legal advice, including internal client communications that comment on the legal advice received and its implications.¹³

[19] Solicitor-client privilege does not necessarily apply to all attachments to privileged communications.¹⁴ However, attachments may, depending on their content, be privileged on their own, independently of being attached to a communication which is itself privileged. An attachment may be privileged if it constitutes an integral part of the communication to which it is attached and disclosure of the attachment would reveal, or allow accurate inferences to be drawn about, privileged information contained in that communication.¹⁵ The party claiming privilege over an attachment must provide some basis for that claim.¹⁶

Parties’ positions on legal advice privilege

[20] TRU withheld information under legal advice privilege on 79 pages of the responsive records. The Table describes each of the communications withheld under s. 14. The Legal Counsel deposes that she has inspected the Table and that it accurately describes the basis on which TRU withheld the information in issue.¹⁷ The Table provides that the withheld communications are mostly email strings containing messages between TRU’s general counsel (the General Counsel) and various senior TRU staff members. In some cases, the General Counsel is only copied on the emails, while in other cases, the General Counsel is not included on the emails. In the latter case, the Table provides that the withheld information consists of, or refers to, confidential legal advice.¹⁸

[21] TRU says the General Counsel was acting in the role of solicitor and providing legal advice to TRU in the emails it withheld under s. 14. It says these communications were confidential. It says that, for the communications that do not themselves contain legal advice, these were provided to the General Counsel for the purpose of facilitating his provision of legal advice.¹⁹

[22] The Legal Counsel deposes that she has reviewed each of the disputed records and consulted with the General Counsel. She says that the “material contained in the Disputed Records withheld under section 14 has been withheld on the basis that it comprises or would reveal the content of confidential

¹³ *Blifinger Berger (Canada) Inc v. Greater Vancouver Water District*, 2013 BCSC 1893 at paras 22-24.

¹⁴ *Finance*, *supra* note 9 at para 110.

¹⁵ Order F20-08, 2020 BCIPC 9 at para 27; Order F18-19, 2018 BCIPC 22 at paras 36-40.

¹⁶ *Finance*, *supra* note 9 at para 111.

¹⁷ Affidavit of Legal Counsel at para 20.

¹⁸ Table at documents 11 and 19.

¹⁹ TRU’s initial submission at paras 39-47.

communications between [TRU and its General Counsel] for the purposes of seeking, formulating or providing legal advice”.²⁰

[23] The applicant says that TRU admits in the Table that attachments and other information withheld under s. 14 do not explicitly contain legal advice. He also says that “[m]erely running a document by a lawyer does not make it privileged”.²¹

[24] In reply, TRU says that where, as is the case here, an attachment is provided to a solicitor for the purpose of seeking legal advice on the contents of the attachment, it is part of the continuum of communications in which legal advice is sought and provided and is therefore privileged.²²

[25] The applicant also questions whether email addresses and other elements of email headers can be privileged, citing a recent OIPC order involving TRU where the adjudicator found that certain email addresses were not privileged.²³

[26] In reply, TRU says:

An email header may reveal such information as whether or not a message is marked as high priority, which can reveal information about the legal advice sought and provided and its urgency. Likewise, knowledge of which specific departments within the University were copied on a communication or [the] time that [it] was sent would allow third parties to draw inferences about the subject [matter] of the advice or the importance that was placed on it by University lawyers or other officials. In this case, a small number of email headers [associated with emails] requesting or containing [the General Counsel’s] legal advice were redacted for this reason.²⁴

Analysis and findings – legal advice privilege

[27] I find that the information TRU withheld under s. 14 consists of emails between the General Counsel and senior TRU managers, as well as some emails among senior managers that do not include the General Counsel. There are also some attachments that TRU withheld on the basis that disclosure would allow third parties to make accurate inferences about the substance of privileged communications.²⁵

²⁰ Affidavit of Legal Counsel at paras 23-24.

²¹ Applicant’s response submission at paras 26-27.

²² TRU’s reply submission at paras 20-21.

²³ Applicant’s response submission at para 28, citing Order F23-33, 2023 BCIPC 39 (CanLII) at para 35.

²⁴ TRU’s reply submission at para 23.

²⁵ Table at documents 8, 26, and 30.

[28] The Legal Counsel deposes that she has reviewed all of the communications TRU withheld under s. 14. She says that they contain, or would allow an observer to infer, privileged legal advice, and that the communications were confidential.²⁶ I accept this evidence, the substance of which the applicant has not challenged. The Legal Counsel, as a practicing lawyer, is an officer of the court, and has a professional duty to ensure that privilege is properly claimed.²⁷ The applicant has not advanced any reason why I should not accept the Legal Counsel's evidence.

[29] I can see from the Table that the majority of the communications withheld under s. 14 are between the General Counsel and various senior TRU staff members. The Table also provides that the communications involved the seeking and giving of legal advice. There is no indication that these communications were shared with anyone besides these parties. I find that these communications are between solicitor and client, entail the seeking and giving of legal advice, and were intended by the parties to be confidential. I therefore find that they are privileged.

[30] As for the emails that do not include the General Counsel, I accept the description of them in the Table as containing or referring to confidential legal advice. I find that disclosure of these emails would reveal the substance of the legal advice itself, and that they are therefore privileged as being part of the continuum of communications related to the seeking and giving of legal advice.

[31] Concerning the withheld attachments, I agree with the applicant that "merely running a document by a lawyer" does not, without more, make that document privileged. However, in this case I accept the assertion in the Table that disclosure of the attachments would reveal the substance of the legal opinion provided in the emails to which they are attached because TRU was seeking legal advice from the General Counsel about the contents of the attachments. On that basis, I find that the email attachments TRU withheld are integral to the communications to which they are attached, and that disclosure of the attachments would reveal the substance of privileged communications, so that they too are privileged.

[32] With respect to the applicant's arguments about email headers, I am mindful that the BC Court of Appeal has urged caution in the severing of information over which privilege is claimed, saying that severing "should only be considered when it can be accomplished without any risk that the privileged legal advice will be revealed or capable of ascertainment".²⁸ As I found above, TRU has satisfied me that it has properly claimed privilege over the withheld communications. I am not satisfied that severance of the associated headers can

²⁶ Affidavit of Legal Counsel at paras 23-24.

²⁷ *Finance*, *supra* note 9 at para 86.

²⁸ *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at paras 38-40 and 51.

be accomplished without any risk of revealing privileged legal advice. I therefore find that TRU may withhold the email headers over which it asserted legal advice privilege.

[33] To summarize, I find that the emails and attachments TRU withheld under s. 14 are subject to legal advice privilege because I accept TRU's submissions and evidence that they consist of, or would reveal, communications between a solicitor (namely, the General Counsel) and client (TRU), that the parties to these communications intended them to be confidential, and that the communications entail the seeking and giving of legal advice.

Conclusion on s. 14

[34] For the reasons given above, I am satisfied that legal advice privilege applies to the withheld information. TRU may therefore refuse to disclose it under s. 14.

Advice or recommendations – s. 13

[35] TRU withheld portions of some emails, along with some draft documents, under s. 13(1). It withheld some of this information under both ss. 13(1) and 14. Since I have found above that s. 14 applies to the information TRU withheld under that section, I need not consider whether TRU is also authorized to withhold that same information under s. 13(1), and I decline to do so.

[36] Section 13(1) provides that the head of a public body may refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. The purpose of s. 13(1) is to prevent the harm that would occur if a public body's deliberative process were exposed to public scrutiny,²⁹ and to protect the free and frank flow of advice and recommendations that occurs when a public body is considering a given issue.³⁰

[37] The first step in the analysis is to consider whether the information in issue would reveal advice or recommendations under s. 13(1). The next step is to consider whether any of the provisions of ss. 13(2) or (3) apply; if one or more does, the public body may not refuse to disclose the information.

Section 13(1) – advice or recommendations developed by or for a public body

[38] "Advice" and "recommendations" have distinct meanings. The term "recommendations" includes information that relates to a suggested course of

²⁹ *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 [ICBC] at para 52.

³⁰ Order 01-15, 2001 CanLII 21569 (BC IPC) at para 22.

action that will ultimately be accepted or rejected by the person receiving the recommendation.³¹ “Advice” has a broader meaning, and usually involves a communication by a person whose advice has been sought, to the recipient of the advice, about which courses of action are preferred or desirable.³² The term “advice” also includes opinions that involve the exercise of judgment and skill to weigh the significance of matters of fact on which a public body must make a decision about future action.³³

Parties’ positions

[39] TRU applied s. 13(1) to portions of emails and some draft documents. It says that much of the information withheld under s. 13(1) consists of “advice provided or initiated by [TRU’s] communications and public relations professionals”.³⁴ It says that the role of these professionals is “entirely advisory” and that the plans, strategies, and communications they prepare are the “central vehicle through which they provide advice and recommendations”.³⁵ The Legal Counsel says that TRU withheld information under s. 13(1) in order to protect TRU’s internal process of preparing its responses to media inquiries.³⁶

[40] The applicant questions whether some of the information withheld under s. 13(1) is really advice or recommendations, since one of the records from which information has been withheld was disclosed to the Ministry of Advanced Education, Skills and Training (the Ministry). Because TRU is an autonomous institution, he says, it is unlikely that TRU would ask the Ministry for advice. He asserts that since TRU’s past practice was to release this record to a third party, it cannot withhold it from the public.³⁷

[41] In reply, TRU says that its having shared a record with the Ministry does not deprive it of the right to withhold information in the record from members of the public under s. 13, nor does a disclosure to the Ministry establish that TRU has a practice of sharing such documents publicly.³⁸

Analysis and conclusions on s. 13(1)

[42] I find that most of the information it withheld under s. 13(1) would, on its face, reveal advice and, in some cases, recommendations developed for or by TRU. This information consists of discussions between TRU’s senior managers and communications professionals about how TRU should respond to media

³¹ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras 23-24.

³² Order 01-15, *supra* note 30 at para 22.

³³ *College*, *supra* note 5 at para 113.

³⁴ TRU’s initial submission at para 57.

³⁵ *Ibid* at para 58.

³⁶ Affidavit of Legal Counsel at para 25.

³⁷ Applicant’s response submission at paras 15-17.

³⁸ TRU’s reply submission at para 6.

inquiries about the applicant, including discussions about the merits of various courses of action, the wording of proposed messages to the faculty and the public, and the replies that should be made to questions from journalists and bloggers.

[43] Some of the withheld information consists of drafts of proposed communications. TRU says that the contents of these drafts are inherently advisory, or that disclosure would reveal advice or recommendations about their contents.³⁹

[44] Previous orders have established that s. 13(1) does not apply to draft documents merely because they are drafts. The test is the same for both draft and final documents: would disclosure reveal advice or recommendations within the meaning of s. 13(1)?⁴⁰ Section 13(1) also applies to information in drafts that would enable an applicant to draw accurate inferences about advice or recommendations based on changes from the draft document to the final version.⁴¹ Draft correspondence may reveal advice or recommendations where the correspondence itself qualifies as advice or recommendations about how to respond to an issue.⁴²

[45] In this case, there is a draft public statement,⁴³ a draft letter to the editor of a newspaper,⁴⁴ and a draft set of responses to the editor of a website.⁴⁵ I am satisfied that most of this information would reveal advice or recommendations if disclosed, since it consists of advice from TRU's communications professionals about how to respond to an issue – namely, journalists' inquiries about the applicant. However, I find that portions of these drafts have already been disclosed in the records. For instance, the substance of the heading on page 54 of the records package is disclosed elsewhere in the records package. Disclosure of the heading would not therefore reveal advice or recommendations. I make a similar finding with respect to portions of the information TRU withheld on pages 77-78 and 82-83. Information that has already been disclosed to an applicant cannot be withheld under s. 13(1).⁴⁶

[46] I also find that a small amount of the information TRU withheld under s. 13(1) is in the nature of an instruction, a "heads up", or an exchange of information between TRU employees that would not reveal advice or

³⁹ TRU's initial submission at paras 61-62.

⁴⁰ Order 00-27, 2000 CanLII 14392 (BC IPC) at section 3.3; Order F14-44, 2014 BCIPC 47 (CanLII) at para 32.

⁴¹ Order F18-38, 2018 BCIPC 41 (CanLII) at para 17.

⁴² Order F19-28, 2019 BCIPC 30 (CanLII) at paras 29-30.

⁴³ Records package at 4-5.

⁴⁴ *Ibid* at 54-55.

⁴⁵ *Ibid* at 77-78 and 82-83.

⁴⁶ Order F20-32, 2020 BCIPC 38 (CanLII) at para 36; Order F12-15, 2012 BCIPC 21 (CanLII) at para 19.

recommendations.⁴⁷ Previous orders have established that these kinds of communications do not fall within s. 13(1).⁴⁸

[47] With respect to the applicant's argument that TRU disclosed some of the withheld information to the Ministry, and therefore cannot withhold it from the public, I do not think that whether a public body has disclosed some information to another public body is relevant for deciding whether the information would reveal advice or recommendations. Moreover, I agree with TRU that sharing information with another public body does not deprive it of the right to withhold it from an applicant.

[48] Finally, there is one piece of information that is labeled as withheld under s. 13(1), but I think TRU likely meant to withhold it under s. 22, and so I will analyze it under s. 22 below.⁴⁹ On its face, it has nothing to do with advice or recommendations.

Section 13(2) – information that a public body must not refuse to disclose

[49] I must next decide whether the information I have found would reveal advice or recommendations under s. 13(1) falls into any of the categories set out in s. 13(2), in which case the public body may not withhold it.

[50] The applicant submits that several s. 13(2) provisions may apply.⁵⁰ TRU denies that any s. 13(2) provision applies.⁵¹ Based on my review of the information in dispute, I do not see how any subsections of s. 13(2), other than those raised by the applicant, could apply. I will therefore consider below only the subsections raised by the applicant.

Section 13(2)(a) – factual material

[51] Section 13(2)(a) provides that a public body must not refuse to disclose any factual material under s. 13(1). The term "factual material" has been interpreted by the courts to mean, in the context of s. 13(2)(a), material that "exists prior to its use in service of a particular purpose or goal", and to include "source materials accessed by the experts [providing advice] or background facts not necessary to the expert[s]' 'advice'".⁵² However, it does not include material

⁴⁷ At pages 39, 40, and 164 of the records package.

⁴⁸ Order F15-52, 2015 BCIPC 55 (CanLII) at paras 25-28.

⁴⁹ This is the incomplete sentence withheld in the lower part of page 108 of the records package; duplicates of this information found on pages 118 and 131 are labeled as being withheld under s. 22.

⁵⁰ Applicant's response submission at paras 19-25.

⁵¹ TRU's reply submission at paras 8-19.

⁵² *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 (CanLII) at paras 93-94.

selected by an expert using the expert’s judgment and skill for the purpose of providing the explanations necessary to the public body’s deliberative process.⁵³

[52] Facts that are integral to the analysis and views expressed are also not “factual material” within the meaning of s. 13(2)(a). If it were otherwise, public bodies would have to parse through responsive records word-by-word and disclose any “fact” included in a document prepared as part of its deliberative process, making the protection offered by s. 13(1) meaningless.⁵⁴

[53] The applicant raises the application of s. 13(2)(a), saying that “TRU usually does not concern itself with facts. Nonetheless, it is likely that they let some slip through.”⁵⁵ I understand the applicant to be saying that some or all of the information withheld under s. 13(1) is factual material that cannot be withheld.

[54] TRU says in reply that its communications professionals selected and presented factual information in their proposed draft messages and communications. It says that disclosure of this material would reveal the advice those professionals gave, since the way in which the media statements and responses to questions are framed and presented “forms an integral part of the specialized advice and recommendations that [TRU’s] public relations professionals are engaged to provide”.⁵⁶

[55] The applicant does not say on what basis he believes that the withheld information contains factual material within the meaning of s. 13(2)(a). On my review of the information which I found is advice or recommendations, I find that s. 13(2)(a) does not apply to any of it. While several of the email portions and drafts TRU withheld contain facts, I find that these facts are integral to the authors’ analysis and so would reveal advice or recommendations if disclosed.

Section 13(2)(k) – report of a task force

[56] Section 13(2)(k) provides that a public body must not refuse to disclose 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. For s. 13(2)(k) to apply, three conditions must be proven:

1. The record in dispute must be a report.
2. The report must be a report of a task force, committee, council, or similar body.

⁵³ *Ibid* at para 94.

⁵⁴ *ICBC*, *supra* note 29 at paras 52-53.

⁵⁵ Applicant’s response submission at paras 20-21.

⁵⁶ TRU’s reply submission at para 12.

3. The task force, committee, council, or similar body must have been established to consider any matter and make reports or recommendations to a public body.⁵⁷

[57] Previous orders have defined a “report” as “a formal statement or account of the results of the collation and consideration of information” which does not include mere observations or recordings of fact⁵⁸ and “an account given or opinion formally expressed after investigation or consideration”.⁵⁹ Furthermore, previous orders have also found that s. 13(2)(k) requires the information at issue to be contained in a record that has the formal structure and formatting that one would expect of a report.⁶⁰

[58] The applicant says that senior TRU administrators were involved in the email exchanges to which TRU applied s. 13(1). He says that these administrators made up *de facto, ad hoc* committees to make recommendations to TRU.⁶¹

[59] TRU says in reply that the information it withheld under s. 13(1) is not part of a “report” within the meaning of s. 13(2)(k) because it is part of an exchange between various TRU employees leading to the development of public relations advice. It also says that these employees do not constitute a task force, committee, council or similar body; they are, rather, individuals carrying out the daily activities of their employment.⁶²

[60] On my review of the disputed information, I find that none of it comprises a formal statement or expression. I also find that none of the information is formatted as a report. I agree with TRU that the withheld information consists of exchanges between TRU employees leading to the development of public relations advice. Since I have found that none of the information before me comprises a “report” as previous orders have defined that term, there is no need for me to consider the other branches of the test.⁶³

⁵⁷ Order F24-17, 2024 BCIPC 23 (CanLII) at para 81.

⁵⁸ Order F17-33, 2017 BCIPC 35 (CanLII) at para 17.

⁵⁹ Order F17-39, 2017 BCIPC 43 (CanLII) at para 46.

⁶⁰ Order F17-33, *supra* note 58 at para 18.

⁶¹ Applicant’s response submission at para 23.

⁶² TRU’s reply submission at paras 14-15.

⁶³ In Order F24-17, *supra* note 57, the adjudicator decided to write to the parties concerning the application of s. 13(2)(k). In the inquiry that led to that order, after the close of submissions, this office had issued the first order to “fully consider” s. 13(2)(k). The adjudicator therefore decided to allow the parties to make additional submissions: at paras 79-80, citing Order F24-03, 2024 BCIPC 4 (CanLII) at paras 71-134. In this case, I have not found it necessary to ask the parties for additional submissions, since my decision on s. 13(2)(k) turns on whether any of the withheld information comprises a “report”, and the definition of “report” has remained consistent; nothing in Orders F24-03 or F24-17 has altered this office’s interpretation of the term.

Section 13(2)(n) – decision that affects the rights of the applicant

[61] Section 13(2)(n) provides 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.

[62] The applicant says that TRU's submission indicates that s. 13(2)(n) applies because otherwise, the background section of that submission serves no purpose other than to cast him in a negative light.⁶⁴ I am unsure what this means; the applicant directs the reader to his arguments on s. 22 for "elaboration", but on reviewing those arguments, I am unable to tell how they are relevant.

[63] In reply, TRU says that the records do not contain a "decision" or "reasons" and that TRU was not engaged in exercising a "discretionary power" or "adjudicative function" within the meaning of s. 13(2)(n).⁶⁵

[64] Previous orders have established that to be captured by s. 13(2)(n), information must contain a decision or reasons for a decision.⁶⁶ I cannot see how any of the withheld information constitutes a decision or reasons within the meaning of s. 13(2)(n). The information consists of back-and-forth discussions about how to respond to a public relations issue. There is no decision made in the exercise of any of TRU's discretionary powers or adjudicative functions, and the applicant has not identified which of these powers or functions might be engaged. I therefore conclude that that s. 13(2)(n) does not apply.

Section 13(3) – information in existence for 10 or more years

[65] Section 13(3) provides that s. 13(1) does not apply to information in a record that has been in existence for 10 or more years. Since all of the records in this inquiry date from 2018 and 2019, and have therefore been in existence for less than 10 years, I find that s. 13(3) does not apply.

Conclusion on s. 13

[66] I have found that most, but not all, of the information TRU withheld under s. 13(1) would reveal advice or recommendations developed by or for TRU if it were disclosed to the applicant. I have found that none of the provisions in ss. 13(2) or (3) apply to the information. TRU may therefore refuse to disclose the information to which 13(1) applies.⁶⁷

⁶⁴ Applicant's response submission at paras 24-25.

⁶⁵ TRU's reply submission at paras 16-19.

⁶⁶ See, e.g., Order F24-31, 2024 BCIPC 38 (CanLII) at para 62; Order F07-17, 2007 CanLII 35478 (BC IPC) at para 37.

⁶⁷ I have read the parties' submissions and evidence about TRU's exercise of discretion in choosing to withhold the information in dispute under s. 13(1). I find that there is nothing to suggest that TRU improperly exercised its discretion in this case.

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

[67] The information TRU withheld under s. 22 consists of portions of emails describing third parties' vacation or leave details or containing brief comments by TRU employees. TRU withheld some information under both ss. 13(1) and 22(1). As I have already found that it was entitled to withhold this information under s. 13(1), there is no need to consider it again under s. 22 and I decline to do so.

[68] The analytical framework for s. 22 is well-established:

This section only applies to “personal information” as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.⁶⁸

[69] In its initial submission, TRU says only that “each branch” of the analytical framework has been met.⁶⁹

Personal information – s. 22(1)

[70] The first step in the s. 22 analysis is to determine whether the withheld information is personal information. Both “personal information” and “contact information” are defined in Schedule 1 of FIPPA:

“personal information” means recorded information about an identifiable individual other than contact information;

“contact information” means 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;

[71] Neither party made a submission about whether the information TRU withheld under s. 22(1) does or does not qualify as personal information. Nevertheless, I find that it does. On my review of the withheld information, I can see that it is reasonably capable of identifying individuals because it consists of comments in emails whose authors' names have not been withheld. None of the

⁶⁸ Order F15-03, 2015 BCIPC 3 (CanLII) at para 58.

⁶⁹ TRU's initial submission at para 66.

withheld information is contact information. In some cases, it is also the personal information of other identifiable third parties to whom the emails' authors refer.

Not an unreasonable invasion – s. 22(4)

[72] The next step in the s. 22 analysis is to determine whether any of the disputed information falls into any of the categories set out in s. 22(4). If it does, disclosure of that information would not be an unreasonable invasion of third-party personal privacy.

[73] Neither party made a submission about whether any provision of s. 22(4) applies. On my review of the withheld information in light of the s. 22(4) circumstances, I find that s. 22(4)(e) applies to a small amount of the personal information. Section 22(4)(e) says that disclosure of information about a third party's position, functions or remuneration as an employee of a public body is not an unreasonable invasion of that third party's personal privacy. Previous orders have established that s. 22(4)(e) applies to information that relates to the third party's job duties in the normal course of work-related activities.⁷⁰

[74] In this case, some of the withheld information consists of ordinary job-related observations made by TRU employees, and I find that s. 22(4)(e) applies to it.⁷¹ TRU must not refuse to disclose this information. There is one piece of withheld information that similarly consists of information related to a TRU employee's job duties, but I find that it is also the personal information of a journalist who is not a TRU employee.⁷² I find that s. 22(4)(e) does not apply to this information. I find that no other s. 22(4) circumstance applies.

Presumptive unreasonable invasion – s. 22(3)

[75] The next step in the s. 22 analysis is to determine whether any of the presumptions set out in s. 22(3) apply. Neither party made a submission about any of the s. 22(3) presumptions. On my review of the withheld information in light of those presumptions, I find that none of them apply.

Relevant factors – s. 22(2)

[76] The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information at issue in light of all the relevant circumstances, including those listed in s. 22(2). Section 22(2) provides, in relevant part:

⁷⁰ Order 01-53, 2001 CanLII 21607 (BC IPC) at para 40; Order F18-38, 2018 BCIPC 41 (CanLII) at para 70.

⁷¹ Namely, part of the information withheld in the lower half of page 49, and the information withheld at the top of page 72 of the records package.

⁷² Namely, the information withheld at the bottom of page 72 of the records package.

In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

...

(c) the personal information is relevant to a fair determination of an applicant's rights

Public scrutiny of the activities of a public body – s. 22(2)(a)

[77] The applicant says that s. 22(2)(a) favours disclosure of some or all of the withheld information because disclosure would expose TRU's involvement in pay-to-publish or predatory academic journals.⁷³

[78] TRU says in reply that none of the information it withheld under s. 22 relates to such journals, and that s. 22(2)(a) is intended to promote scrutiny of the activities of public bodies, not those of individual employees.⁷⁴

[79] I find that none of the withheld information relates to TRU's involvement with academic journals of any kind. I also find that there is no withheld information whose disclosure would be desirable for subjecting TRU's other activities to public scrutiny. The information has nothing to do with the activities of TRU as a public body or institution. I find that s. 22(2)(a) does not apply.

Information relevant to a fair determination of applicant's rights – s. 22(2)(c)

[80] The applicant says that the information TRU withheld under s. 22 must relate to various labour grievances and other legal proceedings he is pursuing. He says again that if the information does not relate to these proceedings, the background section of TRU's initial submission serves no purpose other than to cast him in a negative light.⁷⁵

[81] TRU says in reply that the withheld information is not relevant to the applicant's ongoing or contemplated proceedings. It says that the applicant's grievances (underway and contemplated) relate to disciplinary actions taken by TRU against him and to his union's representation of him. It also says that he has a right to disclosure in those proceedings, so that disclosure of the personal

⁷³ Applicant's response submission at paras 30-40.

⁷⁴ TRU's reply submission at paras 24-27.

⁷⁵ Applicant's response submission at paras 42-49.

information under FIPPA is not necessary to ensure a fair determination of the applicant's rights.⁷⁶

[82] Previous orders have established the elements required to engage s. 22(2)(c):

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.⁷⁷

[83] In this case, there is no evidence before me that the withheld information has any bearing on, or significance for, the proceedings underway or contemplated by the applicant. In order for the third branch of the test to be satisfied, the applicant must prove that there is a “demonstrable nexus” or connection between the withheld information and the legal right;⁷⁸ he has not done so here. None of the information withheld under s. 22(1) has anything to do with disciplinary actions taken by TRU against the applicant or with his union's representation of him. I therefore find that the third branch of the test is not met, and that s. 22(2)(c) does not apply.

Relevant circumstances not set out in s. 22(2)

[84] Having found that neither s. 22(2)(a) nor s. 22(2)(c) favours disclosure of the withheld information, I now turn to consider other relevant circumstances not listed in s. 22(2). Neither party made a submission on any unlisted factors, but I find that for some of the withheld information, the sensitivity of the information is relevant. Previous orders have held that where the information is particularly sensitive, this will weigh against disclosure, and where the information is not particularly sensitive, this will favour disclosure.⁷⁹

[85] The majority of the information TRU withheld under s. 22 concerns the activities that various third parties undertook while on vacation. Previous orders

⁷⁶ TRU's reply submission at paras 28-33.

⁷⁷ Order 01-07, 2001 CanLII 21561 (BC IPC) at para 31; Order F23-65, 2023 BCIPC 75 (CanLII) at para 141.

⁷⁸ Order F23-65, *ibid* at para 145.

⁷⁹ Order F16-52, 2016 BCIPC 58 (CanLII) at paras 87-91.

have considered whether disclosure of details of a personal vacation would be an unreasonable invasion of a third party's privacy, and concluded that:

...details of a personal vacation should generally be considered sensitive in nature, as this is information about what an individual does in their private time away from the workplace. Most public body employees or representatives would not expect that any information about their personal vacations would be publicly disclosed. This is particularly the case about specific details about where they went, what activities they engaged in and the people they met during their personal vacation.⁸⁰

[86] I find that the majority of the withheld information consists of such personal vacation details, and that the sensitivity of this information weighs against disclosure. While previous orders have held that discussion of an individual's vacation or travel plans are generally innocuous and not sensitive in nature, and are "part of the niceties of greetings and workplace etiquette",⁸¹ I find that the information at issue here is of the more sensitive kind because it describes when the authors were on vacation, what they did, where they went, the company they kept, and their own feelings about their personal vacations.

[87] There is a small amount of information withheld on page 105 of the records package that, although it does not relate to a third party's vacation activities, is a description of a third party's personal feelings. Such information has been held to be generally sensitive in nature.⁸² Without revealing the substance of the information, I can say only that, after careful review, I likewise consider it sensitive.

[88] Since no relevant factors favour disclosure of this sensitive information, I find that its disclosure would be an unreasonable invasion of third-party personal privacy.

[89] On the other hand, I find that a small amount of the withheld information is not particularly sensitive,⁸³ and that this lack of sensitivity favours disclosure. This information consists of information related to the professional activities of a journalist. Previous orders have found that where a third party was acting in a professional capacity, this is a relevant factor favouring disclosure.⁸⁴ I find that the information is about the journalist in their professional capacity, and that this factor similarly favours disclosure. Since no s. 22(3) presumptions apply to this

⁸⁰ *Ibid* at para 89; Order F23-22, 2023 BCIPC 26 (CanLII) at para 56.

⁸¹ Order F19-27, 2019 BCIPC 29 (CanLII) at para 71, citing Order F17-13, 2017 BCIPC 14 (CanLII) at para 62.

⁸² See, e.g., Order F21-38, 2021 BCIPC 46 (CanLII) at para 16; Order F24-31, 2024 BCIPC 38 (CanLII) at para 144.

⁸³ Namely, the information I have highlighted at the bottom of page 72 of the records package.

⁸⁴ Order F24-45, 2024 BCIPC 53 (CanLII) at paras 67-68; Order F23-05, 2023 BCIPC 6 (CanLII) at paras 57-58; Order F18-42, 2018 BCIPC 45 (CanLII) at para 22.

information, and no other relevant factors weigh against disclosure, I conclude that disclosure of this information would not be an unreasonable invasion of third-party personal privacy.

Conclusion on s. 22

[90] I have found that all the information TRU withheld under s. 22(1) is personal information. I have found that s. 22(4)(e) applies to a small amount of the personal information, so that its disclosure is not an unreasonable invasion of privacy, but that no other s. 22(4) circumstances or s. 22(3) presumptions apply. I have found that ss. 22(2)(a) and (c) do not apply. Finally, I have found that the sensitivity of most of the withheld information weighs against disclosure, and that the lack of sensitivity of the remainder favours disclosure. Therefore, I find that disclosing the personal information that I have found is sensitive would be an unreasonable invasion of third-party personal privacy, and TRU must refuse to disclose it. On the other hand, disclosure of the information I have found is not sensitive and is about a third party in their professional capacity would not, on balance, be an unreasonable invasion of privacy, and TRU must not refuse to disclose it.

CONCLUSION

[91] For the reasons given above, I make the following order under s. 58(2) of FIPPA:

1. I confirm TRU's decision to withhold information under s. 14.
2. I confirm TRU's decision to withhold information under s. 13(1), subject to item 4 below.
3. I require TRU to withhold information under s. 22(1), subject to item 4 below.
4. TRU is required to give the applicant access to the information I have highlighted in yellow in the copy of the records which is provided to TRU with this order at pages 39, 40, 49, 54, 72, 77-78, 82-83, 114, and 164.
5. TRU must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the pages described at item 4 above.

[92] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by October 3, 2024.

August 21, 2024

ORIGINAL SIGNED BY

David S. Adams, Adjudicator

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