OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order No. 324-1999

INQUIRY REGARDING RECORDS OF THE UNIVERSITY OF BRITISH COLUMBIA

David Loukidelis, Information & Privacy Commissioner
October 12, 1999

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Summary: UBC refused to disclose to applicant internal UBC correspondence and communications. UBC authorized to refuse to disclose portions of records under s. 13. UBC not authorized to withhold information under s. 17. Legislation recognizes no independent 'zone of confidentiality'; express provisions of Act must be relied on as appropriate in circumstances of each case. UBC authorized to withhold privileged communications under s. 14. Some personal financial information ordered severed and withheld.

Key Words: Advice or recommendations - solicitor client privilege - financial or economic interests - reasonable expectation - severance.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 4(1), 4(2), 13(1), 14, 17(1), and 22(1).

Authorities Considered: B.C.: Order No. 20-1994; Order No. 159-1997; Order No. 193-1997. **Ontario:** Order 203.

1.0 INTRODUCTION

I have been asked to decide in this inquiry whether the University of British Columbia ("UBC"), a local public body under the *Freedom of Information and Protection of Privacy Act* ("Act"), properly applied sections of the Act to records it withheld from the applicant.

In the summer of 1998, the applicant lodged an access to information request with UBC for copies of "all communications involving UBC Administrative officials with respect to" a certain matter. UBC's initial response was to give the applicant a fee estimate for copying the requested records. This triggered a request by the applicant for a review by our office of the fee estimate. The fact report prepared by our office for this inquiry discloses that mediation succeeded in resolving that dispute. The applicant agreed to narrow his request, while UBC agreed to waive some photocopying charges.

As for the access request itself, UBC responded, on January 27, 1999, by disclosing 348 pages of records. The response letter noted that "many records" had been severed under ss. 13, 14, 17 or 22 of the Act or some combination of those sections. No reasons were given to support UBC's application of those sections to the records.

This decision prompted a second request for review by the applicant. It appears from the fact report for this inquiry that mediation by this office was again partly successful in resolving the dispute between the parties. For his part, the applicant agreed once again to narrow the scope of his request. The reformulated request covers 46 records and 62 pages of material. The records span the period from June of 1995 to May of 1998 and relate to a matter that eventually led to a September 1997 decision by UBC's Board of Governors. These are the records in dispute in this inquiry.

2.0 ISSUES

These are the questions before me:

1. Was UBC authorized to refuse to disclose information to the applicant under ss. 13, 14 and 17 of the Act?

2. Was UBC required to withhold personal information from the applicant under s. 22(1) of the Act?

On the first point, s. 57(1) requires UBC to establish that it was authorized to refuse to disclose information under ss. 13, 14 and 17. By virtue of s. 57(2), the applicant bears the burden of establishing, for the purposes of s. 22(1) of the Act, that disclosure of personal information in dispute here would not be an unreasonable invasion of the personal privacy of affected third parties.

3.0 DISCUSSION

3.1 Advice or Recommendations - Section 13(1) of the Act authorizes a public body to refuse to disclose "information that would reveal advice or recommendations developed by or for a public body or a minister." Section 13(2) contains a list of exceptions to the s. 13(1) authority to refuse access.

In terms of the records for which s. 13(1) was cited here, my review of the records withheld by UBC reveals that UBC originally applied s. 13(1) to 20 pages of the records.

At p. 2 of its initial submissions in this inquiry, however, UBC claimed "the protection of Section 13 for all documents at issue ... with the exception of document 194". Although this late addition of a new exception to the right of access under the Act is to be strongly discouraged, I am prepared in this case to consider s. 13(1) in relation to all of the responsive records. This practice is to be discouraged, because it can be unfair in some cases to the other parties to an inquiry, who may not have the opportunity to address exceptions raised for the first time in a party's initial submissions. In this case, however, I have decided the applicant had a reasonable opportunity to address the s. 13(1) issue in his reply.

The essence of UBC's argument on this point is that s. 13(1) offers public bodies "the right to operate in a zone of confidentiality as they develop policies and recommendations" (p. 3). UBC argued, again at p. 3, that a

> ... public body may refuse to disclose information which implicitly reveals advice or recommendations if the information disclosed would permit an inference about the advice or recommendations made.

UBC then made the following point, also at p.3:

> In making their September 1997 Resolution, the Board of Governors of UBC received the benefit of the subjective assessments of a number of individuals within the Administration and Faculty of the University on the issue … . The majority of the documents in issue are correspondence on this issue between these individuals including [15 named UBC staff or officials].

UBC's argument on this point concluded with the submission, at p. 4, that its administration

> ... would be prohibited [*sic*] from a full and frank discussion of advice and recommendations if documents such as those sought by the Applicant were subject to disclosure.

Of course, documents such as those sought by the applicant are subject to disclosure unless UBC can demonstrate that s. 13(1) - or another exception to the right of access - applies to information in those records.

In making its s. 13(1) case, UBC relied on an affidavit sworn July 6, 1999 by Mary Hamilton, who is employed by UBC ("Hamilton Affidavit"). Paragraphs 5 and 6 of that affidavit repeat the portions of UBC's written argument partly quoted above. The thrust of the affidavit is Mary Hamilton's opinion, found in paragraph 5 of her affidavit, that UBC's administration "would be prohibited from a full and frank discussion of advice and recommendations" if records such as those sought by the applicant were "subject to disclosure".

In referring to the concept of a 'zone of confidentiality', UBC alluded to Order No. 159-1997, a decision of my predecessor. In that case, the commissioner ruled, at p. 9, that the Insurance Corporation of British Columbia had the

> ... right to operate in a zone of confidentiality as it develops its information, choices, recommendations, and actuarial data for its insurance products.

The commissioner went on to say, again at p. 9, that the disputed materials were "protected from disclosure under sections 13 and 17 in particular."

The phrase 'zone of confidentiality' appears in a number of orders made by my predecessor under different provisions of the Act (particularly respecting ss. 13 and 17). Order No. 159-1997, cited by UBC, is only one example of such an order. In Order No. 193-1997, for example, my predecessor used this phrase in deciding that ss. 13 and 17, among other provisions, authorized a public body to refuse to disclose information relating to a sexual harassment investigation.

In my view, the Legislature designed the Act so that a claim to 'confidentiality' will succeed only where the explicit language of the Act authorizes or requires it. There is no presumption that a public body enjoys any 'zone of confidentiality' simply because of the subject matter of a particular record or set of records. The phrase 'zone of confidentiality' is, in my view, merely a useful way to describe the result when one or more of the Act's exceptions apply to a record or set of records.

Again, despite the usefulness of the phrase, it is clear from the Act that each case must be decided on its merits. It must be decided in light of the Act's explicit provisions and in light of the evidence that is available to the public body, when it makes its decision on an access request, or that is submitted in an inquiry such as this one. The subject by which a record can be described, as opposed to the contents of the records, raises no presumption of confidentiality, offers no generosity of analysis and permits no different standard of proof. Consistent with my understanding of what the previous commissioner meant by the term 'zone of confidentiality', I do not read any of the orders in which my predecessor used that phrase to go any further than what I have just said.

What does s. 13(1) protect? At the very least, it is intended to protect information which consists of "advice or recommendations" to a public body as to a course of action, a policy choice or the exercise of a power, duty or function. For this reason, I agree with UBC that parts of the records to which it applied s. 13(1) in this case are properly covered by that exception. Having reviewed the records to which UBC has applied s. 13(1), it is clear that parts of those records qualify as "advice or recommendations" for the purposes of s. 13(1).

Perhaps because UBC applied s. 17(1) to many of the records to which it also applied s. 13(1), UBC did not sever those parts of the records that could be withheld under s. 13(1) and disclose the remainder to the applicant. Instead, it withheld all of the records. As is noted below, in cases such as this, a public body is required, by s. 4(2) of the Act, to sever records so that information not protected by s. 13(1) (or another exception) can be

disclosed. In this case, therefore, I have severed those portions of the records that UBC was authorized to withhold under s. 13(1). This severing was carried out so that only advice or recommendations have been deleted. The severing also bears in mind my conclusion – which is discussed below – that UBC was not authorized by s. 17(1) to withhold information from these records.

3.2 Solicitor Client Privilege – Section 14 of the Act authorizes a public body to "refuse to disclose to an applicant information that is subject to solicitor client privilege." UBC argued that solicitor client privilege "protects all communications between legal advisor and the client" unless the client consents to disclosure of the communications (p. 4). By my count, 13 pages of the records in issue here were said by UBC to be subject to solicitor client privilege.

Paragraph 7 of the Hamilton Affidavit establishes the fact that UBC receives legal advice from "a number of lawyers employed by the University". Those lawyers are said to include individuals who figure in some of the records. At paragraph 8 of her affidavit, Mary Hamilton says that her review of the s. 14 "severed information" indicates that pp. 22, 24 through 27, 32 through 34, 36, 39, 48 and 279 "regard legal advice provided to UBC in this matter".

For his part, the applicant said, in his initial submissions, that he waived any request for privileged information about legal advice sought by an official of UBC about any personal liability that might be connected with this matter. This does not cover any of the information in issue here. At p. 1 of his reply submissions, the applicant urged me to insist on a "standard of transparent conduct" of UBC's affairs. In saying this, the applicant apparently was asking that UBC's reliance on s. 14 be overturned.

Numerous orders under the Act - and court decisions arising out of some of those orders - have made it clear that s. 14 protects common law solicitor client privilege. Once it is found that a public body has correctly applied s. 14 to a record, only the public body can decide to waive the protection of s. 14 and release the information. I agree with UBC that the information it withheld under s. 14 is subject to solicitor client privilege and therefore agree that it was properly withheld by UBC.

3.3 Financial Harm to UBC - This is the aspect of UBC's decision with which I had the most difficulty. Despite a detailed assessment of the evidence and argument before me, I cannot conclude that UBC was authorized by s. 17(1) to withhold the records to which it applied this exception.

Section 17(1) of the Act is designed to protect the financial interests of public bodies. It reads as follows:

> The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information ... .

Sections 17(1)(a) through (e) go on to provide non-exhaustive examples of various kinds of information protected from release if the public body proves a reasonable expectation of harm from disclosure.

As was noted above, the Act places the burden of proof on a public body to establish that there is a reasonable expectation of harm from disclosure. As was said in Ontario Order 203 (November 5, 1990), the alleged "harm must not be fanciful, imaginary or contrived but rather one which is based on reason". It must be possible for a reasonable person to conclude, based on the evidence, that an identified, or specific, harm to the financial or economic interests of the public body is likelier than not to flow from disclosure of the information. Of course, the evidence in each case will determine whether there is a reasonable expectation of harm from disclosure.

UBC asked that the nature of its s. 17(1) concerns not be spelled out expressly in this order. I have decided to respect that request as far as is possible without making this order completely inscrutable. Still, this request constrains my ability to discuss UBC's evidence and submissions here and necessitates a brief discussion of UBC's s. 17(1) case.

UBC's case on s. 17(1) essentially requires me to accept two things. The first proposition that must be accepted is that disclosure of the information in dispute will, or is likely to, cause some or all members of a particular group to form a negative perception of how UBC carries on certain of its activities. The second proposition is that this negative perception is likely to, or will, have a detrimental impact on certain of UBC's revenues. This issue is addressed in the *in camera* evidence and submissions of UBC. In addition to the Hamilton Affidavit, UBC submitted, *in camera*, a second affidavit of Mary Hamilton, also sworn July 6, 1999. UBC also submitted *in camera* argument on the s. 17(1) issue.

After careful consideration of all the evidence and argument, I have concluded that UBC has failed to meet the 'reasonable expectation' of harm test laid down by the Legislature in s. 17(1). Again, UBC's argument, essentially, is that release of this information is likely to, or will, cause a particular group to have a negative view of certain of UBC's activities. This group, it is said, will as a result not look upon UBC with favour in the future, thus decreasing certain of UBC's revenues. Among other things, this argument raises the following two concerns. First, a reasonable person would, I think, agree that a group's perceptions of a particular state of affairs can be difficult to predict. Second, a reasonable person would agree, I think, that the consequences that flow from a shared perception about a given matter are not always predictable.

Having reviewed the records to which UBC applied s. 17(1), I do not agree that disclosure of this information is likely to, or will, result in a negative perception of how UBC conducts those of its affairs that are in issue here. My review of the information withheld by UBC leads me to conclude that many, if not all, reasonable observers might just as easily decide that UBC handled this matter appropriately. (In saying this, I make no comment on the merits or weaknesses of anyone's position on the issues addressed in the records. Those matters are outside my jurisdiction.) I note, in passing, that no

evidence as to the likelihood of a negative perception being caused by disclosure of the information was provided from any member of the sector that UBC said would be affected, by the disclosure of the information, in the way just described.

Moreover, even if disclosure of this information created a negative perception about UBC among some or all of the members of the relevant group, it does not follow, in my view, that this negative reaction could reasonably be expected to harm UBC's financial or economic interests as contended by UBC. I am not persuaded by UBC's argument that such a negative perception is likely to, or will, cause a diminution in the relevant UBC revenues.

A final note is necessary. In its submission, UBC for the first time argued that the information to which it applied s. 17 (1) could also be withheld under s. 17(1)(d) of the Act. That section sets out one kind of information that may qualify for protection under the harms-based test of s. 17(1). It reads as follows:

> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party.

UBC relied on the aspect of s. 17(1)(d) that refers to "undue financial loss or gain to a third party". UBC contended that other third parties might benefit from negative perceptions about UBC and gain revenue as a result, to their "undue" gain and UBC's "undue" loss. I find that UBC has not made its case on this point, not least because UBC provided no evidence directly addressing this argument. Moreover, for the reasons given above, I am not persuaded that UBC is likelier than not to suffer the financial or economic harm it has advanced in this inquiry. Even if the necessary reasonable expectation of harm for the purposes of s. 17(1)(d) had been established, I do not think any such loss or gain would in either case be "undue" for the purposes of s. 17(1)(d).

3.4 Duty to Sever – A comment is in order about the duty to sever. Section 4(2) of the Act reads as follows:

> The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part [*i.e.*, the Act's access provisions], but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

This section requires public bodies to review each record in detail – essentially line by line - and to decide which parts "can reasonably be severed" and withheld. This allows the remainder of the record to be disclosed as required by s. 4(2). This is obviously not a counsel of perfection. Section 4(2) requires severance to be carried out only where it can "reasonably" be done. But in the vast majority of cases where a record contains both protected and unprotected information, it will be possible to sever it, in accordance with s. 4(2), and release the unprotected portions of that record. I recognize that the time and energy required to carry out a careful analysis of a record may be considerable in some cases. This exercise is, however, mandated by s. 4(2) of the Act.

In this case, I have done the severing for UBC, as indicated above. Public bodies should, however, bear in mind their primary obligation under s. 4(2) to sever records when they make their access decisions. Although I have severed the records in this case, this is definitely not going to be my practice in most, much less all, cases. Severing is not a task that I should be performing for public bodies as part of the inquiry process. In appropriate cases in the future, I may make an order returning the records to the public body, with the requirement that the public body carry out the necessary severing and return the records to me for review and final disposition of the inquiry.

One final point about s. 4(2) is necessary. The above comments about the 'zone of confidentiality' should make it clear that, in my view, there is no basis in the Act for the conclusion that a 'zone of confidentiality' exists which overrides the duty to sever under s. 4(2). Again, a public body is obliged by s. 4(2) to review each record and sever and withhold only information that can reasonably be severed and that is protected from disclosure.

The comments in this section about severing are not part of my decision in this case.

3.5 Third Party Personal Information – In its response to the applicant, UBC cited s. 22 of the Act as one of the provisions it applied in not disclosing information to the applicant. Because UBC's response letter contained no reasons for its decision, the applicant had no way of knowing which aspects of s. 22 were relevant to UBC's decision under that section. Under s. 57(2) of the Act, the applicant bears the burden of proving that disclosure of personal information in the records would not be an unreasonable invasion of a third party's personal privacy.

In this inquiry, the applicant contended, at p. 2 of his initial submissions, that nothing in s. 22 or the other sections relied on by UBC "could possibly be a reason" for UBC "failing to disclose information." The applicant went on to say the following, at p. 2 of his initial submissions:

> In particular, there are no matters of personal privacy that are involved in this issue. It simply bears on administrative decisions and the individuals responsible for making those decisions. I request that any personal information on myself in these files be disclosed to me.

At paragraph 22 of its submissions UBC said s. 22 applied to protect "the identities of individuals recorded on document No. 194." This was not the only page to which UBC initially had indicated s. 22 applied. Despite UBC's reference only to document No. 194 in its argument, I have considered its application of the section to other pages of the records. This is because s. 22 (1) is mandatory; it does not authorize UBC to waive its application to particular personal information. Where a requested record contains protected third party personal information, the public body has an obligation to sever and withhold it.

While I agree with UBC that the names of individuals must be withheld from p. 194 of the records, I do not agree with UBC that s. 22 was properly claimed for those other pages to which UBC applied it. Specifically, I find that none of personal information on the other pages to which UBC applied s. 22(1) is required to be withheld by UBC under s. 22(1) of the Act.

In one other instance, however, I have decided that UBC must refuse to disclose the proposed or actual annual salaries of certain individuals. It is not possible for me to determine, with any certainty, whether the individuals named on pp. 66, 98 and 197 of the records are 'employees' of UBC to whom s. 22(4)(e) of the Act applies. That section says it is not an unreasonable invasion of a third party's personal privacy to disclose information about, among other things, a third party's "remuneration" as an "employee" of a public body. Because of the evidentiary uncertainty on this point, I cannot conclude that s. 22(4)(e) applies. Accordingly, the presumed unreasonable invasion of personal privacy raised by s. 22(3)(f) applies and has not been rebutted. I have therefore severed this financial information from pp. 66, 98 and 197 of the records.

4.0 CONCLUSION

For the reasons given above, the following orders are made under s. 58(2) of the Act:

1. Under s. 58(2)(b) of the Act, I find that UBC is authorized to refuse to give access to the records to which it applied s. 14. I confirm UBC's decision to refuse access to those records.

2. Under ss. 58(2)(a) and (b) of the Act, I find that, in light of s. 4(2) of the Act, UBC is authorized by s. 13(1) to refuse access to portions of the records to which it applied s. 13(1). Subject to my findings and orders in respect of ss. 14 and 22, I confirm that decision by UBC and require it to give access to those portions of the records to which s. 13(1) does not apply.

3. Under s. 58(2)(a) of the Act, I find that UBC is not authorized to refuse access under s. 17(1) of the Act to the records to which it applied that exception. Subject to my findings and orders in respect of ss. 13, 14, and 22 of the Act, I require UBC to give access to those portions of the records to which applied s. 17(1).

4. Under ss. 58(2)(a) and (c) of the Act, I find that UBC is not required to refuse access under s. 22(1) to the information in the records to which it applied that provision, except the names of individuals withheld from p. 194 of the records and the names and salaries of individuals identified on pp. 66, 98 and 197 of the records, to which I find UBC is required by s. 22(1) to refuse access. I require UBC to refuse to give access to the personal information to which I have just found s. 22(1) applies. Subject to my findings and orders in respect of ss. 13 and 14 of the Act, I require UBC to give access to the other information in the records to which it applied section 22(1).

As is noted above, I have prepared severed versions of the relevant records, in light of the above findings and orders and have provided them to UBC, for disclosure to the applicant, along with UBC's copy of this order.

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David Loukidelis
Information and Privacy Commissioner
for British Columbia