



Order F24-83

## LANGARA COLLEGE

Erika Syrotuck  
Adjudicator

September 16, 2024

CanLII Cite: 2024 BCIPC 95  
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**Summary:** An applicant requested a report written by an investigator relating to a workplace investigation from Langara College (College) under the *Freedom of Information and Protection of Privacy Act*. The College partially disclosed some information in the report but withheld the rest under ss. 13(1) (advice or recommendations), 19(1)(a) (threat to anyone else’s safety or mental or physical health) and 22(1) (unreasonable invasion of a third party’s personal privacy). The adjudicator found that ss. 13(1) and 22(1) applied to some of the information in dispute, but that s. 19(1)(a) did not apply. The adjudicator ordered the College to disclose the information that it is not authorized or required to withhold.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, s. 13(1), 19(1)(a), 19(2), 22(1), 22(2)(e), 22(2)(f), 22(2)(h), 22(3)(d), 22(4)(e), 22(5).

## INTRODUCTION

[1] The applicant made an access request, under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to Langara College (College) for a full copy of a report (Report) written by an external investigator (Investigator).

[2] The College refused access to the Report without relying on any FIPPA provisions. The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the College’s response.

[3] The College then provided another response to the applicant’s request, withholding the Report under s. 15(1)(c) (harm to investigative techniques and procedures) and s. 22(1) (unreasonable invasion of a third party’s personal privacy).

[4] As a result of mediation, the College reconsidered its position and released some of the information in the Report. It withheld the remaining information under ss. 13(1) (advice or recommendations) and 19(1)(a) (threat to anyone else's safety or mental or physical health) in addition to s. 22(1).

[5] Mediation did not resolve the remaining issues in dispute and the applicant requested the matter proceed to inquiry.

[6] The Investigator was provided notice of this inquiry and an opportunity to make submissions but chose not to do so.

[7] The College asked the OIPC to use its discretion under s. 56(1) not to hold an inquiry on the basis that the inquiry was moot. Another OIPC adjudicator decided that the matters at issue were not moot and should proceed to inquiry.<sup>1</sup>

[8] Finally, while I have considered all of the parties' submissions, I will only refer to the parts that are relevant to the issues in this inquiry.

## **ISSUES**

[9] At this inquiry, I must decide the following issues:

1. Is the College required to refuse to disclose the information in dispute under s. 22(1)?
2. Is the College authorized to refuse to disclose the information in dispute under ss. 13(1) and 19(1)(a)?

[10] Under s. 57(1), the burden is on the College to prove that the applicant has no right of access to the information in dispute under ss. 13(1) and 19(1)(a).

[11] With respect to s. 22(1), s. 57(2) says that the burden is on the applicant to prove that the disclosure of the information in dispute is not an unreasonable invasion of a third party's personal privacy.

## **DISCUSSION**

### ***Background and information at issue***

[12] The College is a post-secondary institution in British Columbia. The applicant worked as an instructor at the College for one term.

[13] Some time after her employment concluded, the applicant filed a bullying and harassment complaint with WorkSafeBC about events that occurred during

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<sup>1</sup> By way of letter, dated March 6, 2024.

her employment. The College hired the Investigator to investigate the applicant's complaint (Investigation). As part of the Investigation, the Investigator interviewed three third parties (Witnesses).

[14] At the conclusion of the Investigation, the Investigator wrote the Report. The Report totals 23 pages. The College disclosed the majority of the Report, including the identities of the Witnesses.

### ***Section 22 – unreasonable invasion of a third party's personal privacy***

[15] Section 22(1) requires a public body to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[16] The College withheld some information on three pages of the Report under s. 22(1).

[17] The analysis under s. 22(1) has four parts, starting with whether the information in dispute is "personal information" within the meaning of FIPPA.

#### *Is the information "personal information"?*

[18] Since s. 22(1) only applies to personal information, the first step in the s. 22(1) analysis is to determine whether the information in dispute is "personal information" within the meaning of FIPPA. Schedule 1 of FIPPA says that "personal information" means recorded information about an identifiable individual other than contact information. Information is about an identifiable individual when it is reasonably capable of identifying an individual alone or when combined with other sources of information.<sup>2</sup>

[19] FIPPA also says that "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. Past OIPC orders have repeatedly said that whether information is "contact information" depends on the context in which it appears.<sup>3</sup>

[20] The College says that, while not all of the information provided by Witnesses is attributed to a specific individual, the applicant would be able to infer the identities of the Witnesses and the information that each of them provided to the Investigator.

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<sup>2</sup> Order F18-11, 2018 BCIPC 14 (CanLII) at para 32.

<sup>3</sup> Order F22-62, 2022 BCIPC 70 (CanLII) at para 18; Order F20-13, 2020 BCIPC 15 (CanLII) at para 42.

[21] In my view, most of the information in dispute under s. 22(1) is personal information.

[22] Some of the information at issue is the views of the Investigator. I find this is identifiable information about her. It is clearly not contact information. I find that it is personal information.

[23] The other information in dispute is the views of the Witnesses. In some cases, the views are attributed to a specific Witness. This information is clearly about an identifiable individual. In other cases, the Witnesses' views are expressed as collective views. Due to the way the information in dispute is expressed, it is reasonable to infer that the collective views were held by each of the three Witnesses. Therefore, this information is about each of them as an identifiable individual. It is obviously not contact information and so I find it meets the definition of "personal information" under FIPPA.

[24] However, there is some information that I find is not about an identifiable individual. For example, one statement about what a witness said is too vague to be about an identifiable individual.<sup>4</sup> There is also a heading and I do not see how this is about an individual.<sup>5</sup> I find that this information is not personal information, and I will not consider it any further under s. 22(1).

*Section 22(4) – not an unreasonable invasion of privacy*

[25] The next step in the s. 22(1) analysis is to consider s. 22(4). Section 22(4) sets out circumstances where disclosure is not an unreasonable invasion of a third party's personal privacy. If any of the circumstances in s. 22(4) apply, the public body may not withhold the personal information under s. 22(1).

[26] The College says that none of the personal information falls into any of the categories listed in s. 22(4). In particular, it says that none of the information is about any College employee's "position, function or remuneration" under s. 22(4)(e) because this provision has been held not to apply to information collected or supplied in the course of a workplace investigation.<sup>6</sup>

[27] Section 22(4)(e) captures information about what third party did or said in the normal course of discharging their job duties as an employee, officer or member of a public body, but not qualitative assessments of those actions.<sup>7</sup>

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<sup>4</sup> On page 14 of the Report.

<sup>5</sup> On page 12 of the Report.

<sup>6</sup> Citing Order 01-53, 2001 CanLII 21607 (BCIPC) at para 40.

<sup>7</sup> Order 01-53, 2001 CanLII 21607 (BCIPC) at para 40.

[28] Consistent with past orders, I find that the information provided by the Witnesses does not fall under s. 22(4)(e) because it was collected in the context of a workplace investigation.

[29] However, I find that the views of the Investigator about the applicant fall under s. 22(4)(e).

[30] First, I find that, under the definition in Schedule 1 of FIPPA, the Investigator is an “employee” of the College.

[31] This is because FIPPA says that “employee” in relation to a public body includes a service provider. In turn, FIPPA says that “service provider” means a person retained under a contract to perform services for a public body.

[32] The College says that it retained the Investigator to investigate the applicant’s complaint. The disclosed part of the Report says that the Investigator was

“engaged by [the College] to investigate the above-noted Complaint. This engagement was memorialized by a letter ... which contained the Terms of Reference (“TOR”) in this matter.”<sup>8</sup>

[33] Based on this, I find that the Investigator was retained under a contract to perform the service of conducting the Investigation for the College. Therefore, the Investigator is an “employee” under FIPPA and for the purpose of s. 22(4)(e).

[34] I also find that the Investigator conducted the Investigation in the normal course of performing her job duties. The Investigator was hired to conduct the Investigation and made comments about the applicant in discharging this duty. None of the information in dispute is a qualitative assessment of the Investigator’s actions. Therefore, I find that s. 22(4)(e) applies to the Investigator’s comments that are about the applicant only, and not about any of the Witnesses.

### *Section 22(3) – presumptions*

[35] The next step in the s. 22(1) analysis is to consider whether any circumstances in s. 22(3) apply. Section 22(3) sets out circumstances where disclosure is presumed to be an unreasonable invasion of a third party’s personal privacy. The College argues that s. 22(3)(d) applies.

[36] Section 22(3)(d) says that a disclosure of personal information is presumed to be an unreasonable invasion of a third party’s personal privacy if

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<sup>8</sup> Report, page 4.

the personal information relates to employment, occupational or educational history.

[37] The College says that past orders have consistently held that information about an individual's participation in a workplace complaint or investigation process falls within the scope of this provision. As such, it says that the Witnesses' views, including their opinions of the applicant's conduct are part of their employment history.

[38] Past orders have held that an investigation into a workplace matter is the employment history of the person being investigated. Third parties' descriptions, comments or opinions provided in a workplace investigation where those third parties were not the subject of the investigation have been held not to be those third parties' employment history.<sup>9</sup> However, where witness statements reveal information such as the effect that the matter under investigation has had on their own work performance or details about their work history, the witness statements may still be the witness' employment history.<sup>10</sup>

[39] In this case, the information about the applicant was provided by the Witnesses, who were not the subject of the Investigation. They are descriptions of the applicant and her conduct in the workplace. The Witnesses statements do not contain information that would be the Witnesses' own employment history, such as qualitative information about their own work performance or descriptions of their past employment. In this context, I find that s. 22(3)(d) does not apply.

#### *Section 22(2) – relevant circumstances*

[40] The next step in the s. 22(1) analysis is to consider all the relevant circumstances, including those listed in s. 22(2)(a) through (i). I have considered the College's arguments about ss. 22(2)(e), (f) and (h). In addition, I have considered the fact that the personal information is about the applicant.

#### *Section 22(2)(e) – exposure to financial or other harm*

[41] Section 22(2)(e) says that a public body must consider whether disclosure of a third party's personal information will unfairly expose the third party to financial or other harm. If it applies, this circumstance weighs in favour of withholding the information in dispute.

[42] Past orders have said that the "other harm" under this provision includes mental harm. However, the mental harm must rise to "serious mental distress or

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<sup>9</sup> Order F20-13, 2020 BCIPC 15 (CanLII) at para 55. See also Order 01-51, 2001 CanLII 21607 (BCIPC) at para 41.

<sup>10</sup> See Order F23-56, 2023 BCIPC 65 (CanLII) at para 61.

anguish” that is beyond “embarrassment, upset or a negative reaction to someone’s behaviour”.<sup>11</sup>

[43] The College says that the harm in this case arises from the College’s belief that that disclosure would expose the third parties to worry, fear and anxiety. The College is concerned that the applicant would retaliate or harass the third parties.

[44] The College provided an affidavit from its Manager, Records Management and Privacy (Manager). The Manager says that the College was concerned that releasing the entire Report may cause others who participated in the Investigation to experience worry, fear or anxiety and that the applicant may take retaliatory action against those who participated in the Investigation.

[45] In the circumstances of this case, the College’s submissions do not persuade me that s. 22(2)(e) applies. The applicant already knows who the Investigator interviewed in the course of the Investigation, the outcome of the investigation and some of the Witnesses’ specific comments. I do not see, and the College has not adequately explained, how disclosure of the specific information in dispute will expose any third parties to unfair harm, including serious mental distress.

Section 22(2)(f) – supplied in confidence

[46] Section 22(2)(f) lists as a relevant circumstance whether the personal information has been supplied in confidence. If it applies, this circumstance weighs in favour of withholding the information in dispute.

[47] The College says that it treats workplace investigations as inherently confidential. The Manager says the College has a policy in place concerning investigations which establishes the expectation that investigators will ensure the privacy and confidentiality of investigations they carry out. The College also says that the Report itself is marked as privileged and confidential.

[48] In my view, none of the College’s evidence directly addresses whether the Witnesses supplied their views in confidence. However, I am mindful that a witness would generally provide information to an investigator who is conducting a workplace investigation in confidence. Further, given the nature of the information in dispute and the College’s evidence that it treats workplace investigations as confidential and has a policy to that effect, I am persuaded that the Witnesses supplied their personal information in confidence.

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<sup>11</sup> Order 01-15, 2001 CanLII 21569 (BCIPC) at para 49. See also Order F20-37, 2020 BCIPC 43 (CanLII) at para 120, Order F24-31, 2024 BCIPC 38 at para 118.

[49] For this reason, I find that s. 22(2)(f) applies.

#### Section 22(2)(h) – unfair damage to reputation

[50] Section 22(2)(h) asks a public body to consider whether the disclosure may unfairly damage the reputation of any person referred to in the records requested by the applicant. If it applies, it weighs in favour of withholding the information in dispute.

[51] The College says there is a reasonable and credible basis on which to find that disclosure of the information provided by Witnesses will expose them to attacks on their reputations.

[52] Section 22(2)(h) is about whether *disclosure* may unfairly damage a person's reputation. In my view, nothing in the information in dispute itself may damage the Witnesses' reputations. It is information about the applicant's conduct that they provided during the investigation. It is not apparent to me, and the College has not adequately explained, how disclosure of any of this personal information would harm the reputation of the Witnesses or anyone referred to in the records.

[53] As a result, I conclude that none of the information in dispute, if disclosed, would unfairly damage the reputation of anyone referred to in the records. Therefore, I find that s. 22(2)(h) does not apply.

#### Applicant's personal information

[54] Many past orders have considered whether the information in dispute is the applicant's personal information. In general, this is a factor weighing in favour of disclosing the information.

[55] The information that remains in dispute is what the Witnesses said about the applicant. This is her personal information and I find this weighs in favour of disclosure of the information in dispute.

#### Section 22(2) – summary

[56] I have considered all of the relevant circumstances and find that s. 22(2)(f) applies to the personal information in dispute. In addition, the fact that it is the applicant's personal information weighs in favour of disclosure.

#### *Conclusion s. 22(1)*

[57] I found that most of the information in dispute is personal information. However, I found that the Investigator's statements about the applicant fell under



s. 22(4)(e), so disclosing those statements would not be an unreasonable invasion of personal privacy under s. 22(1).

[58] On balance, I find that disclosure of the remaining personal information would be an unreasonable invasion of the Witnesses' personal privacy. No presumptions under s. 22(3)(d) apply. The personal information is simultaneously the Witnesses' and the applicant's personal information. The fact that it is the applicant's personal information weighs in favour of disclosure. However, the information was supplied in confidence and that weighs against disclosure. Given these balancing factors, I find that the applicant has not discharged the burden of proving that disclosure of the personal information in dispute would not be an unreasonable invasion of the Witnesses' personal privacy. I find that s. 22(1) applies to this information.

*Section 22(5) - summary*

[59] Section 22(5) requires a public body to provide a summary of the personal information in dispute to the applicant in certain circumstances. This provision says:

On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless

- (a) the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information, or
- (b) with respect to subsection (3) (h), either paragraph (a) of this subsection applies or the applicant could reasonably be expected to know the identity of the third party who supplied the personal recommendation or evaluation, character reference or personnel evaluation.

[60] Section 22(5)(b) does not apply because s. 22(3)(h) is not engaged.

[61] In addition, I find that a summary cannot be prepared without disclosing the identity of the individual who supplied it. This is largely for the same reasons as I found the information is personal information in the first place. Given that there are only three Witnesses, and the information is expressed as collective views that were held by each of them, it is not possible to summarize the information in a way that would not disclose the identities of the individuals who supplied the information.

[62] I find that s. 22(5) does not require the College to provide a summary.

### **Section 13 – advice or recommendations**

[63] Under s. 13(1), a public body may refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister, subject to certain exceptions. The purpose of s. 13(1) is to prevent the harm that would occur if a public body’s deliberative process was exposed to public scrutiny.<sup>12</sup>

[64] The information that remains at issue under s. 13(1) is:

- two of the section descriptions on the Report’s table of contents;<sup>13</sup>
- a heading;<sup>14</sup>
- some of the Investigator’s comments;<sup>15</sup>
- a comment of a Witness;<sup>16</sup>
- a footnote;<sup>17</sup>
- the contents of section seven of the Report;<sup>18</sup> and
- last three pages of the Report, in their entirety.<sup>19</sup>

[65] The first step in the s. 13(1) analysis is to determine whether the information in dispute is “advice or recommendations developed by or for a public body or a minister.”

[66] “Recommendations” include material relating to a suggested course of action that will ultimately be accepted or rejected by the person being advised.<sup>20</sup> The term “advice” is broader than “recommendations”<sup>21</sup> and includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.<sup>22</sup> Section 13(1) also encompasses information that would allow an individual to make accurate inferences about any advice or recommendations.<sup>23</sup>

[67] If the information is “advice” or “recommendations”, the next step is to determine whether any of the circumstances in ss. 13(2) or (3) apply. These provisions exclude some types of records and/or information from s. 13(1). This

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<sup>12</sup> *Insurance Corporation of British Columbia v. Automotive Retailers Association* 2013 BCSC 2025 at para 52.

<sup>13</sup> Report pages 2 and 3.

<sup>14</sup> Report page 12.

<sup>15</sup> Report pages 7, 8, 9, 14

<sup>16</sup> Report page 14. I found above that this comment was too vague to constitute personal information under the definition in FIPPA.

<sup>17</sup> Report page 14.

<sup>18</sup> Report page 19.

<sup>19</sup> Report pages 21-23.

<sup>20</sup> *John Doe v Ontario (Finance)* 2014 SCC 36 at para 23.

<sup>21</sup> *Ibid* at para 24.

<sup>22</sup> *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 113.

<sup>23</sup> Order F19-28, 2019 BCIPC 30 at para 14.

means that, if information falls within ss. 13(2) or (3) the public body may not refuse to disclose it, even if it is “advice” or “recommendations” within the meaning of s. 13(1).

*Is the information “advice” or “recommendations”?*

[68] The College says that the Report consists of the Investigator’s opinions, analysis and recommendations about the credibility and reliability of the evidence, and whether the applicant’s allegations are substantiated. It says that, in essence, the Report is an expert opinion on the evidence and a recommendation as to whether the College should accept the applicant’s allegation of misconduct.

[69] In my view, the Investigator’s comments, the footnote and the portions of contents of the three pages that are the Investigator’s analysis and findings are “advice” within the meaning of s. 13(1). I accept that the Investigator is giving her opinion on matters relating to the investigation using her skill and expert judgement.

[70] However, I find that the remaining information is not advice or recommendations within the meaning of s. 13(1).

[71] First, some of the information only reveals the scope of the advice requested but not any advice or recommendations itself. Past orders have said that s. 13(1) does not apply to this kind of information.<sup>24</sup> On this basis, I find that one of the section headings, the information in section seven and some information in the last three pages of the Report do not fall within the scope of s. 13(1).

[72] In addition, I do not see how the comment of the Witness, the heading, the other section description or the headers and footers on the last three pages would reveal any advice or recommendations developed by or for a public body and the College did not adequately explain.

*Sections 13(2) and (3)*

[73] The next step in the s. 13 analysis is to consider ss. 13(2) and (3).

[74] Section 13(2) says that a public body must not refuse to disclose the types of records or information set out in ss. 13(2)(a) through (n). Section 13(3) says that s. 13(1) does not apply to information in a record that has been in existence for 10 or more years.

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<sup>24</sup> Order F15-33, 2015 BCIPC 36 (CanLII) at para 24.

[75] Neither party addressed s. 13(2) directly. I am not persuaded that any of the circumstances apply.

[76] The information in the Report is clearly not 10 years or older, so s. 13(3) also does not apply.

*Conclusion – s. 13(1)*

[77] I find that s. 13(1) applies to the Investigator's comments, the footnote and the contents of some of the last three pages of the Report, but not to the remaining information.

**Section 19(1)(a) – threat to anyone else's safety or mental or physical health**

[78] Section 19 says:

19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or

(b) interfere with public safety.

(2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.

[79] As per the Notice of Inquiry, only s. 19(1)(a) is at issue.

[80] The College says that s. 19(1)(a) applies because disclosure will threaten the third parties' safety or health and that of the applicant.

[81] I found above that the College is required to withhold personal information supplied by the Witnesses. It is not apparent to me how the remaining information in dispute, if disclosed, could reasonably be expected to threaten the health or safety of the Witnesses or any other third parties.

[82] With respect to the applicant, the College says that s. 19(1)(a) applies in order to protect the applicant from harm. However, s. 19(1)(a) is about *anyone else's* safety or health. With respect to the applicant's safety or mental or physical health, only s. 19(2) could apply.

[83] Even though s. 19(2) was not an issue listed on the Notice of Inquiry, I will address it because I can easily dispose of this issue. The College has not

provided adequate argument or evidence indicating that disclosure of the applicant's personal information could reasonably be expected to result in immediate or grave harm to the applicant's safety or health. If s. 19(2) was an issue in this inquiry, I would find that s. 19(2) does not apply.

[84] In summary, I find that s. 19(1)(a) does not apply.

## **CONCLUSION**

[85] For the reasons above, I make the following order under s. 58 of FIPPA:

1. Subject to item 3 below, I confirm the College's decision to refuse to disclose some information under s. 13(1), in part.
2. Subject to item 3 below, I require the College to refuse to disclose some of the information in dispute under s. 22(1).
3. I require the College to give the applicant access to the information I have highlighted in orange on pages 2, 3, 11, 12, 14, 19, 21, 22 and 23 in the copy of the records provided to the College with this order.
4. The College 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 3 above.

[86] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by October 30, 2024.

September 16, 2024

## **ORDER SIGNED BY**

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Erika Syrotuck, Adjudicator

OIPC File No.: F22-90205