



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

SIMON FRASER UNIVERSITY

Order 02-37

Alexander Boyd, Adjudicator
July 18, 2002

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Summary: Applicants made a request for letters of reference written by two third parties to a SFU search committee. SFU determined that parts of the letters could be released, including portions that would identify the third party writers. SFU gave the third parties notice of this decision. The third parties requested a review of that decision. The third parties' personal information is subject to s. 22(3)(h) of the Act and SFU is required to withhold any information that would identify the authors of the letters.

Key Words: submitted in confidence – recommendations or evaluations – fair determination of applicant's rights – harm

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(a), (c), (e), (f) and 22(3)(h).

Authorities Considered: B.C.: Order No. 327-1999, [1999], B.C.I.P.D. No. 40; Order 01-53, [2001] B.C.I.P.D. No. 56; Order 00-02, [2000], B.C.I.P.D. No. 2; Order 01-07, [2001] B.C.I.P.D. No. 7; Order 01-15, [2001] B.C.I.P.D. No. 16.

Cases Considered: *Greater Vancouver Mental Health Services Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198.

1.0 INTRODUCTION

[1] On April 24, 2001 an applicant ("Applicant A") on behalf of himself and another individual ("Applicant B") made an access request to Simon Fraser University ("SFU") for a copy of two letters that had been sent to SFU's Vice-President, Research Search Committee ("Search Committee"). On May 1, 2001, Applicant B provided SFU with

a letter confirming that he was aware of Applicant A's letter, concurred with its contents and wished to be a party to the request.

[2] The requested letters were written by two individuals, the third parties in this matter, in response to an e-mail that was widely distributed by SFU to inform the university community that the term of the Vice-President, Research was due to end. It also stated that the Vice-President was interested in being considered for re-appointment. The e-mail notice invited all interested parties to submit a review of the Vice-President's performance in that capacity to the Committee's Chair. The third parties each submitted a letter. The Applicants' request was for a copy of these letters.

[3] Before their access request, the applicants somehow were given copies of the two letters and 17 other letters that had been submitted to the Search Committee. After reviewing the letters, the applicants apparently consulted with the Simon Fraser University Faculty Association and disclosed the two letters to the President and Executive Director of that Association. The President then apparently delivered the remaining 17 letters, in shredded form, to the President of SFU.

[4] The applicants then apparently determined that they wished to obtain a copy of the third parties' two letters through official means. They made an access request to SFU and included a copy of the two letters as an attachment to their request.

[5] When formulating its response to the applicants, SFU determined that it would be appropriate to give the two third parties notice under s. 23 of the Act and those notices were sent to both third parties on May 23, 2001. A response was received from the first third party ("Third Party A") on June 14, 2001. The second third party ("Third Party B") responded on June 28, 2001. Both third parties objected to the release of their letters and specifically to the release of any information that would reveal their identities.

[6] In spite of the third parties' objections, SFU determined that it should release parts of both letters, including the identities of the third parties, to the applicants. SFU informed both third parties of this decision in separate letters sent on August 3, 2001. In doing so, SFU apparently considered ss. 2(1)(b), 4, 22(1), 22(2)(e), 22(2)(f), 22(2)(h), 22(3)(d), 23(3)(g), 22(3)(h), 22(4)(e) and the then definition of "personal information" in Schedule 1 of the Act. (That definition has since been amended.)

[7] On August 15, 2001, this Office received a letter from Third Party A requesting a review of SFU's decision. On August 20, 2001, this Office received a letter from Third Party B requesting a review of the decision. Specifically, both third parties requested a review of the SFU decision to release information that would reveal their identities.

[8] During mediation, some non-identifying information was released with the consent of the third parties. However, as mediation did not resolve either matter, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUE

[9] The issue here is whether SFU is required under s. 22 of the Act to withhold personal information that would reveal the identity of the two third parties. Section 57(3)(a) places the burden on the applicants to show that the disclosure of the third parties' personal information would not unreasonably invade their personal privacy.

3.0 DISCUSSION

[10] **3.1 Records in Dispute** – I will describe the records in dispute first. SFU has provided copies of the records. They consist of two letters to the Search Committee, one written by Third Party A and the other by Third Party B.

Third Party A's Letter

[11] The letter written by Third Party A is two pages long. Its subject line refers to the Vice-President. The letter conveys Third Party A's views about the Vice-President, notably in relation to a matter in which the Vice-President had been involved and about which Third Party A had some knowledge.

Third Party B's Letter

[12] The letter from Third Party B is 3 1/2 pages in length. It is addressed to the "Chair, Search Committee for Vice-President, Research". The introductory section also states "To the Search Committee in Confidence". It closes with the statement "I am sure all committee members realize the importance of maintaining the confidentiality of this information".

[13] My review of this letter leaves me with the impression that Third Party B apparently believed there had been ongoing, significant differences of opinion between the applicants and the Vice-President and that this had negatively impacted the ethics review process at SFU. In this regard, rightly or wrongly, Third Party B was apparently of the opinion that the Search Committee's decision could be influenced by the opinions of the applicants. Third Party B thus apparently determined that it was necessary to provide some detailed background and opinion on what had transpired and some observations of the applicants' role. In doing so, Third Party B referred to the applicants by name.

[14] **3.2 Outline of Section 22** – Section 22 requires a public body to deny access to personal information if its disclosure would result in an unreasonable invasion of a

third party's personal privacy. The portions of s. 22 that were considered in this case read as follows:

Disclosure harmful to personal privacy

- 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
- (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,
- ...
- (c) the personal information is a fair determination of the applicant's rights,
- ...
- (e) the third party will be exposed unfairly to financial or other harm,
- (f) the personal information has been supplied in confidence, ...
- (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
- ...
- (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

[15] The Information and Privacy Commissioner has, in a number of decisions, discussed how s. 22 is to be applied. See, for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56. I will not repeat such a discussion, but will apply the Commissioner's approach here.

[16] Section 22(3)(h) provides that, if disclosure of information could reasonably be expected to reveal that a third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation, the disclosure is presumed to be an unreasonable invasion of the third party's personal privacy.

[17] The two third parties argue that their letters are letters of recommendation or evaluation that were sent to the Search Committee in confidence. If this argument is accepted, s. 22(3)(h) would apply and, unless other factors favour disclosure, require SFU to refuse to disclose any portions of the letters that could reasonably be expected to reveal that the third parties supplied their recommendations or evaluations in confidence. The

first issue I must consider is whether the third parties' letters qualify as personal evaluations or recommendations. If they are, the second issue is whether they were supplied in confidence for the purposes of s. 22(3)(h).

[18] **3.3 Personal Evaluations or Recommendations** – In determining whether the third parties' letters qualify as personal evaluations or recommendations, I reviewed the responsive records and the other materials before me. The records appeared to me, in the context in which they were created, to qualify as personal evaluations or recommendations as contemplated by s. 22(3)(h) of the Act.

[19] SFU did not argue that the letters were not evaluation or recommendation letters. SFU acknowledges that the letters were written by each third party in response to the request of the Search Committee for reviews of the performance of the Vice-President (para. 1, initial submission). It also says, at paras. 1 and 2 of its reply submission, that the letters were letters of evaluation and recommendation.

[20] The applicants did not argue that the letters were not evaluation or recommendation letters. In their *initial* submission, the applicants mention that the letters were submitted to the Search Committee (paras. 5 & 6). The applicant acknowledges, at para. 2 of its reply submission, that the letters are of an evaluative nature.

[21] After carefully reviewing the letters, it is my opinion that both were written to the Search Committee in response to its invitation for all interested parties to submit a review of the incumbent's performance as Vice-President. I find that the letters meet the s. 22(3)(h) requirement of being a personal recommendation or evaluation. I will now consider whether, as required for the purposes of s. 22(3)(h), the records were supplied in confidence.

[22] **3.4 Was the Personal Information Supplied in Confidence?** – To assist in determining whether or not individuals who submit recommendation or evaluative letters to SFU search committees can expect their submissions, and thus their identities, to be treated in a confidential manner, it would be useful to have guidance from SFU's written policies. Unfortunately, SFU says it has no written policy in this regard (para. 1, reply submission).

[23] Given that there is no written policy, I considered the request for comments document issued by the Search Committee. SFU has provided a copy of an e-mail sent on December 22, 2000 inviting interested parties to submit a review of the Vice-President to the Search Committee's Chair. The e-mail stated, "the responses will be given to the committee and a summary will be available to the Vice-President". Such a statement could cause individuals to reasonably assume that, should they submit comments, their identities would be protected from disclosure, other than to committee members.

[24] I now turn to the submissions made by the various parties to this inquiry.

Third Party A's submissions

[25] Third Party A's submissions were brief. On the confidentiality of supply issue, Third Party A stated that SFU has a public policy that assures confidentiality of letters of recommendation that SFU requests. Third Party A also stated that assurances of privacy were given when the letter in question was submitted. There is no explanation as to the nature of this assurance or how it was given.

[26] Third Party A's reply submission re-affirmed this submission and expanded it to include an understanding that this was a consistent policy at all universities with which Third Party A has been associated and that the confidentiality policy "is at the heart of peer review".

Third Party B's submissions

[27] Third Party B submitted that SFU has a long-standing policy that search committees are "closed and confidential" and stated as follows:

They solicit confidential letters from the university community and handle these letters in confidence.

[28] Third Party B acknowledged that the e-mail did not specify that the submissions would be treated in a confidential manner, but said that, because confidentiality was a longstanding practice on the search committees on which Third Party B had served, Third Party B understood that this would be the case.

[29] Third Party B's reply submission re-stated the belief that the confidentiality of submission letters was a long-standing policy and practice at SFU. Third Party B also outlined the search committees that Third Party B had been part of and said they all had treated such submissions in confidence, to the point of collecting all submission copies back from committee members for destruction. Third Party B also referred to that fact that Third Party B's submission itself had included two comments on its being sent in confidence.

Applicants' submissions

[30] The applicants made joint submissions. Regarding the issue of whether submissions made to a search committee can be considered confidential, the applicants stated as follows:

We thoroughly agree that an expectation of confidentiality is crucial to the operation of many university processes, including hiring committees, such as the Vice-President Search Committee.

[31] The applicants appear to further support this position by referencing Section II-3 of SFU Policy A30.01, the Code of Faculty Ethics and Responsibility. They quote it as stating:

It is unethical to fail to respect the confidentiality of information about a colleague gained during participation in the work of committees such as those described in Section IV.1.

[32] It seems to me that, in the absence of any policy to the contrary, the above enhances the position of the third parties, rather than that of the applicants.

[33] As an example of how they support the principle of confidentiality, the applicants described how they proceeded upon receiving a file containing 19 letters submitted to the Search Committee. Their submission states that they “sought a resolution that would respect confidentiality, the principles of natural justice, and the rule of law”. Although not an issue in this inquiry, it would appear to me that the appropriate way to respect confidentiality in this situation would have been to immediately stop reading the letters upon learning their nature and, instead, to have returned them to the rightful custody of the Search Committee.

[34] The applicants suggest that there are three principal problems with the third parties’ beliefs that the privacy of persons who write confidential letters of recommendation is protected.

[35] The first problem they see is that SFU has already released portions of the letter to the applicants and that seventeen letters reviewing the Vice-President also “fell into our hands”. The issue before this inquiry is whether information that would reveal the identities of the two third parties should be released. It is my understanding that no information that would identify the third parties has been released by SFU through its disclosure of portions of the letters.

[36] Noting the absence of any clear information as to how the other letters came into the applicants’ hands, I do not see how that event has anything to do with whether or not the third parties supplied personal evaluations or recommendations in confidence. Certainly, as an aside, I strongly recommend that SFU review its processes with a view towards lessening the possibility of inappropriate disclosures of this kind. In this respect, I note that the applicants’ disclosure of the two letters in question to the Simon Fraser University Faculty Association was inappropriate and placed SFU in a difficult position in terms of its compliance with Part 3 of the Act.

[37] The second apparent point made by the applicants is that the purpose of the confidentiality undertaking was to protect persons submitting reviews of the performance of the Vice-President, but that the guarantee of confidentiality should not be extended to a review of any other individual.

[38] Section 22(3)(h) of the Act requires a public body to determine whether the third party supplied a letter of recommendation or evaluation in confidence. The application of that section does not turn on the identity of those evaluated or recommended. It requires a determination of whether the evaluations or recommendations were supplied in

confidence, as letters sent to the Search Committee in response to its request for comments.

[39] The third point made by the applicants is that, even if it were agreed that confidentiality should extend to the two letters, this does not “give the writers the excuse to abandon professional standards and SFU policies”. Such a concern does not fall within the scope of the Act. Any issues relating to SFU’s internal professional standards and policies are for it to resolve.

SFU’s submissions

[40] SFU states that it has no written policy stating that the identities of persons who provide peer reviews will remain confidential (para. 1, reply submission). In its submission, however, SFU states that in general it supports the confidentiality of the peer review process used at SFU and other universities. It states (at para. 10 of its submission) that it

... recognizes that the protection of the confidentiality of the identity of persons providing evaluations and reviews of the performance of their colleagues is fundamental to the integrity of the peer review process.

[41] SFU tempers this position, however, by stating (at para. 13 of its submission) that it is the

... unusual circumstances of this case that make it appropriate to disclose the identities of the third parties even though such a disclosure will reveal the identities of persons who have provided an evaluation for a peer review.

[42] I take from this that SFU agrees that, in normal circumstances, confidentiality is an integral part of the peer review process and essential to its proper functions. Even if this is not a concession on SFU’s part that the third parties provided their submissions to the Search Committee in confidence, this position supports such a conclusion. SFU then states that the “unusual circumstances of this case” have caused it to determine that the third parties’ expectation of confidentiality should be set aside and their identities released.

[43] I will note here that the fact that there is no written SFU policy is unfortunate. In this regard, I note the following comments made by Commissioner Loukidelis in Order No. 327-1999, [1999] B.C.I.P.C.D. No. 40, at p. 11:

It would be preferable, however, in cases where confidentiality is claimed respecting a personal evaluation, for the evaluations to be provided in the context of an explicit confidentiality policy of the public body. This would permit the inquiry to focus primarily on the explicit policy, as opposed to evidence after the fact, that the evaluation was supplied in confidence. Whether it is necessary or desirable for UBC to have a confidentiality policy regarding such evaluations is a matter only UBC can properly determine ...

[44] Although it is up to SFU to determine whether written policies or guidelines are required to assist individuals in knowing when their confidential submissions and identities might be disclosed, as Commissioner Loukidelis recommended to the University of British Columbia, I recommend to SFU that it consider the development of such guidelines.

[45] After carefully reviewing all of the submissions, I have observed a common theme in all of them. That theme is that it appears to be the norm and expectation within the university community, and at SFU, that submissions providing references or evaluations to committees, such as the Search Committee, are made in confidence. While both the applicants and SFU submitted a belief that the content of the letters under review should cause this to be set aside in this case, neither presented any argument that convinced me that the third parties did not, implicitly at least, supply their material in confidence. In all of the circumstances, I find that the third parties submitted their letters to the Search Committee in confidence for the purposes of s. 22(3)(h) of the Act.

[46] I will now review those portions of s. 22(2) that the parties have argued are relevant in determining whether disclosure of the third-party personal information would be an unreasonable invasion of personal privacy.

[47] **3.5 Relevant Circumstances** – Several of the relevant circumstances in s. 22(2) must be examined here.

Supplied in confidence

[48] SFU considered s. 22(2)(f) and determined that the evidence was inconclusive as to whether or not the third parties supplied their letters in confidence (para. 12(a), initial submission). I have already discussed extensively the matter of whether or not the letters were submitted in confidence when discussing s. 22(3)(h) and determined that they were. I will not repeat that discussion here. Since the third-party identifying information was supplied in confidence for the purposes of s. 22(3)(h), I am satisfied in the circumstances of this case that it was also supplied in confidence as contemplated by s. 22(2)(f). I find that s. 22(2)(f) is a relevant circumstance in this case and that it favours the conclusion that disclosure of the information would be an unreasonable invasion of the third parties' personal privacy.

Public scrutiny of SFU's activities

[49] The applicants refer to s. 22(2)(a) in their reply submission, at para. 3, by stating that disclosure of the information “would be desirable for the purpose of subjecting the activities of the public body to scrutiny ...”.

[50] It must be remembered that s. 22(2)(a) contemplates disclosure of third-party personal information for the purpose “of subjecting the activities of the government of British Columbia or a public body to public scrutiny”. The applicants do not provide an argument that outlines how the disclosure of the third parties' identifying information would subject SFU's activities to public scrutiny.

[51] After reviewing the submissions, I am of the opinion that that s. 22(2)(a) has no relevance in this case. I do not see how disclosure of third-party identifying information would in this case cause SFU to be subject to public scrutiny. I therefore find that s. 22(2)(a) is not a relevant circumstance in this case.

Fair determination of the applicants' rights

[52] The applicants referred to s. 22(2)(c) in their reply submission, at para. 3, by arguing that: "the disclosure would enable us to determine our rights to redress".

[53] Section 22(2)(c) applies only where the personal information in question "is relevant to a fair determination of the applicant's rights".

[54] In Order 01-07, [2001] B.C.I.P.C.D. No. 7, at paras. 30 and 31, Commissioner Loukidelis said the following about determining whether 22(2)(c) applies

[30] In Ontario Order P-651, [1994] O.I.P.C. No. 104, the equivalent of s. 22(2)(c) was held to apply only where *all* of the following circumstances exist:

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
2. The right must be related to a proceeding which is either under way or is contemplated, ...
3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.

[31] I agree with this formulation. ...

[55] This view that the word "rights" in s. 22(2)(c) refers to legal rights has been affirmed by the courts. See *Greater Vancouver Mental Health Services Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198. I took this guidance when determining whether s. 22(2)(c) is a relevant consideration in this case. The applicants did not provide an argument as to how the release of the third parties' identifying information is relevant to a fair determination of their legal rights as understood above. I have no information before me that would persuade me that s. 22(2)(c) is relevant. Therefore, I find that s. 22(2)(c) is not a relevant circumstance in this case.

Unfair exposure to harm

[56] Third Party B has argued that s. 22(2)(e) should be a relevant circumstance in this case, *i.e.*, if the information is disclosed “the third party will be exposed unfairly to financial or other harm”.

[57] Third Party B argues that the release of the personal information would be unfair because the letter was never intended to be disclosed (para. 2, initial submission). Third Party B also argues that the harm would be of a “threatening behavior” or nature (para. 2, initial submission).

[58] To assist me in determining whether or not perceived threatening behavior should be considered a “harm”, I considered the comments offered by Commissioner Loukidelis in Order 00-02, [2000] B.C.I.P.D. No. 2, at p. 7, where he states:

It is clear that s. 22(2)(e) deals with more than mere financial harm – it explicitly refers to “other harm”. In my view, exposure to physical or mental harm can fall within this section. ...

[59] Commissioner Loukidelis provides further assistance in Order 01-15, [2001] B.C.I.P.D. No. 16, at para. 49 when, in referring to Order 00-02, [2000] B.C.I.P.D. No. 2, he stated:

In that case, however, the mental harm referred to went beyond embarrassment, upset or a negative reaction to someone’s behaviour. It clearly referred to ‘serious mental distress or anguish’ to [a third party] ...

[60] I would agree with Commissioner Loukidelis that the intent of s. 22(2)(e) is to allow consideration of a “harm” that is not just financial. It can be of a non-financial nature, including physical or mental. However, in order to be considered a mental harm, the previous decisions cited above indicate that it has to be more than causing a third party to be embarrassed, upset or to have a negative reaction to someone’s behavior.

[61] I have carefully considered the evidence provided by Third Party B and I am not persuaded that harm within the meaning of s. 22(2)(e) might ensue if the identifying information is disclosed. I therefore find that other harm under s. 22(2)(e) is not a relevant consideration in this case. Given this, it is not necessary to consider whether any such harm would be “unfair”.

Finding respecting disclosure

[62] Given that I have determined that the letters are subject to s. 22(3)(h), that disclosure of the names or other identifying information of the third parties is therefore presumed to be an unreasonable invasion of the personal privacy of the third parties, and that the identifying information was supplied in confidence as contemplated by s. 22(2)(f), I find that SFU is required to refuse to disclose such information to the applicants.

4.0 CONCLUSION

[63] For the reasons given above, under s. 58(2)(c) of the Act, I require Simon Fraser University to refuse access, under s. 22(1) of the Act, to any information in the letters that would reveal the identity of the third parties.

July 18, 2002

ORIGINAL SIGNED BY

Alexander Boyd
Adjudicator