



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

Order F08-02

UNIVERSITY OF VICTORIA

Celia Francis, Senior Adjudicator

January 8, 2008

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Summary: Applicant requested access to a document the third party created to describe his workplace interactions with the applicant. Section 22 found to apply to the third party's personal information in the record and UVic is required to withhold it. It is not reasonable to sever the record as the personal information of applicant and third party is intertwined. This is not an appropriate case to summarize the record.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 4(2), 22(1), 22(2)(c), (e), (f) & 22(3)(d), (h), 22(5).

Authorities Considered: B.C.: Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-56, [2002] B.C.I.P.C.D. No. 58; Order F05-31, [2005] B.C.I.P.C.D. No. 42; Order 00-02, [2000] B.C.I.P.C.D. No. 2; Order 03-16, [2003] B.C.I.P.C.D. No. 16; Order 02-21, [2002] B.C.I.P.C.D. No. 21.

1.0 INTRODUCTION

[1] This decision arises out of a request by the applicant to the University of Victoria ("UVic") for access under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to a record that the third party, a UVic employee, created. UVic denied access to the record, in its entirety, under s. 22(3)(h) of FIPPA. The applicant requested a review by this Office of that decision and mediation led to a decision by UVic to apply s. 19(1)(a) and s. 22(3)(d) to the record, in addition to s. 22(3)(h). Because the matter did not settle in mediation, a written inquiry took place under Part 5 of FIPPA.

2.0 ISSUE

[2] The notice for this inquiry stated that the issues before me in this case are:

1. Is UVic authorized by s. 19(1)(a) to deny access to the record?
2. Is UVic required by s. 22 to deny access to the record?

[3] Under s. 57(1) of FIPPA, UVic has the burden of proof regarding s. 19 while, under s. 57(2), the applicant has the burden of proof regarding third-party personal information.

[4] In view of my decision that s. 22 applies to the record in this case, I need not consider whether s. 19 also applies.

3.0 DISCUSSION

[5] **3.1 Application of Section 22**—Numerous orders¹ have dealt with the application of s. 22 and I have applied, without repeating them, the principles set out in those orders. The relevant provisions of s. 22 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 ...
- (c) the personal information is relevant to 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 ...
- (d) the personal information relates to employment, occupational or educational history, ...

¹ See, for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56, and Order 02-56, [2002] B.C.I.P.C.D. No. 58.

- (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, ...

...

(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.

[6] **3.2 Background**—This story² begins with a meeting of the third party, a UVic employee, with his supervisors to discuss problems he was having with the applicant in the workplace. He was “emotionally exhausted” and about to leave his job because of it. Due to the detail and complexity of the issues, his supervisors asked him to “put his thoughts down on paper”, which he reluctantly agreed to do. He deposes that he created the record on his own time, using his own resources and, in creating and submitting it, considered the document to be his own property. When he submitted it, he said it was not to be copied nor was it to be shared with anyone without his express permission. He did not expect the applicant to learn that he had made comments about her. He also did not intend to lay a complaint against the applicant and neither he nor UVic intended to initiate any investigative or complaint process. Rather, UVic hoped to address the issues so that the two individuals could continue to work together.

[7] The third party was then persuaded to meet with the applicant’s supervisor and to share his document on a limited basis. It appears that, before the access request at any event, perhaps five UVic officials saw it: the third party’s supervisor and two others in the third party’s department at UVic, the applicant’s supervisor and a human resources consultant.

[8] During this period, the applicant’s supervisor was preparing to do a performance review of the applicant, a process which would involve inviting input from other UVic staff members. In an email, the applicant’s supervisor mentioned to the applicant that she was aware of some “feedback” that, through the performance review, she hoped to obtain in a form that she could share with the applicant. In a meeting with the applicant soon after, the supervisor mentioned that there was a “complaint” against her. The supervisor later realized that she may have made a mistake in mentioning the matter to the applicant as, not only might this have violated the third party’s confidence, but the third party had not characterized the matter as a “complaint”.

² The information in this background section comes from paras. 2-14, UVic’s initial submission; paras. 2-27, Martin-Newcombe affidavit; paras. 4-8, Anscombe affidavit; paras. 2-7, third party’s affidavit. The applicant also recounts her perspective of the events leading to the access request in her initial submission. It does not coincide with UVic’s version on all points but the differences are not, in my view, significant to the issues I am considering here.

[9] Various meetings and emails ensued and the applicant then resigned from her position at UVic. UVic accepted her resignation and, although the applicant soon after attempted to retract it, UVic refused to allow her to do so. Her access request for the third party's document arrived not long after this.

[10] The record in dispute is a typed, 28-page document that recounts the third party's experiences and dealings with the applicant in the workplace.

[11] **3.3 Is the Information Personal Information?**—FIPPA defines personal information as “recorded information about an identifiable individual other than contact information”. The record comprises information about identifiable individuals, principally the third party and the applicant. Some is the third party's information only but the vast majority is the intertwined personal information of both the applicant and the third party.

[12] **3.4 Presumed Unreasonable Invasion of Privacy**—Because none of the information in the record falls under s. 22(4),³ I must consider whether any of the information raises one or more of the presumed unreasonable invasions of personal privacy under s. 22(3).

Personal recommendation or evaluation

[13] UVic says that it originally relied on s. 22(3)(h) and that the type of information s. 22(3)(h) refers to is caught under s. 22(3)(g). It notes that previous orders have, however, found that information on workplace investigations or “communications relating to the relationships between employees” does not fall under s. 22(3)(g). UVic therefore now takes the position that the document more properly falls under s. 22(3)(d), given its contents and the purpose of its creation.⁴

[14] Because I find below that s. 22(3)(d) applies to the third-party personal information in the disputed record, I need not consider whether s. 22(3)(h) also applies.

Employment history

[15] The applicant argues⁵ that the record contains her personal employment history information. UVic admits⁶ this and also argues that the record in dispute contains the third party's employment history, in that it describes his workplace

³ This section lists categories of information disclosure of which is not an unreasonable invasion of privacy.

⁴ Paras. 34-35, initial submission. The applicant makes similar observations at paras. 36-44 of her initial submission.

⁵ Para. 28-34, initial submission.

⁶ Para. 16, initial submission.

interactions with the applicant and others, and was developed for the purpose of facilitating his ability to explain what his work experiences had been, in particular in relation to working with the applicant. UVic says that previous orders have found that “documents which explore workplace tensions between employees typically involve matters which fall within s. 22(3)(d)”.⁷ It acknowledges that these decisions have considered this issue mainly in the context of workplace investigations and have held that information on such investigations falls into s. 22(3)(d).⁸ Contrary to the applicant’s suggestion,⁹ UVic says that the third party did not develop the record as a form of reprisal for her raising concerns about his work attendance.¹⁰

[16] UVic accurately describes the record in dispute as containing information on workplace interactions and relations between the third party and the applicant, as well as between the third party and others. I agree with its characterization of the record as relating to employment history of these individuals, as previous orders have interpreted this term.

[17] Some information relates only to the third party. The majority of the information is the personal information of both individuals in that it concerns their dealings and actions in the workplace. I find that s. 22(3)(d) applies to the record in dispute, insofar as the third party’s personal information is concerned. Disclosure of this information is therefore presumed to be an unreasonable invasion of the third party’s privacy.

[18] **3.5 Relevant Circumstances**—It is now necessary to consider the relevant circumstances to determine if disclosure of the personal information in the record would be an unreasonable invasion of the third party’s privacy. Both UVic and the applicant made a number of arguments on the circumstances that they consider to be relevant in this case.

Supply in confidence

[19] Although the applicant refers to the disputed record as a “complaint”, UVic says that the third party created it to be a record of his interactions with the applicant, “to explain my feelings and the difficulties I was experiencing, and not as a complaint against the Applicant”.¹¹ Neither he nor UVic wished to instigate a formal investigation or disciplinary proceedings. If he had wanted to do this or have his concerns communicated to the applicant, the third party would, he says, have created a different kind of document. UVic takes pains to stress that the third party was reluctant even to create the record, still less to share it with UVic officials. He was deeply concerned that the record should have an extremely

⁷ Para. 17, initial submission.

⁸ Paras. 16-18, initial submission; paras. 5-15, third party’s affidavit.

⁹ At para. 7 of her initial submission.

¹⁰ Para. 8, reply submission; para. 3, second affidavit of third party.

¹¹ Para. 14, first affidavit of third party.

limited distribution at most and, he says, he would not have provided the record if he had not received express assurances of confidentiality. He says he did not even want the applicant to become aware of its existence. UVic says it kept the record confidential, giving it a restricted distribution, and that it was treated confidentially by each person who had access to it.¹² UVic argues that the circumstances in which the third party supplied the record in confidence strongly favour withholding the record.¹³

[20] The applicant vigorously rejects any suggestion that the third party supplied the record in confidence, saying she was promised a copy of it¹⁴ (which UVic denies).¹⁵ She said that the third party's identity was revealed on a number of occasions, including in emails and meetings, and that the existence of the "complaint" was not kept confidential among UVic staff. I note, as does UVic,¹⁶ that this last was in part because the applicant herself told others that there was a "complaint" against her.¹⁷ She also sent an email to her departmental listserve shortly after resigning, saying, in part, that she was "not leaving because of any complaint".¹⁸

[21] I accept the third party's evidence that he created the record as a private document and that he supplied the record to UVic reluctantly and then only on the basis that it was supplied in the strictest confidence. I am also satisfied that UVic treated the record confidentially after receiving it and that it disclosed the record to only a few individuals, each time with the third party's express permission and without waiving or otherwise destroying the confidentiality of the supply of the personal information. I therefore find that s. 22(2)(f) applies here and that it favours withholding the third party's personal information.

Fair determination of applicant's rights

[22] The applicant argues that the record is important to her professionally because, she says, it contains concerns, complaints and allegations about her professional conduct—making it her personal information—but she has been denied the opportunity to respond to them. She states that UVic's actions regarding the record were a factor in her decision to resign. She also said that the record "has a bearing on her professional reputation", as a number of individuals and departments at UVic, her union and this Office have all seen the

¹² Para. 2, second Martin-Newcombe affidavit; para. 3, second Anscombe affidavit.

¹³ Paras. 22-25 & 30, initial submission. Affidavit of Draper (paras. 3-4); first affidavits of Anscombe (para. 5), Martin-Newcombe (para. 7) and third party (paras. 6-15).

¹⁴ Paras. 14, 35-60, 85, 88, initial submission.

¹⁵ Para. 5 reply submission; paras. 9 & 12, second Martin-Newcombe affidavit; paras. 4-5, second Anscombe affidavit

¹⁶ Para. 15, reply submission.

¹⁷ Paras. 40 & 50, initial submission.

¹⁸ Exhibit "L", first affidavit of Martin-Newcombe, UVic's initial submission.

record¹⁹ while she, the subject of the “complaint”, has not. The applicant argues that she has a right to her good name, which she cannot uphold because she has not seen the allegations. In her view, s. 22(2)(c) applies and favours disclosure of the personal information to her.²⁰

[23] UVic draws my attention to the test for applying s. 22(2)(c) as set out in previous orders and says the applicant’s legal rights are not in issue here. The applicant has resigned, it says, and there is no live issue and there are no proceedings underway or contemplated to which the record might be relevant. Although the applicant says she was led to believe that the record could result in disciplinary action,²¹ UVic denies this.²² It did not intend to engage in a formal investigation or to launch disciplinary proceedings²³ and, it says, the record is not accessible to anyone at UVic who would have any impact on the applicant’s personal and professional reputation.²⁴ UVic points out that, contrary to the applicant’s suggestion that the “complaint” is on her “record”, one of the applicant’s own documents illustrates that there is nothing on her “file”.²⁵

[24] I dealt with a similar issue in Order F05-31.²⁶ In that case, the applicant, a union, requested the name of a third-party individual who had made an access request about the union and who, the union believed, had authored supposedly defamatory remarks about it. The union claimed it needed the third party’s name in order to sue that individual for defamation. In finding that s. 22(2)(c) did not apply, among other things, I said this about the applicant’s arguments:

[45] ... Paris J. said the following in *Attorney General (British Columbia) v. British Columbia (Information & Privacy Commissioner)*:

Rights Affected Directly or Indirectly

¶59 One does have the legal right to a good reputation, assuming, of course, that it is merited. It is enforceable, as witness the common law action of defamation....

[46] In saying that one has the legal right to a good reputation, Paris J. was clearly saying that the right not to be defamed is a legal right and that an action of defamation is the means to protect one’s reputation. In light of the criteria set out above from Order 01-53, and the comments by Paris J.,

¹⁹ UVic denies that many UVic individuals have seen the record and retorts that the applicant “alone perpetuates discussion regarding” it; para. 15, reply submission; para. 6, second Anscombe affidavit.

²⁰ Paras. 8-13, 16-22, 74-85, initial submission.

²¹ Para. 17, initial submission; para. 33, reply submission.

²² Para. 6, second Martin-Newcombe affidavit.

²³ Paras. 27-30, initial submission.

²⁴ Para. 6, second Anscombe affidavit.

²⁵ Para. 12, UVic’s reply submission; email of April 20, 2006 from the human resources consultant to a labour relations officer at the applicant’s union, attached to her initial submission as Appendix 13.

²⁶ [2005] B.C.I.P.C.D. No. 42.

I conclude that the right to sue for defamation is a right within the meaning of s. 22(2)(c).

...

[48] The IUOE also asserts that it is contemplating suing the author or authors of the “bulletin” for defamation but it has not shown with any cogency how it, as opposed to the individuals who were the subject of the original request, was defamed. Nor has the IUOE provided any proof that it is contemplating suing (for example, in the form of a resolution of its Board). In my view, more is necessary to fulfil the second part of the test than merely asserting that one is contemplating suing.

...

[50] In any case, independent of the above, the IUOE has not shown that it needs the personal information in order to start an action for defamation, making that information relevant to a fair determination of rights. ... [footnotes and citations omitted]

[25] I accept that the applicant is concerned about her professional reputation. As UVic points out,²⁷ however, her wish to “respond” somehow to the comments in the disputed record does not trigger s. 22(2)(c).

[26] I also accept that the applicant has a legal right to sue for defamation. She has not, however, produced any evidence that she is suing—or contemplates suing—the third party or anyone else for defamation, in which the disputed record would be relevant. Nor is there evidence of any other proceeding in which her legal rights might be at stake for which she needs the disputed record. While there may now be more awareness of the existence of the third party’s document than UVic and certainly the third party intended, the applicant herself appears to have been the principal instrument of much of this. I accept that the record is not on her personnel file and that it is not accessible to anyone who might provide a reference. For these reasons, I find that s. 22(2)(c) has no relevance here.

Unfair exposure to harm

[27] UVic said that disclosure of the information might cause harm to the third party because he comments on the applicant’s work performance. The third party addresses, in some detail in an *in camera* portion of his affidavit, the negative consequences he believes would flow from on disclosure of the record.²⁸ UVic adds that

²⁷ At para. 13 of its reply submission.

²⁸ At para. 15, first affidavit of third party.

25. ...There is a history of the Applicant reacting in an aggressive and hostile manner to criticism of her work. ...[*in camera* sentence removed].²⁹

[28] UVic supports this statement with an affidavit from the human resources consultant. He deposes that, during the applicant's employment with UVic,

2. ... I was made aware of difficulties that five University staff had with the Applicant. Those people found her to be unnecessarily aggressive and combative. Those five found her to be intimidating and defensive, and found that their interests were not taken into consideration by her. When the Applicant was made aware of complaints which were made about her, I am told she became hostile and aggressive and suggested that she was being defamed.
3. Since she left the University, she has accused me of defamation and her lawyer has written to me and demanded an apology and threatened to sue me personally for statements I made in relation to her.³⁰

[29] The applicant denies the allegations about the five staff and says she was never told that other UVic employees had difficulties with her. In rebuttal to this affidavit, she produces a number of emails and letters from UVic faculty and staff which contain favourable remarks about her work and manner in the workplace.³¹ The applicant says that UVic failed to point to any evidence to support its comments about her manner, except the third party's record, which she has not seen.³² She says that she did not threaten the third party and he has nothing to fear from her. She says she would merely expect him to circulate an apology if his comments were found to be untrue.³³ She goes on to say that, after she left UVic, the human resources consultant "wrote a very offensive note" about her to her union. She says she asked him in writing to apologize for his "unsubstantiated statements about me", which he refused to do, and the matter is now in her lawyer's hands.³⁴

[30] Taken together, the material before me establishes that s. 22(2)(e) is relevant. In saying this, I am by no means suggesting that the applicant would cause physical harm to the third party. Of course, s. 22(2)(e) does not encompass just physical harm, but mental harm and anguish as well.³⁵

[31] It is evident that the third party created and supplied the record to UVic reluctantly, perhaps against his better judgement. It is also clear that he did not

²⁹ Initial submission.

³⁰ First Anscombe affidavit.

³¹ Appendices 3-10, reply submission.

³² Paras. 31-32, 55, 71, reply submission.

³³ Paras. 79-80, reply submission.

³⁴ Para. 75, reply submission.

³⁵ See Order 00-02, [2000] B.C.I.P.C.D. No. 2, on this point.

want the matter to come to the applicant's attention and, while UVic officials no doubt acted throughout with the best intentions, the third party is likely dismayed at the way events have unfolded, despite his efforts and wishes to the contrary.

[32] The third party's heartfelt *in camera* evidence on the possible detrimental consequences of disclosure to his mental and emotional well-being is persuasive. Disclosure could in my view expose him to the "unfair" harm he fears and I therefore find that s. 22(2)(e) applies here, weighing against disclosure.

[33] **3.6 Severance of Applicant's Personal Information**—To summarize, I find that the third-party personal information in the disputed record falls under s. 22(3)(d) and that, of the relevant circumstances the parties raised, s. 22(2)(c) is not relevant here and ss. 22(2)(e) and (f) apply, weighing against disclosure. The applicant has not met the burden of proof and I find that s. 22(1) requires UVic to refuse her access to the third party's personal information. This is not the end of the matter, however, as I must consider whether, in accordance with s. 4(2) of FIPPA, it is reasonable to sever the third party's personal information from the record and disclose the applicant's own personal information to her.

[34] UVic notes that in some cases an applicant may be denied access to her or his own personal information, for example, where a third party's personal information is "inextricably intertwined" with the applicant's and disclosure of the third party's personal information to the applicant would be an unreasonable invasion of the third party's privacy. In UVic's view, it is not possible in this case to disclose the applicant's personal information in the disputed record without disclosing the third party's.³⁶

[35] Section 4(2) reads as follows:

4(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

[36] I noted above that the record in dispute contains a small amount of information which is solely the third party's personal information. This information could reasonably be severed. However, the vast majority of the record is the joint personal information of both individuals in that it concerns events and dealings of both individuals in the workplace. I agree with UVic that the personal information of these two individuals is inextricably intertwined and that the third party's personal information cannot reasonably be severed such that the applicant's personal information can be disclosed to her. In arriving at this conclusion, I have applied the principles expressed in previous cases about

³⁶ Paras. 15-20, initial submission.

the interpretation and application of s. 4(2).³⁷ It follows that I find that s. 22(1) requires UVic to refuse the applicant access to the entire record.

[37] **3.7 Summary of Applicant's Personal Information**—UVic argues that, because the personal information of the applicant and third party is intertwined, it is not possible in this case to prepare a summary of the applicant's personal information under s. 22(5) without revealing the identity of the third party. Where only one person could have provided the information, it says, no summary will be ordered.³⁸

[38] I have considered this aspect of the matter in light of the submissions in this case and the principles set out in previous orders on s. 22(5).³⁹ I conclude that it would not be appropriate in this case for UVic to prepare a summary.

4.0 CONCLUSION

[39] For the reasons given above, under s. 58 of FIPPA, I require UVic to refuse the applicant access to the record in dispute.

January 8, 2008

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC File: F06-29110

³⁷ See for example, Order 03-16, [2003] B.C.I.P.C.D. No. 16, at paras. 42-64.

³⁸ Para. 36, initial submission.

³⁹ See for example, Order 02-21, [2002] B.C.I.P.C.D. No. 21.