



OFFICE OF THE
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Order F17-46

UNIVERSITY OF BRITISH COLUMBIA

Celia Francis
Adjudicator

October 19, 2017

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Summary: An applicant requested access to her personal information. The University of British Columbia disclosed over 800 pages of records, withholding some information under ss. 13(1) and 22(1). The adjudicator found that s. 13(1) applied. The adjudicator also found that s. 22(1) applied to some but not all of the information. The adjudicator ordered UBC to disclose the information to which s. 22(1) did not apply.

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

Authorities Considered: BC: Order F15-03, 2015 BCIPC 3 (CanLII); Order F17-02, 2017 BCIPC 02 (CanLII); Order F14-22, 2014 BCIPC 25 (CanLII); Order F10-11, 2010 BCIPC 18 (CanLII); Order 01-07, 2001 CanLII 21561 (BC IPC); Order F16-01, 2016 BCIPC 01 (CanLII); Order F05-08, 2005 CanLII 11959 (BC IPC); F05-28, 2005 CanLII 30678 (BC IPC); Order F17-03, 2017 BCIPC 03 (CanLII); Order F15-60, 2015 BCIPC 64 (CanLII); Order F16-32, 2016 BCIPC 35 (CanLII); Order F15-52, 2015 BCIPC 55 (CanLII); Order 01-15, 2001 CanLII 21569 (BC IPC) .

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36; *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665.

INTRODUCTION

[1] This order flows from an applicant's request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the University of British

Columbia (UBC) for her personal information. UBC disclosed 815 pages of records in response to the request, withholding some information under s. 13(1) (advice or recommendations) and s. 22(1) (harm to third-party personal privacy). The applicant requested a review of UBC's decision by the Office of the Information and Privacy Commissioner (OIPC). Mediation by the OIPC did not resolve the issues and the matter proceeded to inquiry.

ISSUES

[2] The issues before me are whether UBC is authorized by s. 13(1) and required by s. 22(1) to withhold information from the applicant. Under s. 57(1) of FIPPA, UBC has the burden of proof regarding s. 13(1). Under s. 57(2), it is up to the applicant to prove that disclosure of personal information would not be an unreasonable invasion of third-party personal privacy.

DISCUSSION

Information in dispute

[3] The records consist principally of emails among UBC faculty members and the applicant, who was a student at the time.¹ There is considerable repetition of information among the emails. The withheld information is the information in dispute.

Approach to applying s. 22(1)

[4] The approach to applying s. 22(1) of FIPPA has long been established. See, for example, Order F15-03:

Numerous orders have considered the approach to s. 22 of FIPPA, which states that 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.” This section only applies to “personal information” as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party’s personal 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 would be an unreasonable invasion of a third party’s personal privacy.²

[5] I have taken the same approach in considering the s. 22 issues here.

¹ The emails span the period from August 2014 to October 2015.

² Order F15-03, 2015 BCIPC 3 (CanLII), at para. 58.

Is the information “personal information”?

[6] FIPPA defines “personal information” as recorded information about an identifiable individual, other than contact information. Contact information is defined as “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.”

[7] UBC said that the information in question is the personal information of other students and faculty, as well as of the applicant.³ The applicant did not expressly address this issue. However, her submission indicates that she accepts that the withheld information includes personal information.

[8] The information that UBC withheld under s. 22(1) is information about the applicant and other identifiable individuals and it is not contact information. I find that it is personal information.

Does s. 22(4) apply?

[9] Section 22(4) of FIPPA sets out a number of situations in which disclosure of personal information is not an unreasonable invasion of a third party’s personal privacy. Neither party addressed this issue directly.

[10] There is no basis for finding that s. 22(4) applies here. The withheld information does not, for example, relate to a third party’s position, functions or remuneration as an officer, employee or member of a public body (s. 22(4)(e)).

Presumed unreasonable invasion of third-party privacy – s. 22(3)

[11] The next step is to consider whether disclosure of the information in issue is presumed to be an unreasonable invasion of a third party’s personal privacy. UBC argued that ss. 22(3)(d) and (h) apply to most of the withheld information. The applicant did not directly address these issues.

[12] The relevant provisions read as follows:

22 (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,

...

³ UBC’s initial submission, para. 5.

- (h) the disclosure could reasonably be expected to reveal the content of a personal recommendation or evaluation, a character reference or a personnel evaluation supplied by the third party in confidence and the applicant could reasonably be expected to know the identity of the third party,

...

[13] **Educational history** – UBC submitted that some of the information is about other students' programs and courses, so s. 22(3)(d) applies.⁴ The applicant did not expressly address this issue.

[14] The information in question relates to the educational programs of other students and includes information about their progress with their studies. I am satisfied that this personal information relates to the educational history of the other students.⁵ I find that s. 22(3)(d) applies to it.⁶ This means that disclosure of this information is presumed to be an unreasonable invasion of third-party personal privacy.

[15] **Personal evaluation** – UBC said that it relied on s. 22(3)(h) to withhold comments about the applicant that faculty members supplied in confidence. UBC said disclosure of the comments would reveal the faculty members' recommendations and "evaluative statements or evaluative material" about the applicant and her progress through her program of study. It submitted that s. 22(3)(h) protects the identities of third parties who supplied personal recommendations or evaluations in confidence.⁷

[16] The comments about the applicant in this case were not given in the context of a formal evaluation of her course work. Indeed, UBC's evidence and the records themselves show that the faculty members in question were not being asked to formally assess the applicant's academic performance.⁸ Rather, they provided their comments and opinions about the applicant in the context of ongoing discussions about how to assist her with her studies. This is not the kind

⁴ UBC's initial submission, paras. 13-15.

⁵ This finding is consistent with past orders such as Order F17-02, 2017 BCIPC 02 (CanLII), Order F14-22, 2014 BCIPC 25 (CanLII), and Order F10-11, 2010 BCIPC 18 (CanLII).

⁶ This finding applies to the information withheld under s. 22(1) on the following pages: 2-4, 51-53, 55, 180 (names only, withheld in seventh paragraph), 192, 197-201, 310, 323, 364, 372, 467, 493, 495-497, 506-507, 510, 519, 545, 580-581, 797. I include here the information UBC withheld on p. 181. UBC applied s. 22(3)(h) to this information but it is about another student. Section 22(3)(d) thus clearly applies to it.

⁷ UBC's initial submission, paras. 7, 16-19. Affidavits of the director and chair of the applicant's department at UBC.

⁸ Affidavits of the director and chair of the applicant's department at UBC.

of information that past orders have found to be a “personal recommendation or evaluation”.⁹

[17] I find that the information in question does not reveal the content of a “personal recommendation or evaluation, a character reference or a personnel evaluation” for the purposes of s. 22(3)(h). This means that the s. 22(3)(h) presumption does not apply to the information in question.¹⁰

[18] I have also considered the balance of the information that UBC is withholding under s. 22, specifically personal email addresses and personal, non-work-related comments. I find that no s. 22(3) presumptions apply to it.¹¹

Conclusion on s. 22(3)

[19] In summary, I find that the s. 22(3)(d) presumption applies to some of the personal information, but no presumptions apply to the balance of the personal information.

Relevant circumstances – s. 22(2)

[20] In determining whether disclosure of personal information is an unreasonable invasion of third-party personal privacy under s. 22(1) or 22(3), a public body must consider all the relevant circumstances, including those set out in s. 22(2). At this point, the s. 22(3)(d) presumption that disclosure of the withheld information would be an unreasonable invasion of personal privacy may be rebutted. The applicant did not specifically address s. 22(2). UBC raised the following relevant circumstances:

22 (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,

...

⁹ See, for example, Order 01-07, 2001 CanLII 21561 (BC IPC), at para. 2, Order F16-01, 2016 BCIPC 01 (CanLII), at para.10.

¹⁰ This finding applies to the information that UBC withheld under s. 22(3)(h) on the following pages: 82, 180 (bottom paragraph), 320, 321.

¹¹ In its initial submission, paras. 8, 20-24, UBC said this information should be withheld. UBC included p. 540. However, this page contained no markings indicating withheld information.

[21] UBC also said that s. 22(2)(e) applied.¹² However, it did not provide any argument or evidence on this issue and I do not see how it applies in this case.

[22] **Supply in confidence** – UBC said that the faculty members supplied, in confidence, both the personal information of other students and what it called the “evaluation information”.¹³ The faculty members say that they understood that their email discussions about the applicant were confidential and that they expected their emails to be treated in confidence and not forwarded.¹⁴ I accept this evidence. I find that s. 22(2)(f) applies to this information.

[23] **Applicant’s rights** – UBC acknowledged that the applicant has made a human rights complaint against it. UBC argued, however, that what it called the “evaluation information” is not relevant to a fair determination of the applicant’s rights in that proceeding.¹⁵ The applicant did not address this issue. There is no basis in the material before me to find that s. 22(2)(c) applies.

[24] **Previous disclosure** – UBC withheld information on one page¹⁶ under s. 22(3)(h) that it disclosed elsewhere. I do not see how re-disclosing this withheld information to the applicant would be an unreasonable invasion of third-party privacy.

[25] UBC also withheld information under s. 22(3)(h) in some places¹⁷ that is similar in character and content to information it disclosed elsewhere. UBC did not explain these apparent inconsistencies. I do not see how disclosing this information, which is about the applicant and is essentially the same as what UBC has already disclosed, would be an unreasonable invasion of third-party privacy.

Conclusion on s. 22(1)

[26] I found that all of the information UBC withheld under s. 22 is personal information. Some of it relates to the educational history of individuals other than the applicant and s. 22(3)(d) applies to it. I also found that this personal information was supplied in confidence, so s. 22(2)(f) applies to this information. This circumstance favours withholding the s. 22(3)(d) information and I find that the presumption regarding this information has not been rebutted. The applicant did not meet her burden of proof regarding this information. I therefore find that s. 22(1) requires UBC to withhold this information.

¹² At para. 9 of its initial submission. Section 22(2)(e) refers to the unfair exposure of a third party to financial or other harm.

¹³ UBC’s initial submission, para. 26.

¹⁴ Affidavits of the director and chair of the applicant’s department at UBC.

¹⁵ UBC’s initial submission, paras. 27-31.

¹⁶ Page 320. UBC has marked it specifically as “s. 22(3)(h).”

¹⁷ Pages 82, 180 (bottom paragraph), 321. UBC has marked it as specifically as “s. 22(3)(h).”

[27] As for the information that UBC called the “evaluation information”, I find that no presumptions apply.¹⁸ I found that s. 22(2)(f) applies to it. However, in my view, the disclosure of the same or similar information elsewhere in the records outweighs this factor. I therefore find that s. 22(1) does not apply to this information.

[28] Regarding the remaining information (email addresses and personal comments), I found that no presumptions applied. However, I find that the character of the comments (references to the individuals’ personal activities, circumstances or views) favours withholding them. No relevant circumstances favour disclosure of these comments or of the email addresses. The applicant has not met her burden of proof regarding this information. I find that s. 22(1) requires UBC to withhold this information.

Advice or recommendations – s. 13(1)

[29] Section 13(1) is a discretionary exception which says that a public body “may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.” The courts have said that the purpose of exempting advice or recommendations is “to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice”,¹⁹ recognizing that some degree of deliberative secrecy fosters the decision-making process.²⁰ They have interpreted the term “advice” to include an expression of opinion on policy-related matters²¹ and expert opinion on matters of fact on which a public body must make a decision for future action.²² They have also found that advice and recommendations include policy options prepared in the course of the decision-making process.²³ Previous orders have found that a public body is authorized to refuse access to information, not only when it directly reveals

¹⁸ This finding applies to pages 82, 180 (bottom paragraph), 320, 321. UBC said, at para. 7 of its initial submission, that all of this information falls under s. 22(3)(h).

¹⁹ *John Doe v. Ontario (Finance)*, 2014 SCC 36 [*John Doe*], at paras. 34, 43, 46, 47. The Supreme Court of Canada also approved the lower court’s views in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC), that there is a distinction between advice and factual “objective information”, at paras. 50-52. In Order 01-15, 2001 CanLII 21569 (BC IPC), former Commissioner Loukidelis said that the purpose of s. 13(1) is to protect a public body’s internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations.

²⁰ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College of Physicians*].

²¹ *John Doe*.

²² *College of Physicians*.

²³ *John Doe*.

advice or recommendations, but also when it would enable an individual to draw accurate inferences about advice or recommendations.²⁴

[30] In arriving at my decision on s. 13(1), I have considered the principles for applying s. 13(1) as set out in the court decisions and orders cited above.

[31] UBC said it applied s. 13(1) to faculty members' internal discussions containing advice or recommendations about the applicant's progress with her program and how to deal with her situation.²⁵

[32] The portions that UBC withheld under s. 13(1) reveal the deliberative process in which the faculty members were engaged regarding the applicant. In these emails, the faculty members provide each other with advice and recommendations on how to deal with the applicant's academic situation, together with options, pros and cons of the options, implications and considerations. In my view, this withheld information consists of advice or recommendations developed by or for a public body and I find that s. 13(1) applies to it.

Does s. 13(2) apply?

[33] Section 13(2) of FIPPA states that a public body may not refuse to withhold certain types of information under s. 13(1). UBC argued that s. 13(2) does not apply. I agree. Although the applicant argued that some facts could be disclosed,²⁶ I find that any "factual material" is intertwined with information to which s. 13(1) applies, such that it would not be reasonable to disclose it. As such, I find that s. 13(2)(a) does not apply to the withheld information in the emails. I also find that the information does not consist of any other information listed in ss. 13(2)(b)-(m).

Exercise of discretion

[34] UBC argued that it exercised its discretion properly in withholding some information under s. 13(1). It is clear that UBC conducted a line-by-line review of the emails and that it disclosed some advice or recommendations in the emails that it could technically have withheld under s. 13(1). I am therefore satisfied that UBC exercised its discretion properly in this case.

²⁴ See, for example, Order F15-60, 2015 BCIPC 64 (CanLII), at para. 12. See also Order F16-32, 2016 BCIPC 35 (CanLII). Order F15-52, 2015 BCIPC 55 (CanLII), also discusses the scope and purpose of s. 13(1).

²⁵ UBC's initial submission, paras. 10, 38-40; affidavit of the director of the applicant's department at UBC.

²⁶ Applicant's response submission, p. 1. The applicant pointed to pages where she suggested the correspondents were seeking factual clarification of certain matters.

Conclusion on s. 13(1)

[35] I find that s. 13(1) applies to the information that UBC withheld under that section. I also find that s. 13(2) does not apply to this information.

CONCLUSION

[36] Under s. 58 of FIPPA, I make the following orders:

1. Under s. 58(2)(b), I confirm that UBC is authorized to withhold the information it withheld under s. 13(1).
2. Under s. 58(2)(c), subject to para. 3 below, I require UBC to refuse the applicant access to the information it withheld under s. 22(1).
3. Under s. 58(2)(a), I require UBC to give the applicant access to the information it withheld under s. 22(1) on pages 82, 180 (bottom paragraph), 320 and 321 by November 30, 2017. UBC must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

October 19, 2017

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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