OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 00-51

INQUIRY REGARDING UNIVERSITY OF BRITISH COLUMBIA LAW FACULTY RECORDS

David Loukidelis, Information and Privacy Commissioner
November 20, 2000

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Summary: Applicant sought access to his own personal information, and a large variety of records related to grading, exam design, failure, withdrawal and readmission, from UBC's Faculty of Law. He also requested that a failing mark on his transcript be corrected to a passing mark. UBC found to have searched adequately for responsive records, except with respect to one record. Sections 6(1), 7 and 10 do not apply to applicant's correction request. Section 28 cannot be used to analyze and alter UBC's policies and procedures. UBC was not required to make the requested correction under s. 29(1). Although UBC was not required under s. 29(2) to make the annotation in the manner sought by the applicant, an annotation was required. UBC was not required to disclose records under s. 25.

Key Words: purposes of the Act – information rights – duty to assist – adequacy of search – every reasonable effort – timeliness – time extension – public interest – accuracy – correction – annotation – directory of records – policy manuals – penalties and offences.

Statutes Considered: *Freedom of Information and Protection of Privacy Act* (British Columbia), ss. 2, 4, 6, 7, 10, 25, 28, 29, 69, 70, 74; *Freedom of Information and Protection of Privacy Act* (Alberta), s. 34; *Freedom of Information and Protection of Privacy Act* (Ontario), s. 40(2).

Authorities Considered: B.C.: Order No. 20-1994; Order No. 30-1995; Order No. 124-1996; Order No. 162-1997; Order No. 246-1998; Order No. 317-1999; Order 00-15; Order 00-16; Order 00-26; Order 00-27; Order 00-32; Order 00-37; Order 00-42. **Alberta:** Order 98-002. **Ontario:** Order P-186; Order P-1721; Order M-201; Investigation Report I93-039P; Investigation Report I95-031M; Investigation Report I95-110M.

Cases Considered: *McInerney* v. *MacDonald*, [1992] 2 S.C.R. 138; [1992] S.C.J. No. 57.

1.0 INTRODUCTION

On August 5, 1999, the applicant made an access request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the Faculty of Law at the University of British Columbia ("UBC") for "all records pertaining to myself including those for admission, registration, evaluation and administration, and including memos, notes and minutes of meetings if I was mentioned." The applicant further clarified this request by saying the following: "Request for exams and questions sets is limited to the six documents from Real Property. Letters sent to me and documents I submitted to the Faculty may be omitted."

The applicant also made a second request to UBC. According to his request for review, this request was submitted on the same day as the first request. The second request covered a large range of documents, related to a lengthy list of administrative policies concerning, among other things, classroom instruction and evaluation, grading, curriculum, exam writing, withdrawal and readmission.

In addition to the two requests, the applicant also submitted a request for correction of personal information to UBC on September 27, 1999. He requested the following: "Please correct my grade in first year Real Property in the Faculty of Law, from an F to a passing grade". Accompanying that request was a two-page annotation that the applicant wished to have appended to his transcript if UBC denied his request for correction. On December 17, 1999, the applicant submitted a "Renewed & Amended" request for correction with a three-page annotation attached to it. The amendments related to the facts and arguments presented and not to the actual item to be corrected.

UBC responded to the two access requests together; it disclosed 81 pages of records, some of which it severed under s. 22 of the Act. UBC later denied the applicant's request for the correction of his mark stating, "The transcript accurately records information of your academic performance in the … course". UBC also denied the applicant's request to have his transcript annotated as "the length of the annotation you have requested is unreasonable" and "the concerns you have raised in that document … have been addressed by the Senate Appeals Committee on Academic Standing".

In his request for review, under s. 52 of the Act, the applicant notes that, of the 81 pages he received in response to his two access requests, only the first three pages related to his second request for general policy information. He also notes that UBC has not identified "which documents pertain to my request at all". It is the response to this second request that he wishes to have reviewed. In respect to his request for personal information, the applicant notes, "I have no evidence to date that the release is incomplete."

At the request of my Office, the applicant submitted a clarification of his request for review of UBC's responses to his second access request. In this clarification, the applicant raised a public interest argument under s. 25 of the Act.

Early this year, the applicant submitted a request for review of UBC's response to his request for correction or annotation of his UBC transcript. The applicant requested that UBC's alleged failure to respond in time to the correction requests, under ss. 6 and 10 of the Act, be reviewed, as well as its obligation under ss. 28 and 29 to correct or annotate the requested information.

Since neither the access nor correction issues were resolved through mediation the applicant requested an inquiry, which I held, under s. 56 of the Act, as a written inquiry.

2.0 ISSUES

The Notice of Written Inquiry issued by this Office frames the following issues:

1. In carrying out its search for records, did UBC comply with its obligation under s. 6(1) of the Act to make every reasonable effort to assist the applicant and to respond without delay openly, accurately and completely?

2. Is UBC required under s. 29 of the Act to make the corrections requested by the applicant?

The second issue encompasses the question of whether UBC has complied with its s. 29(2) obligation to annotate the applicant's personal information with the requested correction.

In its initial submission, UBC identifies, and argues, the s. 6 issue as dealing with "the length of time it took UBC to respond to his [the applicant's] correction request". Since the applicant also argues this issue – in the form of an alleged violation of s. 7 time limits for responding and s. 10 extension of time provisions – I have addressed it also.

In his initial submission, the applicant objects to the fact that s. 28 is not listed as an item under review in the Portfolio Officer's Fact Report. My review of the applicant's request for review indicates that the s. 28 issue was, in fact, raised when the case was originally opened by this Office. I therefore decided to include it as an issue in this inquiry and UBC was given an opportunity to make submissions on that point. The applicant was granted the right to reply to UBC's submission on that issue. I also received supplementary submissions on the s. 6(1) adequacy of search issue.

Last, the applicant also argues that the requested information should be disclosed under s. 25 of the Act. He obliquely referred to the information as 'a matter of public concern' in his original request for review and explicitly cited s. 25 in the clarification related to this request. Although it is not mentioned as an issue in the Notice of Written Inquiry, and was not addressed by UBC in its initial or reply submissions, I determined that it should be considered, given the circumstances just described. I therefore offered the parties an opportunity to address the issue and they made submissions.

A few words are needed about the burden of proof on the various issues. Although s. 57 of the Act, which establishes the burden of proof on parties in an inquiry, is silent with respect to adequacy of search issues, previous orders have placed the burden of proof on the public body to establish that it has complied with its ss. 6(1), 7 and 10 duties. As was noted in the Notice of Written Inquiry in this case, previous orders have placed the burden of proof on the s. 29 issue with the public body. See Order No. 317-1999 and Order No. 124-1996.

Section 57 is also silent about the burden for s. 28 matters. In the only order in which s. 28 has been raised, my predecessor declined to discuss the issue, as other sections of the Act were determinative of the issues. A public body is in the best position to demonstrate that it has complied with its s. 28 duty to make "every reasonable effort" to ensure that accurate and complete personal information will be, or has been, used to make a decision affecting an individual. This factor, and fairness, favour placing the burden of proof on a public body to establish that it has met this burden. This is consistent with the policy that, generally, underpins s. 57 of the Act, which allocates burdens of proof, as viewed in light of s. 2(1). Moreover, as LaForest J. noted in *McInerney* v. *MacDonald*, [1992] 2 S.C.R. 138; [1992] S.C.J. No. 57, at p. 10 S.C.J., "the burden of proof should fall on the party who is in the best position to obtain the facts". As appears below, however, I have decided this issue does not, in any case, squarely arise on the facts here.

The burden is on the applicant with respect to the issue of disclosure under s. 25. (See, for example, Order No. 162-1997 and Order 00-16.)

3.0 DISCUSSION

3.1 Additional Issues Raised By the Applicant – In both his requests for review and submissions, the applicant refers to several other sections of the Act, not all of which are relevant to the specific issues he has asked be reviewed. Before discussing the issues actually under review in this inquiry, I will clarify why I have not dealt with the other sections raised by the applicant.

Added Arguments For Disclosure

The applicant cites s. 35 as support for the release of statistical information he requested. He also cites ss. 22(2)(a), (c), (e), (g) and (h) and ss. 22(4)(d) and (e) to support the release of information in unsevered form. Both ss. 22 and 35 address the disclosure of "personal information" as defined in the Act. In this case, the applicant has not requested a review related to the release of personal information. He has also made it clear, in his access request for policy information, that he does not want personal information of individual students. UBC acknowledged, in its response to the applicant, that the requested policy information is non-personal and it has not severed the three policy pages that it released to the applicant. As no personal information is at issue in the access portion of this inquiry, it is not necessary for me to consider arguments related to s. 22 or s. 35.

The Act's Purposes and Disclosure of Information

The applicant also repeatedly cites ss. 2 and 4 of the Act as reasons why he should be given access to the non-personal information he has requested. Section 2(1) of the Act sets out the purposes of the Act. Section 4(1) creates a statutory right of access to a record; s. 4(2) stipulates that a public body must disclose every portion of a record that is not excepted from disclosure by one of the Act's exceptions to the right of access. Sections 2 and 4 do not, of themselves, provide specific bases for disclosure in a given case. Nor do they create exceptions to the right of access. These sections are relevant in a general sense, but they do not determine whether specific information is to be disclosed or withheld on the facts of this case. After careful consideration of the applicant's arguments, I have decided that I need not discuss these sections further in order to dispose of this matter.

Policy Manuals Under the Act

The applicant intimates that UBC should be required to produce a "proper policy manual" that would be listed in the directory of records in accordance with s. 69 of the Act and be available without request under s. 70 of the Act. Neither of these sections is relevant to this inquiry and neither is properly before me. For clarity, however, it should be noted that it is abundantly clear that s. 70 does not require a public body to produce a policy manual. That section merely requires a public body to make available to the public, without an access request, any "manuals, instructions or guidelines" issued to its employees or officers and any "substantive rules or policy statements" adopted by it. If none of these exists, s. 70 is not triggered.

Allegations Regarding Section 74

The applicant also says

> … the Faculty/University response, assuming there are documents (how the institution could be run without documents is another matter) appears to be an offence under s. 74 of the Act:

The applicant goes on to quote s. 74, before concluding as follows:

> An investigation stemming from this complaint is due by s. 42 of the Act, and or an inquiry stemming from the review, followed by and [*sic*] order and notice regarding failure to meet the prescribed standards.

Section 74 – which applicants have raised in a number of other cases – reads as follows:

> 74(1) A person must not willfully do any of the following:
>
> (a) make a false statement to, or mislead or attempt to mislead, the commissioner or another person in the performance of the duties,

> powers or functions of the commissioner or other person under this Act;
>
> (b) obstruct the commissioner or another person in the performance of the duties, powers or functions of the commissioner or other person under this Act;
>
> (c) fail to comply with an order made by the commissioner under section 58 or by an adjudicator under section 65 (2).
>
> (2) A person who contravenes subsection (1) commits an offence and is liable to a fine of up to $5 000.
>
> (3) Section 5 of the *Offence Act* does not apply to this Act.

This provision is obviously aimed only at acts or omissions relating to the commissioner's duties or actions. It has nothing to do with the quality or timeliness of a public body's response to an access request under the Act. In any case, I have no authority under, or respecting, anything covered by s. 74. It creates offences that only the appropriate authority can prosecute. I have no authority to issue orders respecting alleged breaches of s. 74.

UBC's Response to the Applicant's Access Requests

A brief comment is in order about UBC's response letter. After clearly describing the nature of the two requests submitted by the applicant, UBC's response letter simply says, "Please find enclosed 81 pages of records severed in accordance with s. 22 of the Act." It does not say whether the disclosed records respond to the applicant's first or second request or whether they relate to all or only a portion of the sub-categories in the second request. The letter also says that information has been severed under s. 22, but does not indicate to which request this severing relates. Nor does it give the applicant any general sense of what kinds or categories of personal information UBC severed from the record. The applicant and I have both been left to sort out the meaning of UBC's response using the records disclosed by UBC.

It would have been preferable if UBC had, consistent with the requirements of s. 8, actually provided "reasons for the refusal" in its response to the applicant. Section 8(1)(c)(i) says a public body must tell the applicant the "reasons for the refusal *and* the provision of this Act on which the refusal is based" (emphasis added). Merely citing a section number is not sufficient.

I recognize it can be difficult for a public body to give reasons without disclosing information that is excepted from disclosure, but s. 8(1)(c)(i) clearly requires it to do so. This dilemma is especially compelling where the severed information is third party information protected under s. 22. (The same concern arises where third party information protected under s. 21 is involved.) I also recognize that public bodies can face other pressures, which make it difficult, practically speaking, to give detailed reasons for refusal (including detailed descriptions of withheld records). In Order 00-42,

I commented on the adequacy of the public body's response letter in light of s. 8. I found that references to the sections of the Act relied on to withhold information, and the linking of those references to specific numbered records, sufficed for the purposes of s. 8. I went on, in a passing comment on p. 12, to say that "a public body should be relatively forthcoming in its reasons for applying each exception" and should, "wherever possible", give a factual basis for application of an exception.

These comments were not intended to impose an unrealistic burden on public bodies in responding to requests. At p. 11 of Order 00-42, I acknowledged that it is necessary to be sensitive to the burden faced by public bodies, notably in responding to voluminous requests (*i.e.*, where a public body deals with large numbers of requests or with a request which involves a large number of records, or both). It is impossible to prescribe rules about the level of detail required in all responses. Compliance with s. 8 can only be judged in the circumstances of each case. My comments in Order 00-42 merely indicate that it is *desirable* for public bodies to give as detailed reasons as is practicable, bearing in mind (among other things) the nature and number of records involved. To be clear, Order 00-42 does not create a new standard for responses. This should be obvious from the fact that I considered the public body's response in that case to be adequate for the purposes of s. 8. It is not necessary to dispose of this issue here.

Other Issues

The applicant also raises issues related to previous requests he made to UBC and to a subsequent review by this Office, as well as his concerns about a s. 43 application that UBC apparently submitted to this Office at some point. As these issues are not properly before me in this inquiry, it is not necessary for me to comment, or to make a ruling, on these issues.

3.2 Focus of the Applicant's Concerns – The following quote, from the applicant's initial submission, illustrates the variety of initiatives that the applicant has pursued in order to have a failing mark in a first year law course changed to a passing mark:

> In total I attempted to resolve this with quiet diplomacy and discretion ten different times before formally appealing outside the Faculty via the *Privacy Act* for a correction of personal information or annotation to my transcript on this matter: initially in person to the Associate Dean; by letter to the Examinations Committee; by application for reread; twice by telephone with the Chair of the Examinations Committee; via the AMS Ombudsperson; by appeal to the Dean; by giving options to the Associate Dean; via UBC Ombudsperson; and by appeal to UBC Senate. Ample good faith and concern for our Faculty of Law on my part was to no avail, each time meeting rejection. I am left with no alternative but to appeal to the courts of law to obtain justice.

There is no mistaking that this issue is extremely important to the applicant. This is reflected in the fact that his submissions are lengthy and detailed. He has, to give examples, appended to his submissions copies of exam questions and answers, his exam re-read application and various memos and letters to various UBC appeal and other

bodies. A good deal of the applicant's arguments, and supporting material, are relevant to his various attempts to obtain a passing mark. Most of the applicant's substantive concerns are beyond my legislative authority. The sections entitled "Arbitrary Cooking Standards Applied in Order to Fail Me", "Defacto Mandatory 'Suggested' and 'Encouraged' Failure Policy" and "Subsequent Administrative Law Disputes" are examples of extraneous material that is not relevant to this inquiry. I have read and considered all of the applicant's submissions and material, but mention only material relevant to this inquiry under the Act.

3.3 Adequacy of Search For Records – Section 6(1) of the Act requires the head of a public body to "make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely". The standards expected of public bodies under s. 6(1) in their efforts to search for requested records – and the standards to be met in describing those efforts in an inquiry such as this – have been discussed in some detail in Order 00-15, Order 00-26 and Order 00-32, for example. There is no need to repeat those discussions here.

One of the documents that the applicant was interested in receiving was a mark distribution report. According to the applicant he was provided with a copy of the 1997-98 mark distribution report but did not receive the 1998-99 mark distribution report. He believes that this latter document should both exist and be provided to him. The following submission on the s. 6(1) issue is found in the applicant's initial submission:

> With regards to the whole release I do not believe the Faculty has conducted an adequate search for records. How can they run the institution without there being documents they now say do not exist. Many items they say do not exist at all. (Page 4, item 10)

UBC interprets its search duties under s. 6(1) as follows (from p. 2 of its supplementary submission):

> UBC is required to conduct a reasonable search for records, meaning that the staff most familiar with the records must conduct a search in the locations where the records are most likely to be held.

At p. 3 of this same submission, UBC refers to the orders cited above as setting the standard by which its search must be judged. I agree with UBC's assessment of what a reasonable search means in practical terms.

To document its search for responsive records, UBC relies on an affidavit from Phyllis Chow, whose office was involved in UBC's processing of the request. Exhibit "B" to her affidavit is a memo sent by UBC's Freedom of Information Coordinator to the Faculty of Law's Administrator, asking for the personal records requested by the applicant and for a fee estimate for records not containing the applicant's personal information. The Associate Dean of the Faculty of Law responded by providing some of the requested records and noting that the Faculty "did not have records available for the other information requested by" the applicant. As part of a mediated revision of a

number of the applicant's requests for records – including the one under review in this inquiry – the applicant submitted a request to UBC for 36 items. The Associate Dean of the Faculty of Law responded by releasing documents related to ten of these items and confirming that no documents existed for the remaining requested items.

I am satisfied from the material before me that UBC searched for records in the place a reasonable person would consider the most appropriate location for the requested items – the administrative offices of the Faculty of Law. The question that remains, in my mind, is whether the Faculty should have looked beyond its own domain to see if requested policies existed on a university-wide basis. I have carefully considered the obligation of UBC in this regard and conclude that, since the applicant was concerned about marks he received for courses within the Faculty of Law (as established by his various appeals and correction request), and the Faculty was responsible for assigning these marks, the Faculty is the logical source for any responsive policies. Subject to what is said below, I am satisfied UBC has, within the meaning of s. 6(1), made every reasonable effort to search for the requested records.

The one loose end is the 1998-99 mark distribution report that the applicant has singled out. The applicant's original request is very broad, but this distribution report falls, on a reasonable interpretation of the request, within the records covered by the request. This conclusion is supported by the fact that UBC provided the applicant with a copy of the 1997-98 version of the report. Since no explanation regarding this specific record has been provided by UBC, it is difficult to know if it was in existence at the time of the applicant's request. If the document had been prepared by August 5, 1999 – the date of the applicant's request – it should have been provided to the applicant. In the absence of evidence from UBC on this point, I find that it has not searched adequately for this one record. I make the appropriate order below.

3.4 Timeliness of UBC's Response – UBC issued its response to the applicant's August 5, 1999 access requests on August 30, 1999, which is within the 30-day time frame legislated in s. 7 of the Act. There is, accordingly, no issue to be decided in this inquiry regarding the timeliness of UBC's response to the access requests. I say this despite the applicant's assertion that the time taken to respond to the request violated principles of administrative law.

On the third page of the covering letter accompanying his initial submission in this inquiry, the applicant says UBC has violated the Act through its "[f]ailure to respond for 3 months to my initial request for correction on September 27, 1999". At p. 52 of the "Inside the Faculty of Law" document included in his initial submission, the applicant says "he has received no direct response as to the correction issue". This is inaccurate, since the material before me establishes that UBC responded to the applicant's correction request on December 22, 1999.

At p. 53 of his initial submission, the applicant says UBC did not notify him of an extension of time, under s. 10 of the Act, to respond to his correction request. On the first

page of its initial submission, UBC addresses the time taken to respond to the applicant's correction request in the context of s. 6(1) of the Act, which reads as follows:

> The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

UBC says it was unable to respond without delay due to "understaffing" in its Freedom of Information Coordinator's office and the fact that it was also "considering at the time a s. 43 application" concerning the applicant. It also points out that the applicant's *"new and amended request"* correction request of December 17, 1999 was responded to "promptly" on December 22, 1999 (emphasis in the original). That is the correction request in issue here. The applicant's complaint about delay relates to a correction request that is not in issue here. It is, therefore, not necessary to consider whether the response times contemplated by ss. 7 and 10 of the Act, or the duties imposed on public bodies by s. 6(1), apply to a request for correction of personal information. (I am inclined to the view that those provisions do not apply to correction requests.)

I should add, in passing, that nothing in the Act permits an applicant's request, of any kind, to be put on hold while a public body decides whether to apply for an authorization under s. 43.

3.5 Disclosure in the Public Interest – The applicant says that s. 25(1) of the Act requires disclosure of records in this case. Sections 25(1) and (2) of the Act read as follows:

> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.

The following passage is from p. 44 of the applicant's initial submission:

> Issues of legal education and lawyer formation are in the public interest because of the unequaled power, second only to the rich of which there is considerable overlap, of lawyers as a group. Indeed one of the biggest international unions are the Bars, with the strongest closed-shop contracts – the Law Society Acts. The public have a right to know and influence, what is going on in the law schools of professional induction.

UBC says that, as the requested records do not concern "environmental health or safety issues", the applicant must prove that the disclosure of information is "clearly" in the public interest. It goes on to cite Order No. 246-1998 as an example of when a public body is required to disclose information under s. 25. In that case, my predecessor said, at p. 10, that "this positive duty of disclosure only exists in the clearest and most serious of situations". At p. 3 of its supplementary submission, UBC also cites Order 00-16 to support its contention that s. 25 should not be for "self-appointed public advocates to champion their personal causes" or for the applicant to "revise and update a 4th edition of his self-titled, 'INSIDE THE UBC FACULTY OF LAW'". It relies on the following passage from Order 00-16, at p. 14:

> This provision is not an investigative tool for those who seek to look into the affairs of a public body. It is an imperative requirement for disclosure which is triggered by specific information the disclosure of which is clearly in the public interest.

UBC argues that neither the applicant's request for his personal information, nor his request for general documents about educational and grading procedures, "possess the necessary elements of seriousness or the compelling need for disclosure that is contemplated by s. 25 of the Act". The comments I made in Order 00-16 are apposite here. Section 25(1) does not apply in this case.

3.6 Accuracy of Personal Information – The essence of the applicant's case is that his failing mark in his first year Faculty of Law Real property law exam is inaccurate and should be corrected. UBC takes the view that the mark is accurate and that correction is not appropriate.

Section 29 reads as follows:

> 29(1) An applicant who believes there is an error or omission in his or her personal information may request the head of the public body that has the information in its custody or under its control to correct the information.
>
> (2) If no correction is made in response to a request under subsection (1), the head of the public body must annotate the information with the correction that was requested but not made.
>
> (3) On correcting or annotating personal information under this section, the head of the public body must notify any other public body or any third party to whom that information has been disclosed during the one year period before the correction was requested.
>
> (4) On being notified under subsection (3) of a correction or annotation of personal information, a public body must make the correction or annotation on any record of that information in its custody or under its control.

Alleged Link Between Sections 28 and 29

Before dealing with the merits of the s. 29 issue, it is necessary to deal with the applicant's contention that s. 29 cannot be addressed without considering s. 28, which reads as follows:

> 28 If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must make every reasonable effort to ensure that the information is accurate and complete.

This argument is evident from the following paragraphs, found at pp. 14 and 19 of the applicant's initial submission:

> The focus of attention has wrongly shifted to the wording of s. 29 alone, ignoring the intent that s. 29 operate in conjunction with s. 28. That this is the legislative intent is even evidenced, not by mere inspection of the *Act* and common sense, but by the Manual also, cited above…"
> …
>
> Section 28 continues to operate through a correction request and operates in conjunction with s. 29. S. 29 does not operate alone, and the interpretation that correction upon request is optional and discretionary is wrong because s. 28 continues to operate and is really what gives s. 29 teeth.
>
> As it has been s. 28 has been treated more as a preamble to sort of be considered in the background to make s. 29 have some sense to it – otherwise why bother to correct at all even simple facts, without the law telling bureaucrats to do so – but s. 28 has been ignored as a piece of legislation, and amazingly, or not because of its significance, as the engine of the correction/annotation provisions.

At p. 16 of his initial submission, the applicant says s. 28 "ought to be the real focus of correction disputes…".

The applicant's contention that "common sense" dictates that an inter-relationship exists between s. 28 and s. 29 has some merit. If personal information is inaccurate – including because a public body has not made every reasonable effort to ensure it is accurate – it would be reasonable for the affected individual to seek its correction. The applicant's argument, however, goes much further than this, to imply that a s. 29 correction request cannot be evaluated without a lengthy investigation into the manner in which the personal information was gathered or produced.

This analysis is incorrect. The s. 28 obligation is free-standing; review of a public body's compliance with s. 28 is not a necessary component of review of a public body's response to a correction request. The applicant's case is not assisted by his reference to the '*Freedom of Information and Protection of Privacy Act* Policies and Procedures Manual (Revised)', published by the Corporate and Information Access Branch of the Information, Science and Technology Agency. (That document can be

found at http://www.ista.gov.bc.ca/foi_pop/revised_manual/ToC.htm.) The Manual recommends, at Part 3, Division 1.29, that public bodies adopt the following policy respecting s. 29:

> Public bodies have a duty to ensure that the personal information they hold is accurate and complete (see s. 28). Factual information shall be corrected upon receiving adequate proof of the need to correct.

In its discussion of s. 28, at Part 3, Division 1.28, the Manual suggests that, if a piece of personal information is inaccurate, a public body should look at procedures under s. 29 to correct the inaccuracy. This implies nothing more than that the Act offers a mechanism for dealing with inaccuracies if they occur. These portions of the Manual – a useful document that is not, ultimately, binding on public bodies or on me – do not suggest, even, that every correction request is linked to an assessment of how the personal information came to be inaccurate.

Accuracy of Personal Information

I will now deal with the applicant's contention that UBC has failed to comply with its s. 28 duty. The question is whether the mark assigned to the applicant for his first year real property law exam in the Faculty of Law is without error or omission and whether UBC has been thorough and comprehensive in its attempts to ensure that the mark is accurate and complete.

The applicant correctly points out that there are no orders under the Act that interpret s. 28. Commissioners in other jurisdictions have, however, addressed very similar statutory provisions. In Order 98-002, the Information and Privacy Commissioner for Alberta said the following (at paragraph 86):

> Section 34 [which is essentially identical to s. 28] incorporates a fundamental principle of "fair information practices", in that it requires that public bodies, who use personal information to make decisions about individuals, ensure that the personal information is accurate and complete. As stated in Ontario Investigation I95-031M, "The importance of this 'data quality' principle cannot be overstated; its absence can lead to serious consequences."
>
> The Concise Oxford Dictionary, Ninth Edition, defines "accurate" to mean, in part, "careful; precise; lacking errors", and defines "complete" to mean, in part, "having all its parts; entire; finished". Black's Law Dictionary defines "complete" to mean, in part, "including every item or element; without omissions or deficiencies; not lacking in any element or particular". I accept those definitions for the purposes of interpreting s. 34(a).

After citing the definition of the word 'reasonable' from *Black's Law Dictionary*, the Commissioner went on to accept the interpretation of "every reasonable effort" accepted by my predecessor in Order No. 30-1995, at p. 7:

> Every reasonable effort is an effort which a fair and rational person would expect to be done or would find acceptable. The use of 'every' indicates that a public

> body's efforts are to be thorough and comprehensive and that it should explore all avenues in verifying the accuracy and completeness of the personal information.

Investigation Report I93-039P, issued by the then Assistant Information and Privacy Commissioner for Ontario, Ann Cavoukian (the current Commissioner), dealt with s. 40(2) of the Ontario legislation, which is similar to s. 28. She said the following, at p. 8, about the word 'reasonable' in s. 40(2):

> Thus, for reasonable steps to have been taken would not have required a standard so high as to necessitate that every possible step be pursued to ensure accuracy.

(See also Investigation Report I95-031M and Investigation Report I95-110M.)

I agree that the importance of the data quality principle underpinning s. 28 cannot be overstated. A public body's failure to comply with it can, for example, have serious financial consequences for an individual or infringe an individual's right to life, liberty and security of the person. With a slight qualification, I agree that the standard to be applied under s. 28, in light of the facts of each case, is as set out by David Flaherty in Order No. 30-1995, as quoted above. The qualification is that, like my Ontario colleague, I consider that the accuracy and completeness obligations do not require a public body to explore literally "all avenues in verifying the accuracy and completeness of the personal information". It is not necessary for "all avenues", no matter how unlikely or obscure, to be pursued. Section 28 requires thorough and comprehensive efforts to comply, but not the pursuit of avenues of inquiry (or the undertaking of other efforts) that a reasonable person would consider plainly fruitless.

On p. 2 of the s. 28 portion of his initial submission, the applicant says this inquiry "is not an appeal of academic judgement since my position is that sufficient academic judgement has not been applied and where it was it was skewed by low-level information policy". He also says the following, at p. 27:

> By s. 28 of the *Freedom of Information and Protection of Privacy Act* I am entitled to 'every reasonable effort to ensure that the information is accurate and complete' – in this case the information on my transcript. Faculty policy by design precludes a reasonable application of academic judgement in cases such as mine, and in fact it appears that arbitrary judgement was applied along with conflicting accounts of mark cooking. The Commissioner should investigate Faculty Privacy rights policy, and my case directly.
>
> …
>
> I submit that s. 28 incursions on the bureaucratic control of schools in their personal information manufacture is but one means of this democratization.

The crux of the applicant's view of s. 28 can be seen from the following passage in his initial submission:

> Section 28 is legislation, supposedly put there for some purpose beside [*sic*] making the FOI&PP Act look nice – the obvious target is low-level bureaucratic information policy, which in reality inside an institution operates *on* the Commission categories of "fact" and "opinion"… .
> …
> Section 28 is more than intended to tell bodies to be diligent in avoiding simple mistakes in gathering outside created information or in forming subjective opinions: s. 28 is there because the legislature realized that public bodies are in the business of information manufacture and in its more profound sense s. 28 instructs public bodies on the manufacturing process.
> …
> … policy is at a far lower level of significance under UBC *Act* than s. 28 of the *FOI&PP Act,* such that s. 28 can impinge on low-level bureaucratic policy, without doing violence to the autonomy of UBC." [emphasis in original]

The applicant also says the following at p. 22 of the s. 28 portion of his initial submission:

> The FOI&PP Act focuses on correction of information, not appeal of substantive decisions, but intends that substantive decisions can be changed. This intent should be carried out, other avenues notwithstanding, until the legislature, or circumstance that finds the two appeal avenues identical, indicates otherwise. The Act is intended to impinge on most government operation under other acts.

The following arguments appear at pp. 5 and 7 of UBC's supplementary submission:

> It [s. 28] deals with the reasonableness of a public body's efforts to ensure the *information* is accurate and complete; it does not licence the censure of UBC's *academic policies or processes* which may have been used in determining a student's academic standing, as is demanded by … [the applicant].
> …
> The grading policies of UBC do not constitute … [the applicant's] 'personal information' for the purpose of s. 28.
> …
> In summary, UBC disagrees with … [the applicant's] characterization of s. 28 as a vehicle to review 'policy' issues, and with his conclusion at page 43 that "the mandatory manufacture of failure data in a completely relative process driven by the distribution policy and subsequent examination manufacturing process must be regulated by Privacy legislation".

The applicant apparently considers that, under s. 28 of the Act, I should review the procedures by which UBC arrives at a mark and determine whether these procedures produce a mark that is accurate and complete. The applicant characterizes these policies as "Privacy rights policy", although I fail to see how they have anything to do with information and privacy issues addressed by the Act.

The grading policies of UBC's Faculty of Law are not the applicant's personal information, even though application of those policies may affect the mark he achieves in a given course. Section 28 is intended to ensure that personal information that a public body will use to make a decision directly affecting someone is as up-to-date, accurate and complete as possible, so that decisions based on this information are properly made. The instructor's decision on the mark to be assigned to the applicant's exam led to that mark, with the policies on grading providing part of the context for that decision. The role of a policy in the assigning of a mark does not, however, transform the policy into "personal information" used in the decision.

By way of contrast, useful examples of the operation of s. 28 are found in the *Freedom of Information and Protection of Privacy Act* Policies and Procedures Manual (Revised), referred to above and relied on by the applicant on other points. At Part 3, Division 1.28, it gives the following examples of how a public body ensures accuracy of personal information: checking documents such as birth certificates to ensure a birth date is correct; verifying the date on an application or form to make sure it is current and, if not, contacting the individual to confirm that the information is still the same; and, where someone has omitted answers on a document, contacting them if more details are needed.

These examples help to illustrate the scope of s. 28. The primary focus of s. 28, and the examples, is clarification of personal information through its comparison with other records or sources or by contacting the individual to whom the personal information relates. Quite properly, the examples do not deal with the altering of an administrative decision or policy simply because an individual affected by that decision or policy believes it is flawed in some sense.

The applicant has pursued a number of avenues at UBC to address his concerns about his mark in first year real property law. He is also aware, as he says on p. 51 of the s. 28 portion of his initial submission, that other avenues – including the UBC Senate Standing Committee on Academic Appeals, the Board of Governors and an application for judicial review in the courts – are available to him to pursue this issue. He says, however, that these routes would take "many months or years afterwards" of his time. (UBC's submissions indicate the applicant has, in fact, already unsuccessfully appealed his mark to the Senate Standing Committee on Academic Appeals.) In any case, contrary to what the applicant apparently believes, the Act is not a quick fix for problems for which appeal mechanisms or other remedies exist.

For the reasons discussed above, s. 28 cannot be used to analyze or alter policies and procedures of UBC's Faculty of Law respecting the determination of student marks. UBC has complied with its s. 28 obligations in this case.

3.7 Correction of Personal Information – The applicant asked UBC, under s. 29 of the Act, to correct his failing real property law mark by changing it to a passing mark. UBC declined to do this and the applicant has asked that his annotation be included with his transcript whenever it is mailed out. UBC refused the applicant's request for the

annotation on the grounds that it was too long and that the concerns raised in the applicant's annotation "have been addressed by the Senate Appeals Committee on Academic Standing…".

Request For Correction

Most of the applicant's arguments with respect to s. 29 are intertwined with his s. 28 arguments, discussed above. I do not propose to repeat them here, except where they relate to the issue of annotation, with which I deal below.

It is clear that the applicant's mark – the personal information he has identified as being in issue under ss. 28 and 29(1) – is what he wishes corrected. He has not suggested the mark is incorrectly recorded, *i.e.*, he has not argued there is a factual "error" in the mark. His submissions focus on his complaint about the policies, processes and decisions that led to his receiving a failing mark and to that mark remaining unchanged. The applicant believes, simply, that he should have been awarded a passing mark and that s. 29(1) should yield it.

The common sense interpretation of s. 29 – one that is obvious on the face of that section – is that it was not intended as a generalized avenue of appeal, or redress, for anyone who (reasonably or unreasonably) disagrees with, or is disappointed by, a decision that affects him or her. No other conclusion is possible given the ordinary meaning of the words "error or omission in his or her personal information". Clearly, s. 29(1) only deals with factual errors or omissions in recorded personal information, as part of the privacy scheme created by Part 3 of the Act. (See, also, Order No. 20-1994 and Order No. 124-1996, at p. 4.) Either the applicant does not see this or he is content to ignore it.

Because UBC declined to make the correction requested by the applicant, that ends the correction issue for the purposes of this inquiry. While I do not exclude the possibility that a public body could be required to properly assess a s. 29(1) correction request where it has not done so, the evidence here is that UBC considered the request and declined to act on it. It is clear from the use of the word "request" in s. 29(1) that the Legislature did not intend to impose on public bodies a duty to make corrections. Otherwise, every student who is disappointed with her or his marks, for example, could *require* an institution to change the marks as directed by the student. That is clearly not the intent or effect of the section.

In its initial submission, UBC cites Order No. 124-1996 and says that, while the Act does not require a public body to correct personal information, it should do so if the facts are clearly incorrect. UBC contends that the applicant's academic transcript "accurately" records the applicant's mark in the real property law, so there is "no 'error' that needs to be corrected". That contention is, on the material before me, obviously correct. I agree with UBC's view that, although s. 29, strictly speaking, imposes no legal duty to correct an error or omission in personal information when a correction is requested, the correction "should", in UBC's words, be made when the error or omission is brought to the public body's attention through a s. 29(1) request. Again, a public body's decisions

often have significant financial and other consequences for any citizen who is subject to its authority. The public interest in good government and in sound decision-making suggests that, wherever possible, a public body *should* – even though it is not legally required to do so – correct actual errors or omissions in personal information when requested. This is consistent with the s. 28 obligation to make every reasonable effort to ensure that personal information that will be used in decisions is accurate and complete.

Annotation of the Correction

The next issue arises out of UBC's refusal to append the applicant's annotation to his academic record. The applicant's annotation is ambitious. He believes UBC should be required to annotate his record – in electronic and paper form – with a three-page, single-spaced argument as to why the result of the re-read of his exam was inappropriate. The annotation also includes the applicant's perspective on various alleged "administrative law" deficiencies and "policy disputes". As I noted above, the correction actually sought by the applicant is for UBC to "correct" his failing mark from an F to a passing mark.

At paragraph 17 of its initial submission, UBC describes the actions it has taken, or is planning to take, with respect to the applicant's annotation request:

> UBC has placed a copy of … [the applicant's] correspondence relating to his requests for information in his files in the Office of the Dean, Faculty of Law and Registrar's Office. The Faculty of Law will add a cross-reference notation in red ink on the copy of the Senate decision letter [regarding the applicant's appeal] stating "*A request for correction of information was made by …* [the applicant] *on September 27, 1999. The information was not corrected."* UBC will keep a copy of … [the applicant's] three-page annotation in a separate file. [emphasis in original]

UBC asserts that an academic transcript is not the "proper place" to include an annotation consisting of the applicant's discussion of whether or not he received the appropriate mark. It submits that the applicant's three-page annotation is "merely an attempt to re-adjudicate" issues already heard and decided by the relevant appeal bodies. UBC concludes that the applicant's annotation is "incongruous with the purpose of an official academic transcript".

In his affidavit sworn on behalf of UBC, Richard Spencer, UBC's Registrar and Director of Student Services, described what a UBC transcript looks like and how and when it is disclosed by UBC. According to his evidence, his office gains access to a student's transcript – which is found in UBC's Student Information System – using a computerized system that has a limited capacity to accommodate added comments. He deposed that a committee at UBC recently considered permitting students to add other material to their transcript, as long as it was clearly marked as not forming part of the official document and as having been requested by the student. The committee rejected this proposal on the basis of "potential confusion and conflict with the purpose of an official transcript of a student's academic record".

The Registrar suggests that – since transcripts are *only* released at the request of the student and as directed by the student – the applicant has "full control" over who receives a copy of his transcript. I infer from this that UBC believes the applicant has ample opportunity to annotate copies of his transcript as he pleases, before releasing them to others. Richard Spencer also deposed that his office will provide the applicant with an official letter, stating that the applicant appealed his mark for the real property law course and that the appeal failed. UBC will give the applicant the number of copies of this letter that he needs, so he can send it to recipients of his transcript. The Registrar also deposed that it is not uncommon for students to send such additional material to transcript recipients under separate cover. This apparently is intended to deal with cases where an official transcript is sent directly by UBC to a prospective employer or other institution, without it passing through a student's hands.

In the cover letter to his initial submission, the applicant rejects UBC's argument that his annotation cannot be easily included with the transcript. He claims it could be "scanned" onto his transcript or be held in hard copy and attached as needed. He also says that other attachments to his UBC files currently exist, so the annotation should be no different.

I begin by observing that there are limits to a public body's annotation obligation. The Legislature cannot have intended, through s. 29(2), to require public bodies to accede to unreasonable annotation demands, *e.g.*, where an individual demands that a public body attach a 400-page annotation to an electronic record that contains allegedly incorrect or incomplete personal information. Section 29(2) says the public body must "annotate the information with the correction that was requested but not made". The s. 29(2) obligation to annotate a record requires, at the least, that a note of the requested correction be placed on the (by definition, recorded) personal information the applicant requested be corrected.

Some of my predecessor's observations in Order No. 124-1996 are useful here. He said in that case that a public body's s. 29(2) obligation is not unlimited and is subject to a "fairness" test. I would substitute the word 'reasonableness' for 'fairness'. But I agree with him that the scope of a public body's obligation in a given case depends on the type of records involved, the length of the requested correction and the public body's administrative resources. (There may be other factors, although I do not agree with my predecessor that the existence of avenues of appeal is relevant to s. 29(2).) These considerations acknowledge that public bodies such as UBC should be given some leeway in complying with their s. 29(2) obligation. Section 29(2) itself tacitly acknowledges the need for some flexibility, perhaps partly to allow for changes in technology. For one thing, the word "annotation" ordinarily connotes the act of noting something on a record. Use of that word, without elaboration, preserves flexibility for public bodies to work out, in the circumstances of each case, how an annotation will be made. Second, s. 29(2) does not dictate that an annotation must be recorded in the same medium as that in which the personal information exists.

Here, the correction requested by the applicant is, in his own words, a correction to "my grade in first year Real Property in the Faculty of Law". The correction he requested is

"from an F to a passing grade." (I note here, in passing, that the applicant arguably did not specify a correction. Is a "passing grade" to be interpreted as 50%, or whatever letter mark matches that? Or is it 91% or its letter mark equivalent? It could also be argued that the applicant did not request correction of an "error" or "omission" in his personal information within the meaning of s. 29(1).) Since the phrase "passing grade" is the requested correction, this is the "correction" that must be annotated. As s. 29(2) puts it, "the information" is to be annotated with the correction. In this case, the "information" in question is the mark actually awarded to the applicant. UBC is not, in this case, required to append the applicant's three-page "annotation" to his academic record or transcript. That document merely gives reasons why the requested correction should be made. The annotation would only have to record the fact that the applicant asked that his failing mark be changed to "a passing grade". UBC could add, if it wished, that the applicant appealed his mark and lost and that it is required by law to note the requested correction, which it has declined to make. By way of example only, an annotation of the applicant's F on the transcript could read like this:

> * Student requested change to "a passing grade". Request denied.

In this case, Richard Spencer's evidence appears to be that any computerized annotation of the correction is not feasible without expenditure of time or resources. He deposed that "it would require considerable time and resources" to be able to effect a computerized annotation. He also referred to the "considerable" time and resources needed to "develop policies and procedures administratively". I do not understand his evidence to be that it is not technically possible to annotate the applicant's academic record in some way, including in the fashion suggested below.

In light of this, UBC has said it will do several things to meet its s. 29(2) obligation. First, it has offered to give the applicant as many copies as he likes of an explanatory letter "confirming that he appealed his mark and lost the appeal". Second, it would add a copy of the appeal decision of its Senate Committee on Academic Standing to the applicant's Faculty of Law file. That copy would be annotated in red ink with the following notation: "A request for correction of information was made by ... [the applicant] on September 27, 1999. The information was not corrected." Last, UBC says a copy of the applicant's three-page annotation will be kept in "a separate file".

Despite the superficial attractiveness of UBC's proposal, none of its suggestions, in my view, complies with its s. 29(2) duty to annotate the applicant's personal information – his failing mark – with the requested correction of "a passing grade". None of the steps it proposes to take appears to involve the Student Information System's record of the applicant's relevant personal information, *i.e.*, his first year law marks. As I understand the evidence, the applicant's academic record is recorded in UBC's Student Information System and that system produces transcripts (*i.e.*, records) of the applicant's personal information, including his failing mark. I am driven to the conclusion, after careful consideration, that s. 29(2) requires UBC to, in some fashion, annotate the Student Information System's record of the applicant's personal information.

How would this be done? Whether or not it is done electronically, it should be possible for UBC to flag, in its Student Information System and not just in the Faculty of Law's files, the fact that an annotation of a requested correction exists and can be retrieved where indicated. Judging from Richard Spencer's affidavit, it would be possible for UBC to include in its Student Information System a computer code, or notation, indicating that a correction request has been made and that an annotation is on file. When a copy of the transcript is requested, staff would be alerted to the fact that an annotation needs to be retrieved and included in the envelope with the transcript. The annotation itself need not be stored electronically in the Student Information System; it would only be cross-referenced to that system by the code or notation just described.

I should note, in passing, that the steps proposed by UBC, while commendable, would require modification even if they were otherwise acceptable for the purposes of s. 29(2). First, any letter it gives the applicant – presumably addressed to whom it may concern – should record the requested correction. It would not be sufficient to say the applicant appealed a mark and lost, since that would not record the requested correction, "a passing grade". UBC's proposed red ink annotation of the Senate appeal decision would also fall short of the mark. It is not sufficient to note that a correction has been requested but not made. Section 29(2) clearly requires more. It says a public body must actually annotate the requested correction – here, "a passing grade". Last, it is not clear what UBC means when it says a copy of the applicant's three-page annotation will be kept in "a separate file". Is that file to be cross-referenced to the applicant's Faculty of Law file or to the Student Information System? Where is it located? When, why and to whom will the annotation be disclosed? This last step does not, in my view, advance UBC's position for the purposes of s. 29(2).

UBC has actively considered the issue of including external documents with official transcripts and rejected this idea as inappropriate. An annotation related to a request for correction of personal information is different from the simple inclusion of other extraneous information (if for no other reason than that the former of the two is required by legislation). Apart from the academic data in a transcript, it is very likely that the "personal information" in a transcript is limited to data such as name, address and date of birth. This makes it unlikely that correction requests under s. 29(1), and annotations under s. 29(2), will be frequent. In any case, this kind of personal information is likely to be corrected as a matter of course and therefore is not likely to involve annotation. Despite the applicant's approach here, many students may consider annotation of marks not to be in their best interests. I suspect that UBC will not be overly burdened with requests to correct a student's official transcripts.

4.0 CONCLUSION

For the reasons given above, I make the following orders:

1. Under s. 58(3)(a) of the Act, I order UBC to perform its duty to the applicant under s. 6(1) of the Act, by searching again for the 1998-1999 mark distribution report requested by the applicant. Under s. 58(4) of the Act:

(a) I require UBC to complete the search within 30 days after the date of this order and to deliver to me (with a copy to the applicant directly and concurrently), within 10 days after completion of the search, an affidavit sworn by a knowledgeable person as to the efforts in undertaking that search and as to the results of that search; and

(b) I require UBC to provide a response, in accordance with s. 8 of the Act, respecting any record found in the search under this paragraph, with that response being provided to me and to the applicant as contemplated by s. 1(a).

2. Under s. 58(3)(a) of the Act, I require UBC to perform its duty under s. 29(2) of the Act to annotate the applicant's personal information with the requested correction. For clarity, the requested, but rejected, correction is "from an F to a passing grade".

Nothing in this order is to be interpreted as requiring, or suggesting, that UBC actually make the correction requested by the applicant.

November 20, 2000

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia