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

Order 00-53

INQUIRY REGARDING SIMON FRASER UNIVERSITY EMPLOYMENT-RELATED RECORDS

David Loukidelis, Information and Privacy Commissioner
December 21, 2000

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Summary: Applicant not entitled to access to third party personal information found in records relating to SFU's review of a third party's employment performance or associated records. Public interest disclosure not required. Personal information was not covered by s. 22(4). SFU was required to disclose minor amounts of information that was not covered by s. 22(1).

Key Words: personal information – unreasonable invasion of personal privacy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 22(2)(a), (e), (f) and (h), 22(3)(a), (d), (f) and (g), 22(4)(e), (f), (i) and (j), 25.

Authorities Considered: B.C.: Order No. 54-1995; Order No. 62-1995; Order No. 78-1996; Order No. 81-1996; Order No. 97-1996, Order No. 286-1998; Order No. 331-1999; Order 00-02; Order 00-07; Order 00-13; Order 00-15; Order 00-27; Order 00-32; Order 00-44.

Cases Considered: *Clubb* v. *Saanich (District)* (1996), 35 Admin. L.R. (2d) 309 (B.C.S.C.).

1.0 INTRODUCTION

This inquiry arose out of the applicant's November 24, 1999 request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for release of a report, and other records, that Simon Fraser University ("SFU") had previously released to the same applicant. SFU had, at that time, severed portions of the records and withheld them from the applicant. When he made his request last year, the applicant gave SFU a number of reasons why it should re-sever the records and disclose more information. The records

relate to another individual's employment with SFU, including a performance review respecting that employee and her departure from SFU.

SFU wrote the applicant on November 25, 1999 and set out its understanding that the request covered seven records. These included the former employee's employment contract, a 1996 performance review (together with Appendices A through E to that record), three letters, a written separation notice and a release signed by the employee. SFU's letter also confirmed a conversation between the applicant and an analyst in SFU's information and privacy office, which clarified that the applicant's request for "all materials in the accompanying packages that were previously released" related to all of the materials just described other than the performance review itself. SFU also confirmed that the records listed above were the only ones that responded to the applicant's request.

SFU responded to the request on February 16, 2000, by enclosing severed copies of the requested records. It told the applicant that it was withholding information under ss. 22(3)(a), (d), (f) and (g) of the Act. It also told the applicant that it had considered ss. 22(2)(a), (e), (f) and (h) of the Act in making its decision and that it had disclosed information covered by s. 22(4)(e). SFU's decision letter ran to some 11 pages and was accompanied by a chart listing the records and the exceptions it had applied to those records. (As an aside, I commend SFU for the care it took in providing the applicant with such a detailed description of the records and for giving him reasons for its response.)

The applicant wrote to this Office on March 15, 2000 and requested a review of SFU's decision to apply s. 22 of the Act to large portions of the records. He also argued that SFU had not supplied all of the relevant records, pointing out that no records between late December 1996 and mid-March 1997 had been disclosed to him. As mediation was not successful in resolving the request for review, I held a written inquiry under s. 56 of the Act.

The applicant raised ss. 22(4)(f), (i) and (j), and s. 25, of the Act in his initial submission and SFU had an opportunity to respond to the applicant's arguments on these sections. I therefore considered them in the inquiry as well.

I should note, at this point, that the level of detail in this order exceeds that which I might ordinarily offer on some of the issues. I have done this in part because of the applicant's ongoing attempts, now and in 1997, to get access to a third party's personal information. I have also done this in an attempt to do justice to the applicant's lengthy and detailed submissions in this inquiry.

2.0 ISSUES

The issues to be considered in this inquiry are as follows:

1. Did SFU fulfill its duty under s. 6(1) of the Act to make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely, with regard to its search for records in the custody or under the control of SFU?

2. Was SFU required by s. 22(1) of the Act to refuse to disclose personal information to the applicant?

3. Does s. 25(1) of the Act require SFU to disclose information in the public interest?

Section 57(2) of the Act places the burden of proof on the applicant with respect to the s. 22(1) issue. As established by previous orders on the point, SFU has the burden of proof with respect to the s. 6(1) issue and the applicant has the burden of proof regarding the applicability of s. 25(1).

3.0 DISCUSSION

3.1 Did SFU Fulfill Its Section 6(1) Duties? – Section 6(1) of the Act reads as follows:

> 6(1) 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.

I have discussed in numerous orders the standards imposed on public bodies under s. 6(1) in searching for records that respond to an applicant's request and in describing, in an inquiry such as this, the public body's search efforts. I will not repeat those discussions here. See, for example, Order 00-15 and Order 00-32.

The applicant acknowledges that, with his 1999 request, he asked for the same documents SFU had previously disclosed in 1997. It appears SFU had, in 1997, provided certain records in response to a reporter's request and that the applicant subsequently requested and obtained the same records, in two stages.

The applicant says he framed his 1999 request on the understanding that SFU's 1997 search was adequate and complete. He says, however, that SFU did not, in its 1997 response, provide all five appendices to the performance review until later. He says these appendices were responsive records, such that SFU should have disclosed them initially. He cited this example, apparently, to support his contention that SFU likely has other relevant records it has not disclosed this time around.

The applicant also says that internal evidence in the released records suggests there are other documents besides those SFU has found. One of the records, a letter dated March 17, 1997, mentions two other records which appear to be relevant to the request, but which SFU did not include. The applicant also contends there is a gap in the records between December 1996 and mid-March 1997, although the wording of the performance review suggests the existence of the former employee's response to the review and a record of the decision on the future of the employee's employment with SFU. The applicant, in effect, is inviting me to review the adequacy of SFU's 1997 search.

In response, SFU points out that the applicant in 1999 requested the same documents SFU had disclosed in 1997. SFU's November 25, 1999 letter to the applicant confirmed its understanding of his 1999 request. That letter listed the records from the 1997 request and set out SFU's understanding that the applicant was requesting the same documents again. It says the applicant said nothing about documents potentially being missing after he received SFU's November 1999 letter. It goes on to say the following in its initial submission:

> 15. The request was for documents that had already been released in an edited form. The essence of the Applicant's request was that SFU re-release these same documents with less severing of the contents.
>
> 16. Copies of the Requested Documents listed in the November 25, 1999 letter had been previously provided to the Applicant in response to two earlier requests. SFU interpreted the Request on November 24, 1999 as a request for additional disclosure of the contents of those documents that had previously been released.

SFU argues that its interpretation of the request was reasonable and that it made every reasonable effort to assist the applicant by setting out its understanding of the scope of the request. It further argues that there was nothing in the applicant's request to alert SFU that the applicant was seeking other documents besides those listed in the letter of November 25, 1999. It also points out that any gap between December 1996 and mid-March 1997 would have been obvious to the applicant after its letter of November 25, 1999. SFU says it has never claimed there were no other records on this topic and argues that the applicant is trying to increase the scope of the request during the review stage.

I do not agree with the applicant's contention that the employment review report of necessity indicates the likely existence of a response from the former employee and a record of a decision. Any responses the applicant believes should have flowed from the report might easily have been verbal.

As for the records mentioned in the March 17, 1997 letter, SFU did not comment on this issue in its submissions, so I requested further submissions. In response, SFU reminded me that:

> The Applicant's request was for documents **previously released** to a newspaper reporter. Simon Fraser University confirmed the scope of the Applicant's request in a letter of November 25, 1999, which identified the particular documents previously released. The Applicant did not object to the listing provided by Simon Fraser University. It is Simon Fraser University's position that the Applicant's request did not require Simon Fraser University to undertake a search of its records to identify other documents. The essence of the Applicant's request was that Simon Fraser University reviewed [*sic*] the severing it has performed on the documents as previously released and provide the same documents to the Applicant with less severing.

> The documents referred to by the Applicant, that is, the February 28 letter and the reference letter, were not disclosed in the documents previously released to the reporter and were not identified on Simon Fraser University's letter of November 25, 1999.
>
> Further, since the date of the submissions in this inquiry the Applicant has made a further request to Simon Fraser University for records and has been provided with copies of the two documents in question.
>
> In summary, Simon Fraser University's position on the Section 6(1) issue raised by the Applicant is fully answered in its initial and reply submissions. The documents received by the Applicant as a result of his request were the identical documents released to the previous applicant. The adequacy of the search conducted by Simon Fraser University for documents in response to the previous request is not an issue in this inquiry. [emphasis in original]

I agree with SFU that the adequacy of its search in the 1997 request is not in issue here. It was open to the applicant to expand the scope of his 1999 request at the time he filed it, by saying he wanted SFU to include the two records mentioned in the employment review record (or indeed any other records). In view of the painstaking efforts SFU went to in setting out its understanding of his request in its November 25, 1999 letter, and the applicant's silence in the face of that letter, the applicant cannot now complain that SFU has overlooked records. I am satisfied, based on the material before me, that SFU has complied with its duty under s. 6(1) of the Act to make every reasonable effort to assist the applicant and to respond completely and accurately.

3.2 Does Section 25 Apply Here? – Section 25(1) of the Act sets out what is commonly called the 'public interest override':

> 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.

The applicant seems to believe that SFU has not administered its harassment policy properly and failed to treat another SFU employee fairly under that policy. These factors appear to be the impetus for the applicant's request. He also suggests there were financial and other irregularities in SFU's handling of the first employee's departure from SFU. He appears to think that the withheld portions of these records would shed light on these alleged irregularities. He believes there is a strong public interest in knowing how SFU has administered its harassment policy and that s. 25 requires disclosure of the severed portions of the records. In support of his s. 25(1) argument, the applicant cites

media interest in the application of SFU's policy and public controversy surrounding the policy and its use.

SFU argues s. 25 does not apply in this case. It says there is no immediate urgency to the situation, as contemplated by s. 25(1)(a). It also argues that s. 25(1)(b) does not apply, because the media's interest in an issue does not translate into mandatory disclosure in the public interest. It relies on the decision *Clubb* v. *Saanich (District)* (1996), 35 Admin. L.R. (2d) 309 (B.C.S.C.), which dealt with a public body's decision to issue a public notice under s. 25(1) of the Act. At para. 33 of that decision, the court expressed the view that the "public interest" under s. 25(1) does not encompass anything the public may be interested in learning and is not defined by various levels of public curiosity. SFU says it has discharged any public interest in the matter by disclosing procedural information about its handling of the employee's case, while protecting the employee's privacy.

Over three years have passed since the incidents occurred that led to the creation of most of these records. The applicant's public interest arguments are, in this case, for this reason alone less compelling. Further, the bulk of the records concern SFU's investigation of one employee's performance, not its administration of its harassment policy or its handling of another employee's case. Without commenting on the merits of the applicant's suggestions about SFU's administration of its policy, or on its treatment of the other employee, I am of the view that the disputed information would not cast any light on SFU's activities in the manner contended by the applicant. As was the case in Order 00-27, where I found there was no urgent or compelling need for disclosure such as would trigger s. 25(1), I find that s. 25(1) has no application in this case.

3.3 Does Section 22(4) Apply To Disputed Information? – The applicant argues that much of the withheld information falls under s. 22(4)(e), (f) or (j) of the Act and that SFU must therefore disclose it. I will deal with those arguments now.

Sections 22(4)(e), (f) and (j) of the Act read as follows:

> 22(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,
>
> (f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,
>
> …
>
> (j) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the application for the benefit or is referred to in subsection (3)(c).

Information About Position, Functions or Remuneration

SFU argues that that it has disclosed any information that fits under s. 22(4)(e). I disagree with the applicant's argument that the bulk of the withheld information is about the third party's position, functions or remuneration as an employee of SFU. In Order 00-13, the Executive Director of this Office found that information about disciplinary action taken against a police officer did not fall within s. 22(4)(e). She found that the information related to the officer's employment history and that its release would, under s. 22(3)(d), unreasonably invade the officer's personal privacy. The same thinking applies here; as I discuss in more detail below, most of the withheld information falls squarely within ss. 22(3)(a), (d) or (g) or combinations of those sections.

As an exception to this, however, I have concluded that SFU did not take s. 22(4)(e) quite far enough. Some of the information it withheld relates to actions the reviewer took in carrying out the performance review. Other information concerns work-related activities of SFU employees, including the employee whose performance was reviewed. None of that information, in my view, constitutes any third party's employment history or a personal or personnel evaluation of a third party employee. Such information falls under s. 22(4)(e) and not s. 22(3)(d) or (g). In this respect, I note that, in Order No. 97-1996, the previous Commissioner cited Order No. 54-1995, in which he found (at p. 10) that "the public had a right to know about job descriptions and job qualifications in general terms, not the private information of a public servant with respect to these topics". In Order No. 97-1996, he said the following (at p. 10):

> A good part of the information that SFU has severed as "employment history" is in fact descriptive of what individuals did in their workplaces on particular projects. I refer here not to the behaviour of individuals but rather to their tangible activities in the workplace, such as research projects and related activities. I find that much of this information in the report describes the "functions" of the employees and thus should be released to the applicant. My goal is to disclose such information without identifying specific individuals to the general reader, because of other privacy interests worthy of protection.

I have identified, in the copy of the records delivered to SFU with its copy of this order, the information that I find is covered by s. 22(4)(e). Disclosure of that information is not an unreasonable invasion of personal privacy and SFU is not required by s. 22(1) to refuse to disclose it.

Details of A Contract

At para. 7.4 of his initial submission, the applicant offers the following interpretation of the release signed by the former employee, which he says is a contract with SFU:

> It is intended to provide a service to SFU of keeping her mouth shut which the contract indicates that [the former employee] is being given consideration. Although the service is unusual, it was one which SFU (or at least its executives) saw benefit in the expenditure of public funds.

SFU does not address this aspect of the applicant's case. By no stretch of the imagination, in my view, do the third party's obligations under the release – which is clearly contractual in nature – qualify as "services", to be supplied to SFU, within the meaning of s. 22(4)(f) of the Act. I find that s. 22(4)(f) does not apply to this record.

Details of A Discretionary Benefit

The applicant, in para. 7.3 of his initial submission, says he believes SFU has not been forthcoming about the "benefits granted" to the former employee. Specifically, he says the following:

> Since vacation benefits are reportable benefits, it would logically follow that any grant of getting paid without working should also be reportable … according to the records provided [the former employee] worked up through April 1, and had more than a year's leave available when she left, despite having taken a long vacation in the summer of 1996. It would seem like something is missing and that SFU once again has been less than forthcoming on information they are required to provide.

SFU does not address this aspect of the applicant's case either. As far as I can determine, the only references in the records to "vacation benefits" are statements in the March 17, 1997 letter, the written notice dated April 9, 1997 and a memorandum dated April 23, 1997. These references are to the effect that the former employee was entitled to receive a lump sum payment equivalent to a certain number of hours of unused holiday time. (The amount paid to the former employee was disclosed to the applicant in the last of the three records just described. The exact number of hours of unused vacation time was withheld from all three records.)

SFU has disclosed the amount of the alleged "benefit" to the applicant. Only related personal information, used in calculation of that amount, has been withheld. There is no evidence that SFU had any discretion in deciding whether or not to pay the former employee for unused vacation time. To the contrary, the records just described support the conclusion that the former employee was entitled to the payment (whether under a collective agreement or otherwise is not clear). I do not consider the amount paid to be a discretionary financial benefit as contemplated by s. 22(4)(j). Nor is the related information, which discloses hours worked and similar information, covered by that section.

3.4 Presumed Unreasonable Invasions of Personal Privacy – Section 22(3) sets out categories of personal information the disclosure of which is presumed to cause an unreasonable invasion of the personal privacy of a third party. These presumptions may be rebutted, including in light of relevant circumstances listed in s. 22(2).

Section 22(3) reads as follows:

> 22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
>
> (c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,
>
> (d) the personal information relates to employment, occupational or educational history,
>
> (e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax,
>
> (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,
>
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
>
> (h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation,
>
> (i) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations, or
>
> (j) the personal information consists of the third party's name, address, or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

Several aspects of s. 22(3) are relevant here. I turn to them now.

Medical, Psychiatric or Psychological History

SFU determined that s. 22(3)(a) applies to personal information in Appendices A, B and E to the performance review, apparently because they contain the personal information of the complainant in the harassment case mentioned earlier. That individual is also the author of Appendix A to the review. SFU asserts that the portions severed under this section relate to a third party's medical, psychiatric or psychological condition and that

disclosure of the severed information would lead to an unreasonable invasion of the third party's personal privacy.

The applicant argues that any presumed unreasonable invasion of the privacy of the author of the letter that forms Appendix A is overcome by circumstances set out in s. 22(2). He says, also, that the letter is publicly available on the Internet. He does not extend these arguments to the other records to which SFU applied s. 22(3)(a).

The fact that personal information is known to an applicant, or to the public, may be a consideration favouring disclosure in some cases. In Order No. 331-1999, for example, the name of an individual who had been complained about was already known to the applicant, who had made the complaint, and I ordered the name disclosed. See, also, Order No. 78-1996, in which my predecessor found that the applicant – who was the subject of a harassment complaint – was entitled to more information, in part because some of the information had been made known in the media. The information in this case consists of descriptions of a third party's mental and physical health. It undoubtedly falls under s. 22(3)(a) of the Act. SFU is not now required to disclose the information simply because some version of it may have been publicly disclosed, by the complainant or someone else, at some time in the past.

This situation is to be distinguished from that in Order No. 331-1999. In that case, I ordered the public body to disclose to the applicant the name of a police officer about whose conduct the applicant had complained. The applicant in that case clearly already knew that officer's name. Here, the applicant alleges that a version of very sensitive personal information is, or has been made, publicly available. Moreover, the personal information here is of an intimate and very sensitive nature. It deals with, among other things, the mental and physical health of the third party. There is no clear evidence of this before me. In the circumstances, I find that the applicant has not rebutted the presumed unreasonable invasion of personal privacy created by s. 22(3)(a) in relation to the third party's personal information.

Third Party Finances and Details of Financial Benefits

The applicant says he is not interested in the former employee's financial information. He ties his s. 22(3)(f) arguments into those regarding s. 22(4)(j), which says it is not an unreasonable invasion of a third party's personal privacy to disclose details of a discretionary benefit of a financial nature granted to the third party by a public body. He believes SFU has not been forthcoming on the payments it made to the former employee on her departure.

SFU says that it has severed information on the former employee's finances in accordance with the presumption in s. 22(3)(f). It says it complied with s. 22(4)(e) by disclosing information on the third party's position, functions or remuneration as an SFU employee and by disclosing her employment contract and the amount she was paid on her departure. It also disclosed the reasons for her departure.

I find that, to the extent the severed information relates to the former employee's finances, SFU has properly determined that it is financial information covered by s. 22(3)(f).

Employment History and Personal Recommendations or Evaluations

The applicant argues that ss. 22(3)(d) and (g) do not apply to the disputed information, partly on the basis that the former employee was an agent of SFU, not a third party. He also says these sections do not apply to the extent the withheld information relates to the former employee's job functions, *i.e.*, where s. 22(4)(e) applies.

In para. 31 of its reply submission, SFU counters the applicant's "agent" arguments, by saying that SFU acts through its employees, who

> … are not normally considered to be in an agency relationship with SFU. SFU at law is vicariously liable for the actions of its employees who are acting within the scope of their employment and, at law, SFU acts through employees with respect to communications with counsel. The Submissions of the Applicant fail to recognize that a Public Body necessarily acts through its employees and officers, but this does not result in the employees losing the privacy protection granted to third parties under the *Act*.

SFU goes on to point out, correctly, that Schedule 1 of the Act defines "third party" as a person, group of persons or organization other than the person who made the request or a public body. It also rightly observes that the definition of "public body" does not include an individual.

I reject the applicant's argument that SFU's employees do not have privacy rights under s. 22 of the Act because they are SFU's agents. While an employee may, in some sense, act for SFU in carrying out her or his employment duties, this does not mean the employee is not a third party as defined in the Act. The Act's definition of "third party" is against the applicant on this point. Further, s. 22(4)(e) on its face treats a public body employee as a third party for the purposes of s. 22. Section 22(3), moreover, does not distinguish between employees of a public body and other third parties.

SFU has applied ss. 22(3)(d) and (g) jointly to a number of records, to protect the reviewer's and others' comments about the former employee's performance of her duties and to protect the reviewer's findings and recommendations. SFU says this information – such as information about the former employee's work record and that person's reasons for leaving SFU – qualifies as her employment history under s. 22(3)(d). It says the severed information, so far as it relates to the former employee's performance review and her departure, constitutes both a personal evaluation and a personnel evaluation of the former employee, in that it appraises her performance of her duties. It says, therefore, that s. 22(3)(g) also applies. It seeks support in Order No. 52-1995, Order No. 81-1996 and Order No. 78-1996, in which it says my predecessor found that s. 22(3)(d) covered various items in personnel files.

I find that most of this information falls under ss. 22(3)(d) and (g). I agree with SFU that Order No. 78-1996 has some relevance to this case. In that order, my predecessor found that disclosing a third party's performance appraisal to the applicant would be an unreasonable invasion of that third party's privacy.

Order No. 62-1995 is also relevant. In that case, my predecessor found that, under s. 22(3)(d), "particular details of the disciplinary actions taken against the [third party] teacher are so sensitive that they should not be disclosed on privacy grounds". As the third party argued in that inquiry, "One can think of little which most persons would wish to keep [more] private than their discipline records".

In Order No. 81-1996, the previous Commissioner found that s. 22(3)(g) protected information relating the circumstances surrounding an employee's departure from the public body. Similarly, in Order 00-44, I found that information about what was said at a meeting about a complaint fell under s. 22(3)(d).

With the exception of those portions which I have found fall under s. 22(4)(e), and with the exception of a phrase descriptive of the former employee's departure which SFU withheld in the release and April 9, 1997 notice, but disclosed in its submissions, I agree with SFU that ss. 22(3)(d) and (g) apply to the information it has marked in the records as being subject to those provisions.

3.5 Relevant Circumstances – Section 22(2) of the Act requires a public body to consider "all relevant circumstances" in deciding whether a disclosure of personal information will result in an unreasonable invasion of a third party's personal privacy. Section 22(2) sets out relevant circumstances to be considered, but that list is not exhaustive. Other factors may be relevant and have to be considered. A circumstance may favour disclosure or it may favour the withholding of personal information, but the circumstance is not in itself determinative of the issue.

In this case, both parties focused on factors found in s. 22(2) and whether or they rebutted the presumed invasions of privacy discussed above. The relevant portions of that section follow:

> 22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> …
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence,
>
> …

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

Subjecting SFU's Activities to Public Scrutiny

The bulk of the applicant's extremely detailed initial submission advances his argument that SFU has not paid enough attention to s. 22(2)(a) of the Act. It requires a public body to consider whether "disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny". The applicant's arguments on this point are intertwined with his s. 25 arguments. He believes that s. 22(2)(a) favours more disclosure in this case, as SFU should be subjected to more scrutiny over its administration of its harassment policy. At para. 1.1 of his initial submission, he argues as follows:

> Institutions need to be publicly accountable, both for their own long-run good, and for maintaining a democratic society where institutions are the servants, not the masters of the public that pays for their activities. The democratic premise is that in the long run an informed public will be better able to protect its rights and make wiser decisions.
>
> In contrast, SFU seems to take the view that being told how things are supposed to work is generally sufficient in this area. From 1994 through 1998, SFU promised to report on the [case of the other SFU employee], but it has never done so. There has been no internal or external investigation of what went wrong. Thus a critical unfilled need for information persists.
>
> People want and need to know whether harassment programs treat persons fairly. Though some want to know this more than others, the amount of press given to this issue would indeed suggest that this is an area of significant public concern.
> …
> If the public is to be truly informed, it must also receive information on whether the above policy was followed in practice. The public also needs to be informed whether SFU took any effective action to deal with known violations of the above principles, especially when they were highly prejudicial to person [*sic*] accused of major offenses.

The applicant appears to believe that SFU engaged in a number of dubious activities in its handling of the former employee's departure and that it made false or misleading statements to the media on this topic. Among other things, he believes that SFU persecuted another employee who was the subject of a harassment complaint, was biased against that employee and may have hidden evidence that would have cleared him. He suggests the disputed information would confirm these suspicions. He also believes that SFU conducted a performance review of the former employee in order to conceal problems with one of its programmes, including certain supposedly improper actions by the former employee in the course of her work in the programme.

The applicant goes on to argue that SFU also withheld information that is publicly known, including the names of the various people involved in the complaint investigation

mentioned above and in the performance review of the former employee. He cites a number of orders, which he argues support the notion that what is known to the applicant or the public is a factor favouring more disclosure. He relies on Order No.78-1996, Order No. 97-1996, Order No. 330-1999 and Order No. 331-1999. The applicant says that, in the past, SFU has disclosed personal information where it was already publicly known. He gives an example where SFU issued a public statement of its actions under its harassment policy regarding three other employees.

SFU says it provided partial access to the records in the interests of subjecting to public scrutiny both its personnel evaluation process as it related to the former employee and its evaluation of the functioning of her office. It is of the view that disclosure of the severed portions would harm its personnel evaluation process. It believes that disclosure would have a chilling effect on participation in that process by SFU employees and others. SFU contends the applicant has received enough information to show that SFU took the former employee's conduct seriously and that the former employee's privacy takes precedence over the details. It says this situation is similar to that in Order No. 62-1995, in which my predecessor found that the public body had disclosed enough information to allow for public scrutiny of its disciplinary proceedings. After that point, the employee's privacy rights became paramount with respect to specifics of the discipline taken. It also says Order No. 221-1998, in which my predecessor found that public scrutiny of the public body did not require disclosure of personal information obtained in the peer review process, supports its decision in this case.

I do not agree with the applicant's broad-brush approach to the application of s. 22(2)(a). I agree that accountability and the need for some public scrutiny of SFU's actions in dealing with the former employee favour disclosure of some information. As was the case in Order 00-02, however, the applicant here appears to be requesting the information because of what he perceives as unfair treatment of another person (the respondent in the complaint mentioned elsewhere in this order). Disclosure of the rest of the former employee's personal information would not assist the public under s. 22(2)(a) in scrutinizing SFU's treatment of that person. Nor would further disclosure assist in subjecting SFU's activities in the application of its harassment policy to further scrutiny.

Nothing in the (very sensitive) personal information withheld under s. 22(3)(a) would assist in subjecting SFU's activities to public scrutiny. I conclude that SFU has properly applied s. 22(2)(a) in disclosing information about the performance review process it undertook and the arrangements it made around the former employee's departure, while protecting specific personal information covered by one or more of the presumptions in s. 22(3).

Unfair Exposure to Harm

The applicant lumps his arguments on ss. 22(2)(e) and (h) together. The applicant argues, in para. 6.5 of his initial submission, that there

> … has been little demonstration that anyone will be **unfairly** harmed, whereas the possibility of being fairly harmed is a legitimate hazard of a high profile job. The

> assumption of unfair harm is only a leap of faith by SFU based on the assumption that the participants need to be protected from public stupidity. [emphasis in original]

SFU argues, in paras. 51 and 52 of its initial submission, that the disputed information contains "opinions, claims and counter-claims which if disclosed would result in harm to [the former employee] in the form of personal embarrassment, ridicule, emotional upset, loss of respect by co-workers and detriment to her employment prospects". It says similar harm to others would be caused. SFU goes on, in para. 53, to say that some of the severed information also contains details of the former employee's personal financial plans and arrangements relating to her dealings with SFU and that disclosure of this information would expose her unfairly to financial harm.

In my view, the former employee might suffer harm to her reputation from disclosure of the disputed information. At least one other third party might also suffer such harm. The question is, would that harm be "unfair"? As regards the third party personal information covered by s. 22(3)(a), I find that any harm caused by its disclosure would be "unfair" for the purposes of ss. 22(2)(e) and (h). I make the same finding as regards the former employee. The employee's performance was reviewed and the employee is no longer employed by SFU. Exposure to harm flowing from disclosure of information about her work performance cannot, for example, be viewed as fair in this case.

SFU supplied no evidence of the financial harm that might ensue from disclosure of the minimal and straightforward financial details of the former employee contained in this record. I therefore find that financial harm under s. 22(2)(e) is not relevant here. It is not necessary, therefore, to consider whether any such harm would be "unfair".

Supplied In Confidence

The applicant argues that SFU has failed to establish that the disputed information was "supplied in confidence" for the purposes of s. 22(2)(f) of the Act. He says SFU merely asserts that it received letters and interviewed people in confidence, without proving it. In para. 6.4 of his initial submission, he argues it was not enough for employees to write "confidential" on the letters they sent to SFU:

> At the very least a claim of confidentiality must have a legitimate recognized purpose in an appropriate setting at the time the information was given. The giver must not merely want confidentiality; rather the giver must have been given proper assurance than [*sic*] confidentiality will be respected, usually as an inducement to provide the information.

SFU says that the requested records were all marked "confidential" by their makers and that the third parties supplied the information in them with an expectation of confidentiality. SFU also supplied an affidavit by the person who conducted the performance review. She deposed that she was told that the complainant's letter (Appendix A to her report) and another letter from an employee (Appendix B to her report) had been provided in confidence by their authors and that she had treated them as such throughout her investigation. She also deposed that she had received a letter from

the former employee in confidence and that she had sent a letter to the former employee in confidence (Appendices E and D, respectively, to her report).

She further deposed that she conducted the performance review with the cooperation and participation of several people and that the success of the review depended on their full participation and cooperation in providing "complete observations and frank opinions and assessments of [the former employee's] performance". She went on to depose that

> … the performance appraisal process of senior university employees and officers would be compromised by the release of personal information obtained in the appraisal process, as the employees of Simon Fraser University and other persons would be reluctant or unwilling to participate in the process or to participate fully and frankly in the process.

This is, of course, an expression of opinion, as opposed to evidence of facts relevant to the issue at hand.

Several orders deal with the issue of confidentiality of supply. For example, in Order 00-07 I found that third parties had provided information in confidence during interviews (in that case, about the applicant) and that this was a relevant circumstance. Similarly, in Order No. 286-1998 my predecessor found that the confidential supply of information during a harassment investigation was a relevant circumstance. Based on the affidavit evidence and my own review of the records, I accept that the personal information in issue was supplied in confidence and that this is a relevant circumstance favouring non-disclosure of the personal information.

To summarize, I find that none of the relevant circumstances favours disclosure of disputed personal information to which any one or more of the presumed unreasonable invasions of personal privacy under s. 22(3) applies.

3.6 Review of Individual Records – With some exceptions, I find that SFU properly withheld personal information from the applicant. I will now set out my findings record-by-record.

Former Employee's Employment Contract

This record describes the former employee's duties, salary and so on. SFU has correctly disclosed the contents of this record, with the exception of the former employee's home address. (The applicant in any case says he does not want this information.)

Performance Review

The 10-page performance review includes recommendations made by the reviewer and has five appendices. Appendix A is a three-page letter, dated October 13, 1996, to the president of SFU from a complainant. Appendix B is an eight-page letter, dated October 11, 1996, to SFU's president from another SFU employee, the subordinate of the former employee, with a two-page handwritten attachment. Appendix C consists of the

one-page terms of reference, dated November 5, 1996, for the performance review of the former employee. Appendix D is a one-page letter, dated December 4, 1996, from the reviewer to the former employee. Last, Appendix E is a two-page letter, dated December 3, 1996, from the former employee to the reviewer.

SFU applied ss. 22(3)(d) and (g) to large parts of the performance review, as noted above. I agree with SFU's decision for the most part. SFU withheld virtually all of Appendix A to the performance review, having decided that ss. 22(3)(a) and (d) applied to it. The withheld information includes the complainant's home address (which the applicant does not want) and a lengthy discussion of her dealings with the former employee, her feelings and the state of her health. I find that SFU properly applied ss. 22(3)(a) and (d) to the withheld information in this record.

SFU withheld most of Appendix B under ss. 22(3)(a) and (d). In my view, s. 22(3)(g) also applies to the information that relates to that subordinate's comments about the former employee's actions and behaviour. I find that SFU properly withheld this information under these sections.

I also find that SFU properly applied ss. 22(3)(d) and (g) to information in Appendix C that would reveal issues possibly raised about the former employee's behaviour and actions.

SFU withheld portions of Appendix D, properly as regards the former employee's home address, which the applicant does not want in any case. But I find that s. 22(4)(e) applies to some of the other information withheld by SFU, as it relates to actions of the reviewer in conducting the performance review or other work-related issues. SFU must disclose this information, as marked on the copy of the record provided to SFU with its copy of this order.

SFU properly withheld large parts of Appendix E under ss. 22(3)(a) and (d), to protect the details of the former employee's response to issues under review. That response sets out her explanation for her actions and opinions and includes comments on the health status, actions and feelings of others.

SFU also withheld the name (and other identifying information) of the former employee's legal counsel. The applicant does not want that information but, if he did, I would be strongly inclined to find that it did not have to be withheld under s. 22(1).

March 17, 1997 Letter

SFU disclosed the majority of this record, withholding only a small amount of what might be called financial information about the former employee – the exact number of hours of unused holiday time – and a reference letter SFU's president would provide.

SFU also withheld information that would identify the former employee's lawyer (although it did not withhold the same type of information about its own legal counsel).

Again, the applicant does not want this information, but if he did, I would be strongly inclined to order its disclosure.

The applicant has said he does not, in any case, want the small amount of financial information withheld by SFU. If it were necessary to do so, I would find it is covered by s. 22(3)(f). I also find that s. 22(3)(d) applies to the small amount of information on what SFU's president would say if asked for a reference about the former employee.

March 18, 1997 Letter

SFU withheld information from this letter that would identify the applicant's legal counsel (although it did not sever one phrase in the letter's signature block). I would order that information disclosed if the applicant wanted it. SFU also properly withheld the former employee's address, which the applicant does not want.

SFU properly withheld a small amount of the former employee's financial information which, as noted above, the applicant does not want.

SFU also withheld a phrase which, in my view, does not fall under s. 22. It flows from a reference in the previous paragraph, which SFU disclosed, to the former employee being out of town. SFU did not address this phrase specifically in this inquiry. I find that neither s. 22(1) nor s. 22(3) applies to it and that SFU must disclose it. I have marked the information on SFU's copy of the record.

Release

SFU disclosed this record with some minor exceptions. It withheld the former employee's home address, as well as a two-word phrase and two and a half lines of text, both of which deal with the former employee's employment. It also withheld a phrase SFU considers to be the employee's personal financial information or employment history or both. It also, again, withheld information that would identify the former employee's legal counsel. I have already dealt with that issue and the proper withholding of the former employee's home address.

SFU withheld the two-word phrase in para. 2 dealing with the former employee's departure under s. 22(3)(d). I note, however, that SFU used the same terminology in its submissions. The applicant received these submissions and pointed out that SFU was now admitting that this particular item applied to the former employee's departure. I infer that SFU no longer felt the need to protect this information and I see no need for SFU to withhold it now. I therefore find that s. 22(3)(d) does not apply to this two-word phrase.

The line severed from the third paragraph of this record relates to personal financial information of the former employee (which the applicant does not want). Again, if necessary, I would find that s. 22(3)(f) applies and that SFU must withhold that information.

SFU applied ss. 22(3)(d) and (f) to part of a sentence in a paragraph dealing with the terms of the release. Section 22(3)(d) applies to this information, although I find that s. 22(3)(f) does not.

April 9, 1997 Notice

SFU properly withheld information from this record under s. 22(3)(d). Under ss. 22(3)(d) and (f), SFU also withheld a phrase about the former employee's financial information, in addition to information on the former employee's exact number of hours of unused holiday time. All of this was correctly withheld.

For the reasons given above in relation to the release, I find that s. 22(3)(d) does not apply to the other information withheld from this record, *i.e.*, the information concerning the former employee's reason for leaving. The other phrase, found in the leave management box, is a simple statement of fact. SFU does not specially address how it relates to the former employee's employment history or might otherwise fall under s. 22(1), through s. 22(3) or otherwise. I find that s. 22(3)(d) does not apply to either item.

April 23, 1997 Memorandum

SFU withheld from this record information disclosing instructions to SFU's payroll office on the amount of money to be paid to the former employee, together with information on her benefits and related information. If the applicant wanted this information, I would find that SFU withheld it properly under that section.

4.0 CONCLUSION

For the reasons given above, under s. 58(2)(c) of the Act, I require SFU to refuse access to the disputed records, except that, under s. 58(2)(a) of the Act, I require SFU to disclose to the applicant the information marked on the copy of the records delivered to SFU with its copy of this order.

December 21, 2000

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia