OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 03-37

UNIVERSITY OF BRITISH COLUMBIA

Celia Francis, Adjudicator
October 16, 2003

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Summary: Applicant requested records related to her academic appeal. UBC provided records, withholding other records and information under ss. 3(1)(b), 13(1), 14 and 22. UBC found to have applied ss. 3(1)(b), and 14 properly and, with one exception, s. 22 as well. UBC ordered to disclose some personal information related to applicant. Section 13(1) found not to apply in all cases and UBC ordered to disclose draft letters.

Key Words: scope of the Act – personal note, communication or draft decision of person acting in a quasi-judicial capacity – post-secondary educational body – duty to assist – adequacy of search – respond openly, accurately and completely – every reasonable effort – policy advice – advice or recommendations – developed by or for a public body or a minister – legal advice – solicitor client privilege – personal privacy – unreasonable invasion – workplace investigation – opinions or views – submitted in confidence – personal privacy – employment history – public scrutiny – fair determination of rights – unfair exposure to harm – inaccurate or unreliable personal information – unfair damage to reputation.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(b), 6(1), 13(1), 14, 22(1), 22(2)(c) and (f), 22(3)(a), (d), (f) and (h), 22(4), 22(5).

Authorities Considered: B.C.: Order 327-1999, [1999] B.C.I.P.C.D. No. 40; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 00-16, [2000] B.C.I.P.C.D. No. 19; Order 00-26, [2000] B.C.I.P.C.D. No. 29; Order 00-27, [2000] B.C.I.P.C.D. No. 30; Order 01-10, [2001] B.C.I.P.C.D. No. 11; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 03-24, [2003] B.C.I.P.C.D. No. 24.

Cases Considered: *M.N.R.* v. *Coopers and Lybrand* (1978), 92 D.L.R.; *Mohl* v. *University of British Columbia*, [2001] B.C.J. No. 2685 (C.A.); *Re Polten and University of Toronto* (1976), 8 O.R. (2d) 749 (Ont. Div. Ct.); *Al-Bakkal* v. *de Vries*, [2003] M.J. No. 307 (Q.B.).

1.0 INTRODUCTION

[1] The applicant in this case submitted a request on November 23, 2001 to the public body, the University of British Columbia ("UBC") for access to records related to her academic appeal. UBC responded to this request first on January 23, 2002 and again, in response to a follow-up note from the applicant in March 2002, on April 12, 2002. The applicant submitted two more requests on July 1 and 2, 2002, to which UBC responded on October 29, 2002. In its responses, UBC told the applicant that it was providing records but severing some information under ss. 13(1), 14 and 22 of the *Freedom of Information and Protection of Privacy Act* ("Act").

[2] The applicant requested reviews of UBC's decisions to deny access to information in February 2002 and November 2002. She said she was not interested in the names of third parties but wanted to know what was said about her. She also said that UBC had not complied with its duty under s. 6(1) of the Act in that it had not located and provided all responsive records. She provided examples of records which she had expected to receive but which UBC had not provided. She also complained that UBC had merged its responses to her two July requests.

[3] According to the Portfolio Officer's Fact Report that accompanied the Notice of Inquiry, during mediation, UBC disclosed some information it had previously withheld. UBC also conducted further searches and found and disclosed more responsive records. The matter did not settle in mediation, however, and a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act, by making all findings of fact and law and the necessary order under s. 58.

2.0 ISSUE

[4] The issues before me in this inquiry are:

1. Was UBC required by s. 22 of the Act to deny access to personal information?

2. Was UBC authorized by ss. 13 and 14 of the Act to deny access to information?

3. Did UBC fulfil its duty under s. 6(1) of the Act in its responses to the applicant's requests?

4. Does s. 3(1)(b) exclude certain records from the scope of the Act?

[5] Under s. 57(1) of the Act, UBC has the burden of proof regarding ss. 13(1) and 14, while under s. 57(2), the applicant has the burden regarding s. 22. Previous orders have established that UBC has the burden with respect to ss. 3(1)(b) and 6(1).

3.0 DISCUSSION

[6] **3.1 Procedural Matters** – I will first deal with some procedural matters that arose during this inquiry.

Exceptions in issue

[7] The applicant's requests for review do not specifically mention UBC's decision to deny access under ss. 13(1) and 14, but only s. 22. The notice for this inquiry lists all three sections, in addition to s. 6(1), however, so it seems that the applicant added ss. 13(1) and 14 in mediation. I have therefore considered all three exceptions in this decision, together with s. 6(1).

Material outside scope of requests

[8] UBC says that it withheld a number of items as being outside the scope of the request. It marked them as "N/R" – presumably for "not responsive". The applicant did not take issue with these items in her request for review nor her inquiry submissions. These items relate to topics other than the applicant's freedom of information request and are outside the scope of the request. I have therefore not considered them in this decision.

UBC's delay in responding to July 2002 requests

[9] The applicant raises the issue of UBC's delays in responding to her July 2002 requests for the first time in her initial submission. UBC comments on its response timelines in its initial and reply submission. The applicant did not complain about this issue in her November 2002 request for review, however, nor is it listed in the Notice of Inquiry. I therefore do not consider this issue to be properly before me in this inquiry and have not considered it in this decision.

Late addition of section in issue

[10] UBC said for the first time in its initial submission that it was applying s. 3(1)(b) to certain records. It acknowledged that it had not previously relied on this section but argued that the Information and Privacy Commissioner has previously allowed public bodies to apply exceptions late in the process. It also argued that the applicant was not prejudiced by this late addition and had an opportunity to comment in her reply. The applicant did not object to UBC's application of s. 3(1)(b) in her reply. She does not refer to it at all, in fact.

[11] As this section goes to the fundamental issue of whether the Act even applies to these records, I have considered UBC's arguments on s. 3(1)(b), although I consider them to be made regrettably late in the process. This is to be avoided wherever possible.

[12] **3.2 Compliance with Section 6(1)** – In her second request for review and initial and reply submissions, the applicant mentioned a number of specific areas in which

UBC's response had, in her view, been deficient as regards s. 6(1). Section 6(1) reads as follows:

> **Duty to assist applicants**
>
> 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.

[13] The Information and Privacy Commissioner has considered in a number of orders the standards applicable to a public body's search for records and describing its search efforts in inquiries like this. See, for example, Order 00-26, [2000] B.C.I.P.C.D. No. 29. I will not repeat that discussion here but have applied the same principles in this decision.

[14] Both the applicant and UBC address the applicant's complaints about UBC's supposed s. 6(1) deficiencies in some detail with, in the applicant's case, some repetition. I will not reproduce these submissions but summarize the main points and responses below, followed in each case by my comments and findings.

Blending of responses to July 2002 requests

[15] The applicant objects to UBC having apparently combined its responses to her requests of July 1 and 2, 2002, as they were distinct in her opinion. She says one was for records that pre-dated her November 2001 request and one was for records that post-dated that request.

[16] UBC says that, contrary to what the applicant had said, the two requests were not for different time periods. In UBC's view, the July 2, 2002 request is subsumed within the July 1, 2002 request and it was quite reasonable for UBC to have responded to these requests together.

[17] The request of July 1, 2002 said the applicant wanted all records about her academic appeal held by a number of named individuals. The request acknowledges that it may overlap with her November 23, 2001 request. The request of July 2, 2002 states that the applicant wants all new records related to her appeal "since my original FOI request in November 2001" held by specified individuals.

[18] It is possible that, by acknowledging that there was some overlap with her November 23, 2001 request, the applicant intended her July 1, 2002 request to be for records that pre-dated the November request. This is by no means clear, however, and UBC's interpretation of the July 1 request as encompassing the July 2 request was reasonable, in my view. It follows that I find UBC's combined response to the requests – assuming for discussion purposes that a combined response could be contrary to s. 6(1) – was also reasonable. I find that UBC fulfilled this aspect of its s. 6(1) duty. There is no need for me to make an order with respect to this issue.

Interpretation of November 2001 request

[19] The applicant also alleges that UBC had "misstated" her first request, by which she seems to mean that UBC narrowed the request on its own initiative and without justification. She says that this meant she did not receive certain records that were responsive to her request, and which would have been useful to her in preparing for that appeal, until after her academic appeal was heard.

[20] After the applicant sent an e-mail message to UBC's information and privacy co-ordinator in March 2002 about records she thought she should have received in response to her November 2001 request, UBC found and disclosed other responsive records. The applicant refers to UBC's letter of April 2002, which said that UBC had understood her November 2001 request to be for records that the Faculty of Graduate Studies and the English Department had considered in the course of their reviews of her appeal. The letter says that UBC now understood her request to be broader, requesting all records at the Faculty and Department to do with her academic appeal. She points out that she asked for "all documents and records (including correspondence, etc.) at the Faculty of Graduate Studies and the Department of English regarding" her academic appeal. The applicant argues that UBC's initial interpretation of her request was not reasonable.

[21] UBC responded that its interpretation of the applicant's November 23, 2001 request was consistent with an e-mail message that the applicant had sent on November 30, 2001. It points out that the applicant did not mention this November 30 e-mail in her submission. I note, however, that the applicant attached a copy of it to her initial submission. UBC argues that the applicant said her request was "very specific", "in particular" requesting investigation records of various kinds and that she referred to "her files" in the Faculty and Department.

[22] UBC goes on to say that the applicant's e-mail of November 30, 2001 "underscored" that her request was "highly specific" and "only specifically for" all the records listed in her November 23, 2001 request. Based on this, UBC said that it understood her request "to be confined to documents considered by the Faculty of Graduate Studies and the Department of English's Equity Committee in the course of their reviews of her appeal." UBC argues that its interpretation was reasonable and consistent with the applicant's references to her request being "very specific" and "highly specific" and to copying "her files". This interpretation evidently resulted in a narrowing of the applicant's request, judging by the fact that the applicant's March 2002 query led to the disclosure of further records.

[23] I have reviewed the applicant's request of November 23, 2001 and her e-mail message of November 30, 2001, which UBC argues, was the basis for its interpretation of her request. In my view, the November 30 e-mail does not clarify or narrow the November 23 request but simply repeats it in much the same form.

[24] In the November 23 request, the applicant says

> I would like sent to me all documents and records (including correspondence, etc) at the Faculty of Graduate Studies and the Department of English regarding my

> academic appeal [topic of appeal omitted]. In particular, "investigation" documents, records, correspondence, etc. by the Department's Equity Committee and an investigation by FoGS.

[25] The pertinent part of the applicant's e-mail of November 30 says

> I did want to underscore, further to my FOI request letter, my request is only specifically for all records (including "investigations", correspondence, etc) in my file at FoGS and my file at the Department regarding my "Appeal [topic of appeal omitted]".

[26] The applicant mentions further down in this e-mail (the rest of which urges UBC to respond as quickly as possible to her freedom of information request) that her request is "highly specific".

[27] UBC supports its position on the interpretation issue with affidavit evidence from its information and privacy co-ordinator. The evidence essentially repeats the passage in UBC's April 2002 letter to the applicant on its initial and later interpretations of the request. UBC does not explain how it arrived at the initial interpretation of the request and follow-up e-mail, *i.e.*, that the applicant only wanted records that the Faculty and Department "considered" in reviewing her appeal.

[28] In my view, the applicant's request and follow-up e-mail do not support UBC's narrowed interpretation of the request. In both items, the applicant clearly says she wants "all records" regarding her appeal in the Faculty and Department. I do not consider that the fact that the applicant said she wanted certain records "in particular" or that her request was "highly" or "very specific" lends itself to an interpretation that she wanted anything less than all records related to her appeal in the Faculty and Department. Nowhere does she say or imply that she wishes access only to records that the Faculty and the Department "considered" in their review of her appeal. It appears that those initially searching for responsive records simply interpreted the request that way, for reasons which are not clear from UBC's submissions.

[29] Based on the material before me, UBC did not, in my view, at first comply with its s. 6(1) duty to assist the applicant regarding its interpretation of her November 23, 2001 request. Through its later response to this request, however, I find that UBC did comply with its duty respecting the interpretation issue and I see no need to order it to do anything further in this regard.

Records not provided initially

[30] The applicant also faulted UBC's records searches and mentioned numerous examples of records which she had not received but which she feels she ought to have received. For example, although she had specifically requested records of a "formal investigation" of her appeal, UBC had failed to produce any such records. As another example, she said there were numerous references in the records she had received to other records or types of records which she had not received. The applicant also said she had

provided an envelope of records to a specified UBC employee (apparently in relation to her academic appeal) and UBC had not later disclosed them with its responses. She also said that UBC had provided certain records in response to her later requests which it ought to have provided in response to her earlier request.

[31] The applicant also said that UBC had apparently not asked specified individuals nor certain obvious people for responsive records. In this vein, the applicant further argued that it was not her responsibility to name specific locations or individuals potentially holding responsive records. She also questioned UBC's position that it was unable to find certain records.

[32] UBC argues in its initial submission that its search efforts had met its s. 6(1) duty. It supports its position with a detailed affidavit from its information and privacy co-ordinator in which she deposes as to the steps she took to retrieve the records responsive to the applicant's various requests. She deposes, finally, that she had spent approximately 50 hours in dealing with the applicant's requests.

[33] In its reply, UBC provides a comprehensive response to each of the applicant's complaints regarding its searches. It said, for example, that (contrary to what the applicant said), it had in fact provided some records the applicant said she had not received. It cited page references in support of this argument. In the case of other records the applicant mentions, UBC admits in its reply that it did not locate them earlier but says it now had and was disclosing them to the applicant. It included a new decision letter on these records with its reply. In still other cases, UBC concedes that it did not provide until later some records that were responsive to her November 2001 request. Given the volume of records and large number of sources for those records, UBC argues, the fact that it missed a few pages out of more than 1,300 pages of records does not mean it did not make reasonable efforts the first time.

[34] In another case, UBC says a record the applicant contends she should have received in response to her earlier request did not exist at the time of the earlier request. UBC says the applicant had evidently misread the date as indicating that the record fell within the scope of the earlier request. In other cases, UBC says that it did ask certain individuals for records, despite the applicant's suggestions that it had failed to retrieve records from people she considered to be "obvious" sources, as well others whom she named.

[35] Regarding the supposed lack of records on a "formal investigation", UBC says it had retrieved all the records it could find on an "investigation" and suggests that the applicant's expectations were incorrect. As for the envelope of records the applicant said she had delivered to a specific UBC employee, UBC says the applicant did not name this employee in her request and it did not therefore know to ask the employee for those records.

[36] In my view, UBC did not initially fulfil its s. 6(1) duty to search adequately for records responsive to the applicant's various requests. By its own admission, UBC did not at first disclose some records it should have, although it later found and disclosed those records. Based on the material before me, however, I consider that UBC has rectified its

initial failings with its later searches and disclosures. I also consider that it has satisfactorily described the steps it took in locating responsive records. I find that UBC has now complied with this aspect of its s. 6(1) duty and there is no need for me to order it to search again.

[37] **3.3 Act's Application to Draft Decisions** – UBC raised s. 3(1)(b) for the first time in its initial submission. It says at pp. 12-14 that this section applies to records 000941-000952 and 000956-000968. It says elsewhere in its initial submission that s. 13(1) of the Act also applies to these records and this appears to have been its original decision. The applicant's legal counsel disputed the application of s. 3(1)(b) to these records in a supplementary letter of October 9, 2003. He argued on her behalf that s. 3(1)(b) should be interpreted narrowly and suggested that the records do not appear to meet the test for s. 3(1)(b).

[38] UBC's legal counsel later clarified that UBC's position was that s. 3(1)(b) applies to these records, but that if I find that s. 3(1)(b) does not apply, it argues that s. 13(1) applies. Of course, if s. 3(1)(b) applies to these records, then s. 13(1) does not. I have therefore considered s. 3(1)(b) first.

[39] Section 3(1)(b) excludes from the scope of the Act "a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity." In Order 00-16, [2000] B.C.I.P.C.D. No. 19, at p. 8, the Information and Privacy Commissioner set out the criteria for deciding if a person was acting in a judicial or quasi-judicial capacity:

> This view also accords with the criteria articulated by the Supreme Court of Canada in *M.N.R.* v. *Coopers and Lybrand* (1978), 92 D.L.R. (3d) 1, for deciding whether a function is judicial or quasi judicial:
>
> (1) Is there anything in the language in which the function is conferred, or in the general context in which it is exercised, which suggests that a hearing is contemplated before a decision is reached?
>
> (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
>
> (3) Is the adversary process involved?
>
> (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

[40] UBC refers to Order 00-16 and quotes from Section A.2 of the government's *Policy and Procedures Manual* which outlines when a person is acting in a quasi-judicial capacity:

> If he or she is required to:
>
> - Investigate facts, hear all parties to the matters at issue, weigh evidence or draw conclusions as a basis for their action;
> - Exercise discretion of a judicial nature; and
> - Render a decision following the consideration of the issues rather than simply making a recommendation

[41] This manual is not binding on me.

[42] UBC also cites two passages from Order 00-16, one on the purpose of the section and one on the types of record that s. 3(1)(b) excludes. It then asserts that the author of the records in question is required to conduct a hearing, exercise discretion of a judicial nature and render a decision following the consideration of the issues (criteria apparently drawn from the manual) and that the records in question are communications or draft decisions of panel members who are acting in a judicial or quasi-judicial capacity.

[43] Apart from this, however, UBC does not set out or refer to the criteria that the Commissioner accepted in Order 00-16 for determining if s. 3(1)(b) applies. It also does not provide argument or evidence expressly directed at those criteria (for example, as to the nature and functions of the panel in question and the process it conducted) as they may relate to the records in question. On its face, UBC's submission falls short in establishing that s. 3(1)(b) applies.

[44] I am, however, aware of case law in which the courts have recognized that the university academic appeal process is quasi-judicial. See for example, *Mohl* v. *University of British Columbia*, [2001] B.C.J. No. 2685 (C.A.), *Re Polten and University of Toronto* (1976), 8 O.R. (2d) 749 (Ont. Div. Ct.), and *Al-Bakkal* v. *de Vries*, [2003] M.J. No. 307 (Q.B.).

[45] In addition, the records themselves permit me to conclude that s. 3(1)(b) applies. Records 000941-000952 and 000956-000967 are two different versions of a letter from the Chair of UBC's Senate Committee on Appeals to the applicant, providing the Committee's written reasons on the applicant's academic appeal.

[46] I therefore conclude that s. 3(1)(b) applies to records 000941-000952 and 000956-000967 and that they fall outside the scope of the Act.

[47] Record 000968 is an e-mail message from the chair of the appeal committee to the other panel members on the draft decision letter. UBC severed comments by one panel member to the others on the wording of the decision. It follows from my conclusions on the other records for which UBC claimed s. 3(1)(b) that I consider that it applies to the e-mail as well. The contents are a communication covered by s. 3(1)(b).

[48] I find that s. 3(1)(b) applies to records 000941-000952 and 000956-000968.

[49] **3.4 Advice or Recommendations** – Section 13(1) allows public bodies to withhold information that would reveal advice or recommendations developed by or for a public body or a minister. UBC argues that s. 13(1) applies to records 200021, 200029, 200096, 200101, 000317, 000326 and 000978.

[50] According to the copies of severed and withheld records that UBC provided to this Office for the purposes of the review, it also severed information from record 200094 and withheld records 000585-000589 under s. 13(1). UBC says in its initial submission that it disclosed record 200094 but does not address records 000585-000589. I later learned

through an exchange of letters with UBC that it had disclosed records 000585-000589 in January 2003, apparently during mediation. I therefore do not need to consider them here.

[51] UBC appears originally to have applied s. 13(1) to records 000941-000952 and 000956-000968 but, in its initial submission, argued that s. 3(1)(b) applies to those records instead. I found above that s. 3(1)(b) applies to these records and therefore do not need to consider whether s. 13(1) applies to them.

[52] The applicant mentions s. 13(1) in her initial submission but does not elaborate on it, either there or in her reply, with respect to records 20021, 200029, 200096, 200100, 000317 and 000978.

Draft letters

[53] UBC says that it is entitled by s. 13(1) to withhold draft letters (records 200021, 200029, 200096, 000317, 000326 and 000978), some of which are annotated with comments. It refers to various orders of the Commissioner in support of its position.

[54] UBC says that the draft letters qualify as advice developed by UBC and that they reflect internal deliberations of UBC staff regarding the management of certain issues involving the applicant. It says that these letters were circulated within UBC for the purpose of obtaining advice and recommendations. Some records (200021 and 200096) expressly state that the advice is confidential, UBC says, as evidenced by the fax cover sheets numbered 200020 and 200094, which UBC says the applicant received. (Only record 200094 was included in the package of records before me.) UBC argues that the draft letters and comments are advice and recommendations that led to a course of action by UBC, that is, what to say in letters to the applicant and another person.

[55] Records 200021 and 200096 appear to be identical versions of a letter to the applicant. They are not on letterhead but do not otherwise, on their face, indicate that they are drafts. Record 200096 contains handwritten comments which I find are advice under s. 13(1). UBC says that record 200094 is the fax cover page to the "draft" letter in record 200096, although this is not clear to me, given the page numbering. Record 200094 does indicate that a UBC employee circulated, for comment, a draft letter to the applicant.

[56] Records 000317 and 000326 contain what appear to be identical versions of a letter to someone other than the applicant. The disclosed information on record 000326 indicates that the withheld information is a draft letter.

[57] Records 200029 and 000978 appear to be identical versions of a letter to the applicant. They are marked as drafts and contain handwritten editorial comments, apparently by two different people. I consider that the handwritten comments constitute advice as contemplated by s. 13(1).

[58] UBC did not provide me with final copies of the records which it describes as draft letters, which it could easily have done. I thus have no way of knowing how the drafts differ from the final versions, if at all. UBC says that the Information and Privacy

Commissioner accepted its application of s. 13(1) to a draft letter in Order No. 327-1999, [1999] B.C.I.P.C.D. No. 40. The Commissioner noted in that order that he did not have the final version in that case and thus did not know how the annotated draft he was considering differed from the final letter. He also said he was unable to determine from the material before him if severing the letter was possible. He found, in the circumstances of that case, that the withheld record fell under s. 13(1).

[59] The Commissioner has, however, also made it clear that s. 13(1) does not apply to drafts simply because they are drafts. See, for example, Order 00-27, [2000] B.C.I.P.C.D. No. 30, at p. 6. He said there that a public body can withhold only those parts of a draft which actually are advice or recommendations.

[60] UBC does not explain here why it retained these so-called draft letters. It also does not explain how, in its view, the records contain advice or recommendations. It simply asserts that they do. UBC did not point to specific portions of the records that, in its view, constitute advice or recommendations. UBC also did not provide me with affidavit evidence to support its argument that s. 13(1) applied, for example, by setting out the context for the advice or recommendations and how, in UBC's view, the records fall within the continuum of the deliberative process and contain advice or recommendations. While I accept that the annotations on some records constitute advice, if innocuous editorial advice for the most part, it is by no means clear that all of the records are drafts. In any case, the fact that a record is a draft does not make the entire record advice or recommendations, as the Commissioner has noted.

[61] Much of the information in the so-called draft letters is factual, for example, recounting what happened in various dealings with the applicant or repeating what she said in her own correspondence to UBC. Both in the case of the records which are marked draft and those which give the appearance of being final versions of letters, I am not able to glean from their face what advice or recommendations the records might contain (apart from the annotations). UBC should not expect me to divine this sort of thing but should support its position with argument and evidence and should specify what the advice or recommendation is and where it is to be found. Mere assertions do not suffice. UBC has failed, in my view, to demonstrate that the so-called draft letters are, in their entirety, advice or recommendations as the Commissioner has interpreted these terms in his orders, such as Order 02-38, [2002] B.C.I.P.C.D. No. 38. I find that s. 13(1) does not apply to records 200021, 200029, 200096, 000317, 000326 and 000978, except for the handwritten annotations on records 000978, 200029 and 200096.

E-mail

[62] UBC argues that the remaining record (200101) contains recommendations or advice on a recommended course of action by UBC. UBC does not otherwise explain how s. 13(1) applies to this record. However, unlike the records I considered just above (except for the handwritten annotations), I am able to determine from record 200101 itself that s. 13(1) applies to the withheld information in it.

[63] Record 200101 is an e-mail, from which UBC has severed approximately half the text under s. 13(1). It consists of a mixture of implicit and explicit advice on how to deal with the applicant in a particular matter, including some considerations and internal deliberations. I find that s. 13(1) applies to the withheld information in this record.

[64] **3.5 Solicitor-Client Privilege** – Section 14 of the Act allows public bodies to withhold information that is subject to solicitor-client privilege. The Information and Privacy Commissioner has considered the application of s. 14 in numerous orders and the principles for its application are well established. See for example, Order 00-08, [2000] B.C.I.P.C.D. No. 8. I will not repeat those principles but apply them in this decision.

[65] The applicant does not address s. 14 in her submissions. UBC says that both branches of common law privilege apply in this case and presents its arguments on s. 14 at pp. 9-10 of its initial submission. It argues that legal professional privilege applies to records 000267-000269 and that litigation privilege applies to records 000969-000970.

[66] In the first case, UBC says that record 000267 is a written communication between UBC's solicitor and an agent of UBC that relates to a draft response of the solicitor (record 000268) to a letter from another solicitor to UBC (record 000269). This is the extent of UBC's submission on how it considers that this aspect of s. 14 applies in this case. It did not provide any argument or evidence to support its position.

[67] The Commissioner said in Order 03-24, [2003] B.C.I.P.C.D. No. 24, that the s. 57(1) burden has meaning and a party that asserts solicitor-client privilege must prove that it exists. I do not consider that UBC has done so here. As the Commissioner was able to do in Order 03-24, however, I am able in this case to determine from the records themselves that s. 14 applies in that they relate to legal advice sought from, or given by, UBC's legal counsel. The determination that the Commissioner made at para. 57 of Order 01-10, [2001] B.C.I.P.C.D. No. 11, regarding a similar record, supports my finding here.

[68] Turning to records 000969-000970, UBC says that litigation was in reasonable prospect at the time the two records came into existence. It says they consist of the written response of an agent of UBC to a request for information from UBC's solicitor to conduct or aid in the conduct of litigation. UBC also says that the fact that both agent and solicitor anticipated litigation is apparent on the face of the records. Litigation has since begun, it says, and the test for litigation privilege is therefore met. It supports its position with a brief affidavit of an external legal counsel for UBC, to which is attached a writ of Summons regarding a civil action involving the applicant as plaintiff and UBC as defendant. The writ is stamped as filed in Supreme Court on October 23, 2002 and the applicant's statement of claim is attached to it.

[69] UBC did not provide any other argument or evidence to support its claim that litigation privilege applies to these two records. Again, however, I am able to determine from the records themselves that the litigation privilege branch of s. 14 applies. The records predate the Writ but the contents of the records do support UBC's contention that litigation was in reasonable prospect at the time of their creation and that the dominant

purpose of their creation was to aid in the conduct of that anticipated litigation. Further, there is no indication that litigation was over at the time of the inquiry.

[70] I find that s. 14 applies to records 000267-000269 and 000969-000970.

[71] **3.6 Personal Privacy** – The Information and Privacy Commissioner has considered the application of s. 22 of the Act in numerous orders. See, for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56. I will not repeat that discussion but have taken the same approach in this decision.

[72] The applicant stated in her requests for review and her initial submission that she is only interested in what was said about her. She says she does not want information that would infringe on the privacy of other people. She raises considerations related to her academic appeal and her lawsuit against UBC and asks that I make available any information that in my judgement is in the "interest of justice being served" as related to those two actions. While she does not name a specific subsection of s. 22, this argument appears to relate to the relevant circumstance in s. 22(2)(c). She does not otherwise address s. 22, for which she has the burden of proof.

[73] UBC says that ss. 22(1), 22(2)(f), 22(3)(d) and (f) apply in this case and that ss. 22(4) and (5) do not. It presents its arguments on s. 22 at pp. 2-6 of its initial submission. In my view, s. 22(3)(a) is also relevant in one case. I reproduce below the relevant parts of s. 22:

> **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
>
> …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> …
>
> (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
>
> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
>
> …

(d) the personal information relates to employment, occupational or educational history,

…

(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,

…

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in writing, consented to or requested the disclosure,

(b) there are compelling circumstances affecting anyone's health or safety and notice of disclosure is mailed to the last known address of the third party,

(c) an enactment of British Columbia or Canada authorizes the disclosure,

(d) the disclosure is for a research or statistical purpose and is in accordance with section 35,

(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,

(g) public access to the information is provided under the *Financial Information Act*,

(h) the information is about expenses incurred by the third party while travelling at the expense of a public body,

(i) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the application for the benefit, or

(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).

(5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

Third–party personal information

[74] UBC says that the information that it withheld in records 200094, 000093, 000225, 000166, 000180, 000205, 000103, 000144, 000163, 000164, 000170, 000171, 000173, 000174, 000245, 000246, 000200, 000203, 000125, 000127, 000129, 000132, 000254, 000256, 000865, 000871, 000877, 000936 and 000937 consists of names of third parties, a telephone number, the personal views or opinions of individuals, and the educational or employment information of third parties. It says that this information falls under s. 22(1) or ss. 22(3)(d) and (f), that no relevant circumstances from s. 22(2) apply and that s. 22(4) also does not apply to this information.

[75] I have reviewed these pages and can confirm that information withheld in them is personal information and relates to third parties. The withheld information is replicated several times in that it is contained in multiple copies and versions of e-mail messages. None of it falls under s. 22(4), in my view. Some withheld information is the names of other students mentioned in the records. Most is the personal views, thoughts, opinions or related information of third parties about work-related situations or events, usually pertaining to the applicant's academic appeal. Other information concerns work-related events involving third parties. This information all falls under s. 22(1) or s. 22(3)(d), in my view. A small amount of information in record 000103 is the medical information of a third party and, in my opinion, falls under s. 22(3)(a). Disclosure of all of this personal information is presumed to be an unreasonable invasion of third-party privacy.

[76] The applicant raised considerations related to her appeal and lawsuit, apparently aimed at the relevant circumstance in s. 22(2)(c). She did not, however, explain how the withheld third-party personal information might be relevant to a fair determination of her rights. As the Commissioner has said on more than one occasion, rights mean "legal rights". See Order 01-53, at para. 54, for example.

[77] It appears from the material before me that UBC has dealt with the applicant's academic appeal at the university level. The applicant's lawsuit is apparently still ongoing and is related to her academic appeal. The applicant does not, however, explain how the withheld third-party personal information might be relevant to a fair determination of her legal rights in that or any other process. This may be because she is not interested in the third-party personal information. It is also not apparent from the withheld information itself how it might be relevant to the applicant's legal rights in the litigation she has launched against UBC or any other process. Based on the material before me, I find that s. 22(2)(c) does not apply in this case.

[78] There is an indication that the author of one e-mail was providing the information in confidence. This information appears in record 000200 and is replicated in several other records. Section 22(2)(f) applies in these cases. No other relevant circumstances apply, in my view.

[79] I do not consider that the applicant has met her burden regarding the application of s. 22 to these records. I find that s. 22 applies to the information that UBC withheld under that section in records 000093, 000225, 000166, 000180, 000205, 000103, 000144, 000163, 000164, 000170, 000171, 000173, 000174, 000245, 000246, 000200, 000203,

000125, 000127, 000129, 000132, 000254, 000256, 000865, 000871, 000877, 000936 and 000937 and must be withheld.

Applicant's personal information

[80] UBC argues that ss. 22(2)(f) and 22(3)(h) apply to information it withheld in records 000086, 000178 and 000218 and that s. 22(4) does not apply to it. The information is the same in each case, being three versions of the same e-mail message. UBC says that the information supplied in these records was expressly stated to be supplied in confidence.

[81] UBC then says that, in the alternative, if s. 22(3)(h) does not apply, it is still required to withhold this information "because, considering all relevant circumstances," including the one in s. 22(2)(f), "it would be an unreasonable invasion of third party personal privacy to disclose this information." Disclosure of the withheld information in records 000086, 000178 and 000218 would reveal the identity of a third party who supplied personal information in confidence, it says, and, further, it is not possible to provide the applicant with a summary under s. 22(5).

[82] Most of the withheld information in these pages is the applicant's own personal information, in that it consists of opinions and comments about her. UBC does not specify the third party or parties it considers provided personal information in confidence nor to whom. UBC also does not supply any evidence to support its contention that a third party or parties supplied the information in confidence, for example, affidavit evidence from the third party or parties whose identity or identities it wishes to protect. There is, however, some internal support in the withheld information itself for the argument that a third party or parties provided some personal information in confidence. I find that s. 22(3)(h) applies to third-party identifying information within the withheld information.

[83] It is well established that a public body has the burden of proving why an applicant's own personal information should not be provided to her or him. See Order 03-24, at para. 55, for example. UBC does not address this issue in its submissions nor does it explain why it could not sever third-party identifying information and release the applicant's own personal information to her. It also does not explain why, in its view, s. 22(5) does not apply in this case.

[84] I do not consider that s. 22(5) applies here, as it is possible, in my view, to sever the withheld information in such a way as to protect the identity or identities of a third party or parties who supplied information in confidence and release to the applicant her own personal information. Accordingly, I have prepared re-severed copies of records 000086, 000178 and 000218 for UBC's disclosure to the applicant.

4.0 CONCLUSION

[85] For the reasons given above, I make the following orders under s. 58 of the Act:

1. I confirm that UBC is authorized by s. 14 to refuse access to records 00267-000269 and 000969-000970.

2. Subject to para. 3, below, I require UBC to withhold the information that it withheld under s. 22 in records 000086, 000178, 000218, 000093, 000225, 000166, 000180, 000205, 000103, 000144, 000163, 000164, 000170, 000171, 000173, 000174, 000245, 000246, 000200, 000203, 000125, 000127, 000129, 000132, 000254, 000256, 000865, 000871, 000877, 000936 and 000937.

3. I order UBC to give the applicant access to the information it withheld under s. 22 in records 000086, 000178 and 000218, as marked on the copies of those records provided to UBC with this order.

4. I confirm that UBC is authorized to withhold the handwritten annotations on records 000978, 200029 and 200096 and the information in record 200101 that it withheld under s. 13(1).

5. Subject to para. 4, above, I require UBC to disclose records 200021, 200029, 200096, 000317, 000326 and 000978 that it withheld under s. 13(1), subject to any other applicable exceptions.

6. I confirm that s. 3(1)(b) of the Act excludes records 000941-000952 and 000956-000967 and the withheld information in record 000968 from the Act's application.

7. As a condition under s. 58(4) of the Act, I require UBC to provide me, within 35 days after the date of this order, with copies of records 000086, 000178 and 000218, and 200021, 200029, 200096, 000317, 000326 and 000978 that it discloses in accordance with paras. 3 and 5 above, together with a copy of its covering letter to the applicant. The word "days" in this paragraph has the same meaning as given in Schedule 1 to the Act.

[86] For the reasons discussed above, it is not necessary to make an order respecting s. 6(1).

October 16, 2003

ORIGINAL SIGNED BY

Celia Francis
Adjudicator