



OFFICE OF THE
INFORMATION & PRIVACY
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Order F14-10

UNIVERSITY OF BRITISH COLUMBIA

Ross Alexander
Adjudicator

March 19, 2014

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Summary: A student requested an investigation report by the University of British Columbia relating to a sexual assault and harassment complaint that the student made against a faculty member. UBC disclosed portions of the report, but withheld other portions on the basis that disclosure would be an unreasonable invasion of the personal privacy of third parties under s. 22 of FIPPA. The adjudicator concluded that UBC was required to refuse to disclose most of the withheld information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 22.

Authorities Considered: B.C.: Order F13-09, 2013 BCIPC No. 10 (CanLII); Order F12-08, 2012 BCIPC 12 (CanLII); Order 01-53, 2001 CanLII 21607; Order 01-07, 2001 CanLII 21561; Order 01-37, 2001 CanLII 21591; Order F12-07, 2012 BCIPC 10 (CanLII); Order F08-16, 2008 CanLII 57359.

INTRODUCTION

[1] The applicant is a University of British Columbia (“UBC”) student who made a sexual harassment and sexual assault complaint against a UBC faculty member (“faculty member”). UBC investigated the complaint, and the applicant subsequently requested the resulting investigation report.

[2] UBC disclosed portions of the report to the applicant and withheld the rest on the basis that disclosure would be an unreasonable invasion of the personal privacy of third parties within the meaning of s. 22 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[3] The applicant requested that the Office of the Information and Privacy Commissioner review UBC's decision to withhold part of the report. Mediation did not resolve the matter, so it proceeded to inquiry under Part 5 of FIPPA.

ISSUE

[4] The issue in this inquiry is whether UBC is required to refuse to disclose the withheld information because disclosure would be an unreasonable invasion of third party personal privacy pursuant to s. 22 of FIPPA.

[5] The burden of proof is on the applicant to prove that disclosure of the information will not unreasonably invade third party personal privacy pursuant to s. 57(2) of FIPPA.

DISCUSSION

Record in Dispute

[6] The investigation report is the sole record at issue. UBC has disclosed approximately half of the information in the report to the applicant, so only half of it is in dispute.

[7] Most of the withheld information relates to the faculty member, including the faculty member's name and other references that would identify him.¹ Information about other people who were either interviewed by the investigator or are referred to in the report ("other third parties") is also withheld.² The information that is solely about the applicant has been disclosed to her, but some information about the applicant is withheld where it is intertwined with information about other third parties.

[8] UBC has severed most sections in the report on a line-by-line basis. The result is that only one word or clause is withheld from many sentences. Of note, one section of the report is titled "the complaint". This section contains lengthy verbatim quotes from the written complaint provided by the applicant, plus a brief summary of her complaint. UBC has disclosed most of this section to the applicant. However, it is withholding information that identifies the faculty

¹ Identified in UBC's submissions and Appendix "B" as "information that identifies the respondent", "personal information of respondent", and portions of the "personal evaluations of a third party" information. I note that most of the withheld information falls within multiple categories.

² Identified in UBC's submissions and Appendix "B" as "information that identifies a third party", "personal information of third parties" and portions of the "personal evaluations of a third party" information.

member and other third parties. I will refer to this information as the “complaint information”.

Position of the Parties

[9] UBC submits that disclosing the withheld information in the report would be an unreasonable invasion of third parties’ personal privacy under s. 22 of FIPPA.

[10] The faculty member’s submissions are brief. He asserts that the investigation report contains his personal information and the report should not be disclosed.

[11] The applicant submits that she is entitled to the entire report. She wants the entire report to find out more details about the investigation because she has additional questions about it and does not trust its findings. She also believes that UBC appears to be concerned about the faculty member’s – but not her – privacy and reputation, and says that she needs to receive equal treatment.

Disclosure Harmful to Personal Privacy – s. 22

[12] Section 22 requires UBC to consider the personal privacy of the faculty member and others with respect to the applicant’s request. Section 22(1) states:

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. [Underline Added]

[13] Numerous orders have considered the analytical approach to s. 22.³ The public body must first determine if the information in dispute is “personal information” because s. 22 only applies to “personal information” as defined by FIPPA. If so, the public body must consider whether the information meets the criteria identified in s. 22(4). If s. 22(4) applies, s. 22 does not require the public body to refuse disclosure of the information. If s. 22(4) does not apply, the public body must determine whether disclosure of the information falls within s. 22(3). If s. 22(3) applies, disclosure is presumed to be an unreasonable invasion of third party privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information at issue would be an unreasonable invasion of a third party's personal privacy.

³ Order F13-09, 2013 BCIPC No. 10 (CanLII); Order F12-08, 2012 BCIPC 12 (CanLII) *et al.*

Personal Information and Section 22(4) Factors

[14] FIPPA defines personal information as recorded information about an identifiable individual other than contact information. As I noted above, the information at issue relates to identifiable individuals, including the faculty member, persons interviewed for the investigation and the applicant. For this reason, I am satisfied that the information at issue is personal information.

[15] Section 22(4) specifies circumstances when disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. I find that none of the circumstances in s. 22(4) apply to the withheld information.

Presumption of Invasion of Privacy – s. 22(3)

[16] Section 22(3) provides the circumstances in which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. It states in part:

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,

...

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

[17] UBC submits that s. 22(3)(d) applies to the personal information of the faculty member and third parties, and that s. 22(3)(g) applies to the investigator's personal evaluations of individuals and of the evidence.⁴ The applicant did not provide submissions regarding s. 22(3).

[18] Previous orders have consistently determined that s. 22(3)(d) applies to evidence, statements and investigative findings about an individual's workplace behaviour or actions in the context of a workplace investigation because it relates to the individual's employment history.⁵ In this case, s. 22(3)(d) applies to the

⁴ This information overlaps. Most of the information in the investigator's personal evaluations are also personal information of the faculty member and third parties.

⁵ For example, see Order 01-53, 2001 CanLII 21607 at para. 32.

personal information about the faculty member and third parties because it relates to their employment and educational histories.⁶

[19] Previous orders have stated that s. 22(3)(g) applies to the evaluative material for workplace investigation reports, such as an investigator's comments about the actions of individuals.⁷ The report in this case is the result of a workplace complaint investigation, and it contains personal information consisting of the investigator's assessment of the actions of the faculty member and other individuals. I find that s. 22(3)(g) applies to that personal information.⁸

[20] In summary, at least one of ss. 22(3)(d) or (g) apply to all of the withheld information.

Other Factors – s. 22(2)

[21] The presumption that disclosure of the withheld information would be an unreasonable invasion of personal privacy can be rebutted. Section 22(2) states that public bodies must consider all relevant factors, including certain specific factors. The circumstances at issue in this case under s. 22(2) are as follows:

...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,

...

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

[22] UBC submits that ss. 22(2)(e), (f) and (h) apply to the information about the faculty member. It also states that s. 22(2)(f) applies to the information about the other third parties. The applicant disagrees with UBC's submission, and states that she needs the entire report to protect her rights. Given this submission by the applicant, I will consider whether the factor in s. 22(2)(c) about

⁶ Identified in UBC's submissions and Appendix "B" as "information that identifies the respondent", "personal information of respondent", "information that identifies a third party" and "personal information of third parties".

⁷ Order 01-07, 2001 CanLII 21561 at para. 21.

⁸ The investigator's comments are identified in UBC's submissions and Appendix "B" as "confidential personal evaluations".

information relevant to a fair determination of the applicant's rights is applicable in this case.

[23] I will consider whether s. 22(2)(c) is a relevant factor, followed by s. 22(2)(f), and then ss. 22(2)(e) and (h) in conjunction. I will then weigh all of the relevant factors, including the fact that the applicant knows and provided the complaint information, to determine whether disclosure of the information at issue would be an unreasonable invasion of the privacy of third parties.

Fair Determination of Applicant's Rights - s. 22(2)(c)

[24] The applicant submits that it is unfair for her to not receive the full report, and that she requires it to protect her rights.

[25] Previous orders have held that s. 22(2)(c) only applies if all of the following circumstances are met:

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds.
2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed.
3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question.
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.⁹

[26] In this case, the applicant did not explain what legal rights she is protecting. Further, there is no evidence that any proceeding is either underway or contemplated in relation to the matters at issue in the report, so elements 2 to 4 of the above test are not met. I therefore find that s. 22(2)(c) is not a relevant factor in this case.

Information Supplied in Confidence - s. 22(2)(f)

[27] UBC submits that the personal information provided to the investigator by the applicant, faculty member and other third parties was supplied in confidence within the meaning of s. 22(2)(f). UBC states that it imposes a high degree of confidentiality on its employee investigation and hearing proceedings, and that its guidelines require the privacy rights of the applicant and faculty member to be

⁹ Order 01-07, 2001 CanLII 21561 at para. 31 citing Ontario Order P-651, [1994] O.I.P.C. No. 104.

respected. Given this, UBC states that it is reasonable to conclude that the information was provided to the investigator with the expectation that the information would not be made public.

[28] My understanding of the applicant's submission is that she believes it is reasonable and necessary for such an investigation to remain confidential, but she doubts that UBC has actually kept it confidential. She speculates that the faculty member will be able to get a copy of the report and that other people already know the information in the report. She does not, however, provide evidence that supports these assertions.

[29] UBC's guidelines state that investigations are to be conducted in confidence, and the terms of reference in the report at issue here state that the investigation was to proceed in accordance with those guidelines.¹⁰ Based on this, and the content and context of the report, I am satisfied that the information that was supplied for the investigation was supplied in confidence.

[30] I find that s. 22(2)(f) applies to the information that was supplied by the faculty member and other third parties, and is a factor that weighs against disclosing this information. However, previous orders have stated that s. 22(2)(f) is not a relevant factor for information that was supplied by the person requesting the information, even where the information is supplied in the context of an investigation.¹¹ Therefore, s. 22(2)(f) does not apply to the complaint information because it was supplied by the applicant.¹²

Unfair Exposure to Harm and Damage to Reputation - ss. 22(2)(e) and (h)

[31] Sections 22(2)(e) and (h) relate to unfair exposure to harm and damage to reputation. Section 22(2)(e) is a relevant factor if disclosure of the information would unfairly expose a third party to financial or other harm. Previous orders have stated that harm under s. 22(2)(e) includes "serious mental distress or anguish or harassment".¹³ Section 22(2)(h) relates to circumstances where disclosure may damage the reputation of a person referred to in the records.

[32] UBC submits that ss. 22(2)(e) and (h) apply to the information that is about the faculty member. It states that disclosing this information will damage his reputation and expose him to serious mental distress or anguish because the report involves serious allegations of sexual assault and sexual harassment. UBC states that this will likely harm his career prospects and have negative financial consequences for him.

¹⁰ The terms of reference in the report is part of the report that has already been disclosed to her.

¹¹ For example, see Order 01-53, 2001 CanLII 21607 at para. 62.

¹² 02-01, 04-01 to 10-04.

¹³ Order 01-37, 2001 CanLII 21591 at para. 42.

[33] UBC also submits that the report contains evidence suggesting the applicant may use the report to harass the faculty member by distributing the report in a way calculated to embarrass him. It submits that it is “unfair” to associate the faculty member with the allegations contained in the report because the sexual assault allegation is a serious allegation that was neither proven nor ruled out by the report.

[34] The applicant submits that the allegation of sexual assault against the faculty member becoming public would not stigmatize him because the investigator did not reach any conclusions about the allegation. She says that the faculty member will only be distressed or anguished if he doubts his innocence.

[35] In this case, the report contains unresolved allegations of sexual assault against the faculty member. In my view, the faculty member would be exposed to serious mental distress, anguish, and financial and other harm if he is connected to the allegations. I also find that this would damage his reputation, particularly given that this allegation is the context of interactions between a faculty member and student.

[36] The applicant also asserts that it will be unfair if she does not receive the information. I reject this argument because it turns s. 22 on its head. Sections 22(2)(e) and (h) do not require a balancing of one party’s interests against another’s to see who is being treated most unfairly.¹⁴ The issue is whether the third party will be unfairly exposed to financial or other harm, or may unfairly have their reputation damaged, if the disputed information is disclosed. In my view, the harm to the faculty member would be unfair because it would link him to the unproven allegations of sexual assault.

[37] However, for ss. 22(2)(e) and (h) to be relevant factors, the unfair exposure to harm or damage to reputation must relate to disclosure of the information. In this case, the applicant already knows the complaint information, which identifies and connects the faculty member to the sexual assault allegation, because it is her written complaint. Moreover, she already has a severed copy of the report that discloses most of the complaint, background details about the complaint and investigation, and most of the investigator’s conclusions about the complaint. Given this, the applicant is already in a position to connect the faculty member to her allegations and expose him to much of the same harm and damage to reputation that would occur from disclosure of his personal information in the report.

¹⁴ See, for example, Order F12-07, 2012 BCIPC 10 at para. 43 and Order 01-07, 2001 CanLII 21561 at para. 76.

[38] This issue of the applicant knowing the complaint information because it is the applicant's complaint has been addressed in previous orders. In Order 01-53, an applicant requested copies of records that were created during a workplace investigation into the applicant's complaint about another employee. In that case, former Commissioner Loukidelis determined that ss. 22(2)(e) and (h) were not relevant factors, stating:

Arguments as to unfair harm or damage to reputation fail to account for the fact that the applicant does not need records of the allegations, or of her evidence, to harm the third party's reputation. As I also noted above, the investigation report exonerated the third party entirely. If the applicant nonetheless were to attempt to besmirch the third party's reputation, she would do so at risk of liability in damages for defamation. The fact is that any damage she might do to the third party's reputation would not hinge on her receiving copies of the allegations that she made or records of the evidence she gave to the investigator in support of the allegations. I am not persuaded that a reasonable person would give any more credence to the applicant's allegations because she brandishes a copy of a School District record in which her own allegations are documented, without supporting evidence or any validating comment by the School District.¹⁵

[39] In contrast to Order 01-53 where the complaint was dismissed, in this case the investigation report does not reach a conclusion about the sexual assault allegation. UBC submits that this difference distinguishes this case from Order 01-53. It submits that, in this case, the applicant's allegations against the faculty member will be given an "air of reality" if she is able to produce a formal investigation report showing that her allegations were taken seriously and investigated at length. For her part, the applicant states that she does not have the ability to embarrass the faculty member using only the report.¹⁶

[40] In this case, as in Order 01-53, the applicant is already in a position to broadcast her allegations to the world at large – at risk of liability in damages for defamation. Further, in my view, she is already in a position to connect the faculty member to her allegations with an "air of reality". However, in my view, this is a rare case where there is additional exposure of harm to the faculty member from disclosing his identity in the report, despite the applicant's existing ability to connect the faculty member to her allegations with an air of reality.

[41] This case involves a sexual assault allegation. Although the report does not validate the applicant's allegation, it does state that there is enough evidence to suggest that inappropriate conduct, in some manner, took place on the part of the faculty member in his dealings with the applicant.¹⁷ Therefore, if the

¹⁵ Order 01-53, 2001 CanLII 21607 at paras. 78 and 79.

¹⁶ Applicant's reply submissions at p. 2.

¹⁷ This is clear from the severed version of the report that has already been provided to the applicant. Also, UBC submissions at para. 32.

complaint information containing the faculty member's identity is disclosed, the applicant will then be able to brandish a document that names the faculty member in the context of her sexual assault allegation with other details that make her allegations more persuasive. It would, in my view, enable the applicant to better impugn the faculty member in the eyes of others. It would expose him to harm and may damage his reputation because it increases the perception of his guilt and removes any lingering doubt about his identity. Given this, I find that ss. 22(2)(e) and (h) are relevant factors for all of the personal information about the faculty member. However, they are less significant factors because the applicant already knows the identity of the person attached to the allegations and can connect him to the allegations with an air of reality.

Other Circumstances and Determination of Section 22(1)

[42] Most of the information UBC is withholding from the applicant relates to investigative findings in the report, or evidence from the faculty member or other third parties. The other withheld information is complaint information. The complaint information was supplied by the applicant, and it identifies the faculty member and other third parties. In Order F08-16, Senior Adjudicator Francis dealt with the issue of how s. 22 applies to an applicant's own complaint, stating:

Disclosure to a complainant of the existence and nature of her or his own complaint, despite this information being personal information of the individual complained against, is not generally an unreasonable invasion of that individual's personal privacy because the complainant is already aware of the details of her or his own complaint. However, if the record in question aggregates or intertwines the information provided by the complainant with other complaints or with complaint information from other sources, then the balance under s. 22 will normally favour protection of the third party's privacy.¹⁸

[43] The complaint information is known to the applicant because she provided the information. It is not intertwined with information supplied by others. The fact that the applicant knows the complaint information because she supplied it is a significant factor that weighs in favour of disclosing this information.

[44] After considering the relevant factors, I find the presumption that disclosure of the complaint information about the other third parties has been rebutted because she supplied it in her complaint. Further, I also note that there is no suggestion that any of the third parties were complicit with the alleged sexual assault, or that disclosure of their identities will damage any of their reputations or expose any of them to harm.

¹⁸ Order F08-16, 2008 CanLII 57359 at para. 65.

[45] There is also complaint information about the faculty member. There is a presumption that disclosure of this information would be unreasonable. Further, as I noted above, this information is very sensitive given the seriousness of the sexual assault allegation, especially in light of the finding in the report that there is enough evidence to suggest that there was inappropriate conduct on the part of the faculty member in his dealings with the applicant. The applicant is already in a position to connect the faculty member to the allegations with an air of reality, but disclosure of this additional information would enable the applicant to brandish a version of the report containing the faculty member's identity and the investigator's findings in one document. In my view, this increases the potential harm to the faculty member because it gives more credence to the applicant's allegations and removes any doubt as to the faculty member's identity. Further, there are no significant factors in favour of disclosing this small amount of information that identifies the faculty member to the applicant, other than her being the source of the information. Moreover, she has both threatened to "ruin" the faculty member and stated that UBC's submissions about how the applicant could harm the faculty member gave her ideas about how she could use the report.

[46] After weighing all of the factors in this case, I am not satisfied the presumption that disclosure would be unreasonable invasion of third party privacy has been rebutted for the complaint information about the faculty member. I therefore find that disclosure of this information would be an unreasonable invasion of the faculty member's privacy, and that UBC must withhold it under s. 22.

[47] The remaining information is the information withheld by UBC other than the complaint information. This is the bulk of the information at issue, and is comprised of information such as the evidence of people other than the applicant and portions of the investigator's analysis. There is a presumption that disclosure of this information would be an unreasonable invasion of third party personal privacy because at least one of ss. 22(3)(d) or (g) apply to the information. Section 22(2)(f) is a factor in favour of withholding this information, as are ss. 22(2)(e) and (h) for this information that is about the faculty member. The applicant says that she wants the report because she has questions about the investigation that she wants answered. I empathize with the applicant's desire to learn more details about the investigation, but her desire to learn more about the investigator's reasoning and other people's evidence does not outweigh the privacy rights of the faculty member and other third parties in this case. The majority of the factors favour withholding information and, in my view, there are no relevant factors that are sufficient to rebut the presumption that disclosure of this personal information would be unreasonable. I therefore find that s. 22 requires UBC to withhold this personal information because disclosure would be an unreasonable invasion of personal privacy of third parties.

[48] In summary, I find that UBC is required to refuse to disclose all of the withheld information under s. 22 of FIPPA on the basis that disclosure would be an unreasonable invasion of personal privacy, except for a few excerpts of information about other third parties in the applicant's complaint.

CONCLUSION

[49] For the reasons given, under s. 58 of FIPPA, I order that:

1. UBC is required to refuse to disclose to the applicant those portions of the report that it is withholding under s. 22(1) of FIPPA, subject to (2) below.
2. UBC is required to give the applicant access to the information in the report that I have highlighted in a copy of the record that will be sent to UBC along with this decision by **May 2, 2014**, pursuant to s. 59 of FIPPA. UBC must concurrently copy me on its cover letter to the applicant, together with a copy of the report it provides to the applicant.

March 19, 2014

ORIGINAL SIGNED BY

Ross Alexander
Adjudicator

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