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Order F18-19

UNIVERSITY OF VICTORIA

Elizabeth Barker
Senior Adjudicator

June 5, 2018

CanLII Cite: 2018 BCIPC 22
Quicklaw Cite: [2018] B.C.I.P.C.D. No. 22

Summary: A professor requested information about a University investigation into how he supervised graduate students. The University gave partial access to the records but refused to disclose some information under ss. 13 (policy advice or recommendations), 14 (solicitor client privilege) and 22 (harm to third party personal privacy) of the *Freedom of Information and Protection of Privacy Act.* The adjudicator confirmed the University's decision regarding s. 14. The s. 13(1) and s 22(1) decisions were confirmed in part. The University was ordered to disclose the information it was not authorized to refuse to disclose under ss. 13 and 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, 13(1), 14, 22, 22(2)(a), 22(2)(c), 22(2)(f), 22(3)(d), 22(4)(a), 22(4)(e), 23, 54(b), 56(3).

INTRODUCTION

[1] A professor (applicant) with the University of Victoria (University) requested access to records related to the University's investigation of two students' complaints about him. The University disclosed some records but withheld others completely or in part pursuant to ss. 13 (policy advice or recommendations), 14 (solicitor client privilege) and 22 (harm to third party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant disagreed with this response and asked the Office of the Information and Privacy Commissioner (OIPC) to review the University's decision. Mediation did not resolve the issues in dispute, and the applicant requested that they proceed to inquiry.

Preliminary matter

[2] In his inquiry submission, the applicant alleges that the University did not conduct a thorough search for records responsive to his request. His concern about the adequacy of the University's search for records is not included in the OIPC's notice of inquiry or investigator's fact report as an issue to be determined in this inquiry.

[3] Past orders and decisions of the OIPC have said parties may add new issues at the inquiry stage only if permitted to do so. The applicant did not apply to add the issue to the inquiry, and he does not explain why he is only raising it at this late juncture in the process. For its part, the University objects to any expansion of the issues and says that the adequacy of its search for records is outside the scope of the inquiry.

[4] As the applicant did not obtain the OIPC's prior approval to add this issue into the inquiry, and he provided no explanation for not doing so, I decline to add it at this late stage. I will not consider whether the University conducted an adequate search for records.

ISSUES

[5] The issues to be decided in this case are as follows:

1. Is the University authorized by ss. 13 and/or 14 of FIPPA to refuse the applicant access to the information in dispute?

2. Is the University required by s. 22 of FIPPA to refuse the applicant access to the information in dispute?

[6] Section 57(1) of FIPPA places the burden on the University, as the public body, to prove that the applicant has no right of access to the information being withheld under ss. 13 and 14. However, s. 57(2) states that the applicant has the burden of proving that disclosure of personal information in the records would not be an unreasonable invasion of third party personal privacy under s. 22 of FIPPA.

DISCUSSION

Background

[7] In early 2016, the University investigated the applicant for issues related to the quality of his supervision of two graduate students (student 1 and student 2).[1]

[1] The students are no longer being supervised by the applicant as student 1 completed her doctorate in early 2016 and student 2 transferred to another supervisor in 2015.

The investigation was conducted by the University's now former Associate Vice President Faculty Relations and Academic Administration (AVP). An investigation report was issued and based on that report senior University administrators issued a decision letter. The applicant was given a copy of the investigation report, the decision letter and a formal reprimand letter. These three documents are not in dispute or part of the records before me in this inquiry.

[8] The University Faculty Association initiated a grievance on the applicant's behalf regarding the reprimand letter. However, the grievance was eventually withdrawn. As a result, the applicant did not receive the document disclosure that would have been a normal part of grievance arbitration.

Information in dispute

[9] The applicant seeks access to the records related to the AVP's investigation, including all the emails that the AVP reviewed. The OIPC investigation report states that the applicant confirmed that he is not seeking access to emails he sent or received.[2] However, the records that the University produced for my review include some emails of that type. Given that the applicant does not want access to those emails and they are no longer in dispute, I will not make any decision about them.[3]

[10] The information in dispute is in the following records:

1. Typed and handwritten notes of the AVP's investigation interviews;
2. Memorandum by the Dean of the Faculty of Graduate Studies;[4]
3. Administrative form for student 1's thesis defence;[5]
4. Department notice/bulletin for student 1's thesis defence;[6]
5. Affidavit sworn by the chair of student 1's oral examination committee;[7]
6. Letters that University administrators sent to the applicant;[8]
7. Single emails and email chains. Many of these include attachments, specifically correspondence, handwritten notes, a report, a form, a screen shot and other email chains.

[2] Investigator's fact report para. 8.
[3] The emails to and from the applicant are on the following pages of the records: 23 (bottom) - 28, 137-145, 168-176, 230 (bottom) - 234, 237 (bottom) - 239, 276-283 and 294-296.
[4] Page 18 of the records.
[5] Page 108 of the records.
[6] Pages 64-65 of the records.
[7] Pages 252-253 of the records.
[8] Pages 87-88 and 266-267 of the records. These are formal letters. The applicant only said he did not want his "emails."

Advice or Recommendations, s. 13

[11] The University is withholding all of one email string under s. 13.[9] The applicant disputes the University's application of s. 13 to this record.

[12] Section 13 authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. The purpose of s. 13 is to allow public bodies to engage in full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of decision and policy-making were subject to excessive scrutiny.[10] The exception applies not only when disclosure of the information would directly reveal advice and recommendations, but also when it would allow accurate inferences about the advice or recommendations.[11] Further, "advice" includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact upon which a public body must make a decision for future action.[12]

[13] The process for determining whether s. 13 applies to information involves two stages.[13] The first is to determine whether the disclosure of the information would reveal advice or recommendations developed by or for the public body. If so, then it is necessary to consider whether the information falls within any of the categories listed in s. 13(2).[14] If it does, the public body must not refuse to disclose the information under s. 13(1).

[14] The applicant was part of the communication in all but the last two emails in this email string. As stated above, the applicant does not seek access to emails he sent or received. Therefore, I will only make a determination about the University's decision to refuse access to the last two emails in the string.

[15] In this case, there are two sentences in the last email in the string where a university official suggests the appropriate next step in the administrative process. I find that his suggestion is advice in this context and it is not the type of record or information listed in s. 13(2). Therefore, the University may refuse to disclose these two sentences under s. 13(1).[15]

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[9] Pages 22-28 of the records. The University calls these pages the "Advice Document."
[10] *John Doe v. Ontario (Finance*), 2014 SCC 36 at para. 45.
[11]For example: Order 02-38, 2002 CanLII 42472 (BCIPC); Order F10-15, 2010 BCIPC 24 (CanLII).
[12] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner,* 2002 BCCA 665 [*College*] at para 113.
[13] Order F07-17, 2007 CanLII 35478 (BC IPC) at para. 18.
[14] There are 14 types of information and records listed in s. 13(2), for instance, factual material, public opinion polls and statistical surveys.
[15] I have highlighted the sentences in a copy of page 22 of the records that is being sent to the University along with this order.

[16] However, the balance of email string is a discussion of the administrative process that has occurred or is under way, the steps previously agreed upon, as well as instructions on what to do next. In my view, none of that information is advice or recommendations as those terms have been defined in the case law. I have considered the OIPC Orders that the University cites in support of its application of s. 13, but the information before me is materially different than the information which was found to be subject to s. 13 in those orders.[16] Although there are some rough contextual similarities in those earlier orders, I do not find them persuasive.

Solicitor client privilege, s. 14

[17] Section 14 of FIPPA states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege. The law is well established that s.14 of FIPPA encompasses both legal advice privilege and litigation privilege.[17] The University refuses to disclose some emails and their attachments under s. 14 because it says legal advice privilege applies.

[18] When deciding if legal advice privilege applies, BC Orders have consistently applied the following criteria:

1. there must be a communication, whether oral or written;
2. the communication must be of a confidential character;
3. the communication must be between a client (or his agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

[19] Not every communication between client and solicitor is protected by solicitor client privilege. However, if the four conditions set out above are satisfied, then legal advice privilege applies to the communications and the records relating to it.[18]

Section 14 records not produced

[20] The University did not produce a copy of the s. 14 records for my review. Instead, it provides an affidavit from the University Secretary who deposes that

[16] Order F13-09, 2013 BCIPC 10 (potential discipline for the applicant); Order F14-52, 2014 BCIPC 56 (professor's application for promotion); Order F06-01, 2006 CanLII 3255 (BC IPC) (strategy for the public release of a scientific panel's terms of reference); Order 02-38, 2002 CanLII 42472 (BC IPC) (how to deal with public relations issues).
[17] *College, supra* at note 12 at para. 26.
[18] *R. v. B.,* 1995 CanLII 2007 (BCSC) at para. 22. See also *Canada v. Solosky*, 1979 CanLII 9 (SCC) at p. 13.

she has reviewed the records withheld under s. 14.[19] The Secretary provides the name and job title of those involved in the communications. She also provides an index listing the date, page number, description and participants for each record. The University sought and received prior permission from the OIPC to submit parts of the index *in camera*.[20] The Secretary says that all of the records contain written communications made for the purpose of seeking, formulating or giving legal advice, that they contain legal advice and/or involve information gathered or provided for the purpose of seeking legal advice, and that they are communications made within a confidential solicitor client relationship.

[21] There is no evidence, however, that the Secretary participated in any of those communications or that she has legal training. This lessens the weight I give her opinion and conclusions about the nature and purpose of the communication. In addition, the University was claiming privilege for communications involving the AVP, but the Secretary's evidence is that only *part* of the AVP's role was to provide legal advice to the University. Her affidavit does not contain any details about the AVP's role. It seems to me that the AVP would also have carried out administrative and operational duties for her employer, given she was the Associate Vice President Faculty Relations and Academic Administration.

[22] Not everything done by a lawyer attracts solicitor client privilege and whether solicitor client privilege applies depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.[21] For his part, the applicant disputes that the AVP was acting as the University's legal counsel. Therefore, an important question in this case is what was the AVP's role with respect to the records at issue?

[23] As a result of the above considerations, I wrote to the University to say that the Secretary's affidavit and index was insufficient for me to decide whether solicitor client privilege applies, and I was considering whether to order production of the records for my review pursuant to s. 44(1). However, recognizing the fundamental importance of legal advice privilege to the proper functioning of the legal system as a whole and in order to minimally encroach on it, I first gave the University an opportunity to provide further evidence.

[24] The University did so. It provided an affidavit from the AVP and a supplemental submission regarding s. 14.[22] Based on that additional information,

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[19] The Secretary is also the head of the public body for the purposes of FIPPA.
[20] The description and explanatory notes were *in camera* but the page numbers, dates and record type were in open evidence.
[21] *R. v. Campbell*, 1999 CanLII 676 (SCC) at para. 50.
[22] The supplemental submission and the AVP's affidavit are dated February 14, 2018. The applicant was given an opportunity to respond.

I determined that I had sufficient detail to make a decision about s. 14 and it was not necessary to order production of the records.

Analysis and findings, s. 14

[25] The University claims that the records withheld under s. 14 are privileged communications with its lawyers, namely the AVP and its external legal counsel.

[26] From my review of the index, the records being withheld under s. 14 fall broadly into the following groups:

Group 1 - Emails/email strings between University administrators and an external lawyer.[23] The AVP is copied on these.

Group 2 - Emails/email strings between University administrators. With one exception, the email or last email in each string was either to or from the AVP. The one exception is an email between administrators, which was copied to the AVP.

Group 3 - Attachments to the emails/email strings, specifically letters, reports, notes, forms, a screen shot and other emails/email strings. Some of the attachments are emails/email strings between University administrators and the AVP while others are emails/email strings between the administrators and a student.

[27] For the reasons that follow, I find that all of the records being withheld under s.14 are protected by legal advice privilege.

Emails and email strings (Group 1 and 2)

[28] The AVP deposes that she is a lawyer qualified to practice in BC and that she was the AVP at the time of the communication in the records. She describes her duties and says that she was responsible for providing specialized legal advice to deans, chairs, directors and senior administrators on matters related to faculty, students, and academic policy, procedure and regulation. The AVP says that the University Vice-President Academic and Provost asked her to investigate the issues concerning students 1 and 2, and that he and the Dean of Graduate Studies were her primary instructing clients in that matter.

[29] The AVP says that she has reviewed the index and she describes the records being withheld under s. 14 in some detail. To summarize, she says that they are as follows:

[23] Pages 1-12 of the records.

1. Confidential communications between herself and her clients whereby they gave her records and sought her legal opinion with respect to the steps to take in light of the matters addressed in those records. These communications also contain her legal advice.

2. Confidential communications with her clients in which she collects records from them and from administration files. She says that these investigative actions were necessary to allow her to form an opinion and provide her clients with accurate legal advice. She says that these records effectively reveal the subject matter and basis of the legal advice sought and given.

3. Confidential communications between herself, her clients and external legal counsel. She says she sought specialized legal advice from external legal counsel concerning some aspects of the investigation report.

[30] Based on the index and the AVP's affidavit evidence, I am satisfied that the emails/email strings that involve communications between University administrators and an external lawyer (Group 1) meet the criteria for legal advice privilege. They are confidential communications between the University and its legal counsel that were directly related to seeking, formulating and giving legal advice.

[31] I also find that the emails/email strings that involve the AVP (Group 2) meet the criteria for legal advice privilege. The BC Court of Appeal said the following about lawyers investigating:

> Legal advice privilege arises only where a solicitor is acting as a lawyer, that is, when giving legal advice to the client. Where a lawyer acts only as an investigator, there is no privilege protecting communications to or from her. If, however, the lawyer is conducting an investigation for the purposes of giving legal advice to her client, legal advice privilege will attach to the communications between the lawyer and her client….[24]

[32] The University's submissions and evidence establish that in this case the AVP was investigating for the purposes of giving legal advice. Further, while the AVP's title suggests that she held a senior administrative role within the University, the evidence as a whole satisfies me that she was also a lawyer and in the context of the records in dispute, she was acting and communicating in order to formulate and provide legal advice to her clients.

[33] The applicant disputes that the AVP was acting as the University's legal counsel because, he says, they have other in-house legal counsel. I am not persuaded by that argument. The University's evidence explains in detail the role of its in-house general counsel office, and how that office and the AVP provide

[24] *College supra* at note 12 at para. 32.

legal advice on different matters. In my view, the fact that the University has other in-house lawyers does not mean that the AVP was not acting and communicating as the University's legal counsel in the context of the records in dispute. The evidence as a whole indicates to me that she was.

[34] Regarding the element of confidentiality of the communications, the AVP says that they were confidential but she does not elaborate. The Secretary's affidavit and the index identify the senior administrators with whom the AVP and the external legal counsel communicated. The Secretary also says that these communications were intended to be confidential, they were not shared broadly, and they were kept to a limited subset of people involved in the matters at issue. There is nothing to indicate that anyone outside of the University's senior administrators, the AVP, external legal counsel and external legal counsel's assistants were part of the communication in these emails/email strings. Therefore, I find that they were confidential communications between the University and its lawyers.

[35] In conclusion, I am satisfied by the University's affidavit evidence and the index describing the records that disclosing the emails/email strings in Groups 1 and 2 would reveal confidential communication between the University and its lawyers that directly relate to the seeking, formulating and giving of legal advice. Therefore, the University may refuse to disclose this information under s. 14.

Attachments to privileged records (Group 3)

[36] It is well established that a document that is not otherwise privileged does not become so simply because it is sent to or by a lawyer.[25] In the same way, attachments do not become privileged merely because they are exchanged between a solicitor and client, even if they are attached to a privileged communication. For instance, the Alberta Court of Appeal in *TransAlta Corporation v. Market Surveillance Administrator* rejected a claim of privilege over a copy of a regulatory commission decision attached to an email. In finding that the email was privileged but the attached case was not, O'Brien, J. said:

> In my view, an attachment to a privileged e-mail may be extraneous to the content of that e-mail which means it is still necessary to review the attachment to determine its connection to the e-mail before deciding whether it is also privileged.[26]

[37] A like statement was made by the Federal Court in *Murchison v. Export Development Canada*:

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[25] *Keefer Laundry Ltd. v Pellerin Milnor Corp.* 2006 BCSC 1180 at para. 61; *Canada (Public Prosecution Service) v JGC*, 2014 BCSC 557 at paras. 16-19.

[26] *TransAlta Corporation v. Market Surveillance Administrator,* 2014 ABCA 196 at para. 59. The court agreed with the chambers judge that the attached case was not privileged because it was publicly available online (at para. 62).

> In a similar vein, it is my view that a document that would otherwise be subject to disclosure should not be withheld merely because it has been attached to or enclosed with a properly exempted document…These attachments and enclosure are discrete documents that, save for an exceptional circumstance where they would truly allow one to infer the content and substance of the privileged advice, must be considered on their own and apart from the correspondence to which they are attached or in which they are enclosed.[27]

[38] The BC Court of Appeal in *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)* has also recognized the need to examine the discrete parts of a record before determining if privilege applies to all parts. The Court found that privilege applied to one part of a document but another part, which was a third party communication, was not privileged. It said that where the non-privileged part of the record is not "intertwined" with the privileged part, it may be severed and disclosed under s. 4(2) of FIPPA.[28]

[39] More recently, the BC Court of Appeal in *British Columbia (Attorney General) v. Lee* said:

> The principle that privilege attaches to all communications made within the framework of the solicitor-client relationship does not mean that severance of particular communications within that continuum can never be appropriate. Advice given by lawyers on matters outside the solicitor-client relationship is not protected and may be severed.
> …
> This Court has also permitted severance in the context of access to information requests in circumstances where the disclosed information was a third party document, disclosure of which could not reveal any of the legal advice given to the client: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 68.
>
> The rationale for caution in severing portions of otherwise privileged documents has been aptly expressed in these terms at para. 46 of *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88:
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> > Disclosing one part of a string of communications gives rise to the real risk that privilege might be eroded by enabling the applicant for the communication to infer the contents of legal advice.
>
> Thus severance should only be considered when it can be accomplished without any risk that the privileged legal advice will be revealed or capable of ascertainment.[29]

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[27] *Murchison v Export Development Canada*, 2009 FC 77 at para. 45.
[28] *College supra* at note 12 at para. 68.
[29] *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at paras. 36-40. Leave to appeal dismissed: *Kyla Lee, et al. v. Attorney General of British Columbia*, 2017 CanLII 84240 (SCC).

[40] Therefore, although I find that the emails/email strings are protected by legal advice privilege, this does not inevitably mean that their attachments are also privileged. I must determine each attachments connection to its accompanying e-mail to decide whether the attachments would reveal communications that are protected by solicitor client privilege.

[41] The attachments are letters, handwritten notes, forms, a screen shot and email strings. Details about the attachments are provided in the *in camera* parts of the index, so I cannot say much about them. From their descriptions, I can see that they are records responsive to the applicant's access request for records related to the University's investigation of two students' complaints about him. All of the attachments predate the email/email strings to which they are attached.

[42] Based on the evidence in the index, I can see that two of the attachments, even outside the context of subsequently being appended to a privileged communication, are themselves privileged. They are independently confidential communications between the University and its lawyers regarding legal advice provided by the lawyers.

[43] The rest of the attachments, however, have a non-privileged character outside the context of being subsequently appended to a privileged communication. The evidence reveals that when these attached records were originally created they were not confidential communications between solicitor and client for the purpose of seeking, formulating or providing legal advice. Nonetheless, in the present context, each attachment is appended to a record that I have already found is privileged. The critical question here is whether the attachments are an integral part of the privileged communication to which they are appended. Based on the AVP's affidavit and the index, I am satisfied that they are. Having access to the attachments in this context would reveal the nature of the legal advice sought and provided in the emails to which they are attached. Knowing what documents were exchanged, and when, would allow accurate inferences about the University and the AVP's confidential privileged communications in the emails. Therefore, I find that all of the attachments are protected by privileged because they are a part of, and reveal, the privileged communications to which they are appended.

[44] In conclusion, the University has met its burden and proven that all of the records it is withholding under s. 14 are protected by legal advice privilege.

Disclosure harmful to personal privacy, s. 22

[45] The balance of the information in dispute in this case is withheld under s. 22, including the information that I found above could not be withheld under s.13. Section 22 requires public bodies refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party's personal

privacy.[30] Numerous orders have considered the application of s. 22, and I will apply those same principles here.

Personal information

[46] The first step in a s. 22 analysis is to determine if the information in dispute is personal information. Personal information is defined 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".[31]

[47] Some of the withheld information is about identifiable individuals, specifically their names, what they told the AVP about their interactions with the applicant and what they knew about how he interacted with students 1 and 2. There is also a fair bit of information about students 1 and 2 (they are named), their academic matters and interactions with the applicant and University administrators and professors. All of that information about third parties meets the definition of personal information in FIPPA.

[48] Some of the withheld information is also the applicant's personal information because it is about him and his interactions with others.

[49] However, some of the information that the University is withholding is clearly not personal information, for instance, dates, page numbers, University logos and banners and standard format confidentiality provisos in emails. There is also some information in emails and administrative forms that is clearly provided for the purpose of allowing the individual to be contacted for work purposes (none of it is about student 1 or 2). This is "contact information" so it is not personal information. Section 22 does not apply to information that is not personal information, so the University is not authorized to refuse access to it under that exception.

Section 22(4) - Not unreasonable invasion of privacy

[50] The next step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If so, then its disclosure is deemed not to be an unreasonable invasion of third party personal privacy. The University submits that none of the exceptions in s. 22(4)

[30] Schedule 1 of FIPPA says: "third party" in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than (a) the person who made the request, or (b) a public body.
[31] See Schedule 1 of FIPPA for these definitions.

apply. However, I find that s. 22(4)(e) applies to some of the personal information. Section 22(4)(e) states:

> 22(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

[51] Section 22(4)(e) covers personal information that is about an individual's job duties in the ordinary course of work-related activities, namely objective factual information about what he or she did or said in the normal course of discharging his or her job duties.[32] There is some information of that type here. More specifically, it is information about what administrators said and did while carrying out their job duties and it does not relate to the workplace investigation or disciplinary matter.[33] I find that s. 22(4)(e) applies and disclosing it would not be an unreasonable invasion of third party personal privacy.

Section 22(3) - Presumed unreasonable invasion of privacy

[52] The third step in the s. 22 analysis is to determine whether any part of s. 22(3) applies to the balance of the personal information. If so, disclosure is presumed to be an unreasonable invasion of third party privacy. The University submits that s. 22(3)(d) applies to all of the information it is refusing to disclose under s. 22. Section 22(3)(d) states:

> 22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> …
>
> (d) the personal information relates to employment, occupational or educational history,

[53] Previous orders have said "educational history" includes what educational institution an individual attended and details about their programs and courses.[34] The information in this case is about student 1 and 2 and the details of their academic activities and progress towards their degrees, as well as their interactions with their graduate supervisor, other academics and University administrators. I find that s. 22(3)(d) applies to the third party personal information in this case because it relates to student 1 and 2's educational history.

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[32] Order 01-53, 2001 CanLII 21607 (BC IPC) at paras. 40-41.
[33] Including signing an administrative form at page 108 of records.
[34] Order F10-11, 2010 BCIPC 18 at paras. 17 and 19.

[54] I also considered whether s. 22(3)(d) applies to any of the third party personal information in the sense that it relates to the third parties' employment or occupational history. I find that it does not apply in that sense because the investigation was about the applicant's workplace behaviour and not about the third parties and how they performed their work.

Relevant circumstances, s. 22(2)

[55] The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those listed in s. 22(2). It is at this step, after considering all relevant circumstances, that the s. 22(3) presumption may be rebutted. The parts of s. 22(2) that play a role in this analysis are as follows:

> 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
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> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
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> …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
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> …
>
> (f) the personal information has been supplied in confidence,
>
> …

Public scrutiny, s. 22(2)(a)

[56] The University says that disclosing the third party personal information is not desirable for the purpose of subjecting the University's activities to public scrutiny. I agree. The information is about the work and academic disputes of a small group of academics and students. There is no indication that anything larger is at stake or that the information would have any impact on the university community as a whole or add anything to the public's knowledge of how the University operates. The process that the University followed in terms of investigating student concerns and disciplining the applicant has been disclosed, and the applicant had access to a grievance regime to challenge what took place. Nothing suggests that the public would have any interest in the specific third party personal information at issue in this case, and I conclude that its disclosure is not desirable for the purpose of subjecting the activities of the University to public scrutiny.

Fair determination of applicant's rights, s. 22(2)(c)

[57] The applicant says that the information in dispute is needed to determine his "rights in the grievances and appeals."[35] Previous orders have established that the following four criteria must be met in order for s. 22(2)(c) to apply:

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; and
4. the personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.[36]

[58] The applicant says that his grievance was only temporarily withdrawn and the disputed information can be used to reinstate it. He also says that he has "filed appeals on subsequent disciplines" and the Faculty Association "is currently having an arbitration hearing on the grievance from the latest suspension without pay."[37] He also says that if the information collected in the AVP's investigation is used to discipline him, then he has the right to examine and cross-check it.[38]

[59] The University submits that disclosing the third party personal information is not relevant to a determination of the applicant's rights because the grievances were unreservedly withdrawn and there are no pending or ongoing proceedings concerning the investigation. It provides the email in which the president of the Faculty Association withdraws two of the applicant's grievances. Contrary to the applicant's position, the email does not say that the grievances are temporarily withdrawn, nor does it say anything about reserving the right to reinstate them.

[60] I find that the applicant's submission does not satisfactorily demonstrate how the third party personal information in dispute relates to a proceeding which is either under way or is contemplated, as opposed to one that has already been completed. Despite the applicant's assertion that one of his grievances was only temporarily withdrawn and it can be reinstated, he provides no evidence to establish that is so. The University's evidence is much more persuasive and shows that the Faculty Association withdrew the applicant's two grievances and did not indicate any intent to one day pursue them.

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[35] Applicant's submission, para. 59.
[36] Order 01-07, 2001 CanLII 21561 (BC IPC) at para. 31.
[37] Applicant's submission, para. 29.
[38] Applicant's submission, para. 61.

[61] The applicant alludes to other proceedings that are underway (i.e., "appeals on subsequent disciplines" and "currently having an arbitration hearing"), but he does so in a vague and non-specific way. He provides no detail about those proceedings. He does not explain what bearing or significance the third party personal information has on the determination of the right in question in those proceedings. Further, there is no explanation about how the personal information in dispute is necessary in order to prepare for those proceedings or to ensure a fair hearing.

[62] In short, I am not persuaded by the applicant's submissions that the requested information is necessary or relevant to a fair determination of his legal rights.

Supplied in confidence, 22(2)(f)

[63] For the reasons that follow, I find some of the third party personal information was supplied in confidence, which weighs against disclosing it to the applicant.

[64] The University says that the information about students 1 and 2 is "of a sufficiently private nature that neither the students, nor the other person who provided information, could have reasonably expected it would be disclosed to the Applicant."[39] The University also submits: "Additionally, if personal information about third parties collected in the course of disciplinary investigations was not kept private, it could have a chilling effect on third parties' desire to be forthright in their communications with investigators."[40]

[65] The applicant says he already knows the identity of the students but he does not say anything specifically about whether the information was supplied in confidence.

[66] I can see only two types of express statements about privacy or confidentiality in the records. The first type is a confidentiality proviso in the Dean of Graduate Studies' email signature block, which says:

> This email message, including any attachments, is for the sole use of the intended recipient(s) and *may* [emphasis added] contain confidential information. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message.[41]

[67] On its own, this type of template proviso in a signature block does not support concluding that the email it accompanies actually contains personal

[39] University's initial submission, para. 60.
[40] University's initial submission, para. 61.
[41] Page 14 of the records.

information that was supplied in confidence. Template language of this sort carries little weight because it is automatically inserted without any specific action required on the part of the person sending the email. An objective view of the nature and content of the information or communication that accompanies such a proviso must also indicate that the information was supplied in confidence.

[68] The proviso in this case appears at the bottom of two emails from the Dean about the next steps in processing student 1's thesis.[42] The content of the emails is innocuous administrative detail and one email was sent to an administrator and the other sent to student 1. There is no further information about these specific emails to help me understand the Dean's intent regarding confidentiality when he sent them. In this case, I give no weight to the proviso because there is nothing to indicate that the Dean intended it to apply to the specific information it was appended to. Therefore, I am not persuaded that the information in these emails was supplied in confidence.

[69] The second type of express confidentiality statement in the records is about a memorandum sent by the Dean of Graduate Studies to administrators. The cover email that accompanies the Memorandum says that it is "a CONFIDENTIAL memo."[43] I find that the third party personal information that accompanies that express statement of confidentiality was supplied in confidence. That is because the context and nature of the confidentiality statement indicates that the person inserting it made a conscious decision to assert confidentiality over the specific information in the memorandum. This is not like a template proviso in a signature block that is automatically added to every email regardless of whether the person sending the email thinks the information is confidential.

[70] Although most of the information in dispute contains no explicit confidentiality statements, I considered if there is a basis to conclude that the supplier and receiver mutually understood that the information was being supplied in confidence. I find that this was the case for some of the information. For instance, there are one-on-one emails between student 1 and 2 and administrators as well as the AVP's interview summaries that relate to concerns with the applicant's conduct towards the students. They do not mention confidentiality in what they say to each other. However, given the context of those particular records and what is actually said in them, it is reasonable to conclude that the personal information was supplied in confidence. Providing an employer or educational institution with information about a coworker or academic supervisor's alleged misconduct is generally something that is done in confidence.

[42] Pages 14 and 22 of the records.
[43] Page 17 of the records.

[71] Further, two emails between a student and an administrator contain some information about the emotional state and wellbeing of others and the impact of the applicant's behaviour.[44] These disclosures were also made in the context of a one-on-one communication and it is evident to me that this is information of a sensitive and personal nature, which would only have been shared on a confidential basis.

[72] However, I find that the remainder of the withheld personal information was not supplied in confidence. A large part of it is about administrative processes related to student 1 and 2's academic matters. In fact, some of the withheld information is the type that would clearly have been shared fairly broadly in order to administer graduation processes. For instance, it is information about what paperwork needs to be completed to move a thesis to the next stage, information about the thesis topic and the identity of the academics on the panel for the oral defence. There is insufficient evidence to establish that there would have been any reasonable expectation that what was said about such administrative matters was confidential. Further, where this type of personal information is about the administrators (as opposed to the students), I found above that disclosing it would not be an unreasonable invasion of third party personal privacy because s. 22(4)(e) applies. To be clear, none of the third party personal information described in this paragraph references the applicant's alleged misconduct, the investigation or how anyone feels about it.

[73] The University is also withholding some information in letters it previously sent to the applicant.[45] This is baffling and the University's reason for doing this is not explained. The University does not address the issue of whether the withheld third party personal information in these letters was supplied in confidence. However, the fact that the University earlier sent the completely unredacted letters to the applicant belies any claim that the withheld personal information was considered by the University to have been supplied in confidence. I find, therefore, that this information was not supplied in confidence.

Applicant's existing knowledge

[74] Previous orders have found that the fact that an applicant is aware of, or already knows, the third party personal information in dispute is a relevant circumstance in favour of disclosure.[46] That circumstance plays a significant role in this case because it is evident that the applicant knows much of what the University is refusing to disclose. I conclude this based on what is revealed by the records, what has already been disclosed, what the parties say in their

[44] Page 229 (bottom) and last two sentences of p. 236 of the records.
[45] Page 87-88 and 266-267 of the records.
[46] See, for example, Order F17-02, 2017 BCIPC 2; F17-06 2017 BCIPC 7;Order F15-42, 2015 BCIPC 45; F15-29, 2015 BCIPC 32; Order F15-14, 2015 BCIPC 14; Order F11-06, 2011 BCIPC 7; Order F10-41, 2010 BCIPC No. 61 and Order 03-24, 2005 CanLII 11964 (BC IPC).

submissions and evidence and the applicant's own correspondence with the University administration.

[75] The applicant knows some of the information because the University already disclosed it to him elsewhere in the records.[47] He has also seen some of the withheld emails and correspondence in their unredacted form because the University previously sent them to him.[48] In addition, the fact that he knows some of the information is evidenced by his emails to and from the University, which as previously mentioned are not in dispute.[49]

[76] In some instances, I find that the applicant could easily infer the disputed personal information given the context of the particular record and what has already been disclosed. He was the students' graduate supervisor and he was a participant in the very events described by several records, so it is patently obvious he already knows some of the disputed information or could easily infer it.[50]

[77] In addition, the University is withholding parts of the AVP's typed notes of her investigation interview of the applicant.[51] The notes contain the questions she asked and the applicant's responses (but not the AVP's thoughts or analysis). The notes contain a fair bit of the applicant's personal information because they are largely about him. Where the notes contain third party personal information, it is obviously information that the applicant provided to the AVP, so he already knows it. Further, I conclude that he has already seen these notes because they contain the following statement: "Revisions requested by Association and [applicant]" and there are comment bubbles in the margins that reflect the requested revisions.

Retaliation

[78] The University submits that even though the applicant is no longer the students' supervisor, disclosing the information in dispute "could also expose the third parties to retaliation from the Applicant, particularly since graduate students' relationships with their former supervisors tend to endure past the end of the formal supervisory relationship." [52] The applicant says that worries about

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[47] Records: pp. 13-15 (identity of University administrator), pp. 17-18 (that it is a memo and who it was addressed to), pp. 22-23 (subject line of forwarded emails), p. 229 (names and subject line of email), and pp. 252-253 (identity of affiant and what was said at meeting).
[48] For example: in an administrative email with attachments, a letter setting out his alleged misconduct, his letter of reprimand. Pages 57-65, 87-88, 266-267 of the records.
[49] See *supra* at note 3 for a list of the pages where this information appears.
[50] Records: p. 57 (student's identity and subject line), pp. 252-253 (affidavit summarizing oral examination the applicant attended), p. 108 (administrative form signed by applicant), p. 290 (identity of student).
[51] Pages 31-37 and 40-46 of the records.
[52] University's initial submission, para. 61.

retaliation are unwarranted and baseless and that he "still supports the students very much."[53]

[79] The University has provided no persuasive evidence that suggests the applicant might retaliate against students 1 and 2 once he sees the third party personal information in this case. It is obvious that the applicant already knows most of the students' personal information at issue because it is about the administrative processes involved in their school work and he was part of those processes. The only student personal information he might not be aware of is how they feel and, ultimately, I conclude below that the instances of that type of third party personal information must not be disclosed. I find the University's argument about retaliation to be speculative and unsupported by evidence that would lift it out of the realm of conjecture.

Summary and conclusion, s. 22

[80] I find that s. 22 does not apply to some of the disputed information because it is not personal information as defined by Schedule 1 of FIPPA. It is either not about identifiable individuals or it is contact information.

[81] The s. 22(3)(d) presumption applies to the personal information in the records because it is about student 1 and 2's educational history. Considering all relevant circumstances, I find that the presumption has been rebutted for a small portion of the withheld personal information. It is information that, as discussed above, the applicant clearly already knows because it was sent to him already, it originates with him, or he can easily infer it based on what has already been disclosed to him and his personal involvement in events. This rebutted third party personal information is not sensitive and the evidence does not suggest that it was supplied in confidence. In the context of these specific records and the events they address, giving the applicant access to information that he clearly already knows or can easily infer would not be an unreasonable invasion of third party personal privacy.

[82] However, I find that disclosing the balance of the third party personal information would be an unreasonable invasion of third party personal privacy.[54] I can see no circumstances that weigh in favour of its disclosure or would rebut the s. 22(3)(d) presumption. It includes what people told administrators and the AVP in one-on-one conversations about the applicant's interaction with students 1 and 2. There is nothing to indicate that the applicant already knows what these people said. Its disclosure is not desirable for the purpose of subjecting the University's activities to public scrutiny, and I am not persuaded that its

[53] Applicant's submission, para. 61.

[54] I have highlighted the only information whose disclosure would be an unreasonable invasion of third party personal privacy under s. 22(1) in a copy of the records that are being sent to the University along with this order.

disclosure is relevant to a fair determination of the applicant's rights. Further, in my view, it is likely that this information was supplied in confidence during the investigation and some of it is sensitive as it is about the third parties' emotional states and wellbeing.

Applicant's personal information

[83] Some of the third party personal information that I find is properly withheld under s. 22, is intermingled with the applicant's personal information because it is about the third parties' interactions with him. Section 4(2) requires a public body to provide access to part of a record, if the information in the record that is properly excepted from disclosure can reasonably be severed from the record. In my view, the applicant's personal information is so closely intermingled with the third parties' personal information that it cannot be reasonably severed and disclosed to him.

[84] I have also considered s. 22(5), which requires a public body to give an applicant a summary of personal information supplied in confidence about the applicant, unless the summary would identify the third party who supplied it. In my view, in those instances where information about the applicant was supplied in confidence, and I have found it must not be disclosed, a summary is not possible. That is because the information provided by the third parties about the applicant is contextually specific and he will certainly be able to ascertain the identity of the third party. Therefore, I find that there is no obligation on the University to provide a summary under s. 22(5).

Providing notice to Student 1 and 2

[85] The University concludes its s. 22 submission by saying that, if I decide that it would not be an unreasonable invasion of personal privacy to disclose the information withheld under s. 22, then the OIPC should notify student 1 and 2 pursuant to s. 54(b) of FIPPA and provide them with an opportunity to provide evidence and make submissions in the inquiry.[55]

[86] This is not the first time that a public body has suggested that the Commissioner should give notice to third parties if he concludes that s. 22 does not apply.[56] Before turning to the specific notice obligations in this case, it is appropriate to provide some guidance for public bodies to follow when addressing third party notice issues in the context of s. 22.

[87] As a starting point, s. 23 is the provision in FIPPA that specifies when and how a public body *must* or *may* give notice to third parties when the public body

[55] University's initial submission, para. 63.
[56] For example: Order F17-39, 2017 BCIPC 43; Order F17-31, 2017 BCIPC 33; Order F14-39, 2014 BCIPC 42.

believes the record contains the third party's personal information and s. 22 applies. A public body is not required by s. 23(1) to give a third party notice of the access request, if the public body does not intend to give the applicant access to the third party's personal information. However, s. 23(2) authorizes a public body to give notice and gives it the discretion to do so, if the public body deems it necessary.

[88] Section 22(4)(a) says that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the third party has, in writing, consented to or requested the disclosure. If the third parties do not receive notice of the request for records, they are deprived of the opportunity to indicate whether they consent to disclosure. Thus, a matter that may have been resolved by consent, or could have been addressed more efficiently, ends up in the more formal and time-consuming OIPC processes.

[89] If a public body thinks the third party should be notified, it is incumbent on the public body to do so as early in the process as possible, and certainly once it is apparent that the public body's s. 22 decision is not going to be resolved at OIPC mediation and is proceeding to inquiry. The public body is in the best position to provide the third party with early notice and a description of the contents of the records. For instance, the public body typically has the names and contact information of the third parties and can contact them to determine their view on disclosure. Further, it is the public body that has access to the records in dispute and can provide the information about them that the third party needs to make an informed decision about whether to object or consent to disclosure.

[90] It may be that after receiving notice, the third party consents to disclosure. If the third party does not consent, the public body has the option of seeking affidavit evidence from the third party as evidentiary support for its s. 22 decision. Alternatively, the third party or the public body may request that the OIPC find that the third party is an appropriate person under s. 54(b). If the third party is an appropriate person, the OIPC will give them a copy of the request for review and an opportunity to make their own representations during the inquiry pursuant to s. 56(3). In all circumstances, the obligation to provide the third party with a copy of the disputed records or sufficient information about them rests with the public body.[57]

[91] In this case, the University said that it did not give the students notice under s. 23 because it "was concerned about re-traumatizing" them.[58] It also says that it did not seek affidavit evidence from them for the same reason.

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[57] FIPPA prevents the OIPC from disclosing records except in specific circumstances. See s. 47 of FIPPA.

[58] University's initial submission, para. 69.

[92] I can see nothing in the records or the University's submissions and evidence to suggest that learning about the applicant's request for records would traumatize the students. The students are adults, the applicant is no longer their graduate supervisor and one student has already graduated. The records that are in dispute and those that were disclosed reveal that the disagreements between the students and the applicant were of an academic and administrative nature (i.e., this is not a case involving physical or verbal abuse). Further, what the students say in the records reveals them to be confident, mature individuals with plenty of support from University administrators with regards to their interactions with the applicant. In my view, notifying student 1 and 2 could reasonably have taken place at an earlier stage in the dispute between the University and the applicant, preferably before, or shortly after, the OIPC issued the notice of inquiry.

[93] Where, as in this case, the public body thinks notifying the third party is necessary, the early stages of the dispute are when this should take place - not after the submission phase of the inquiry has closed or the adjudicator has made a decision.[59]

[94] I will now turn to the Commissioner's notice obligations under s. 54 and their application to this case. Section 54 states:

> 54 On receiving a request for a review, the commissioner must give a copy to
>
> (a) the head of the public body concerned, and
> (b) any other person that the commissioner considers appropriate.

[95] Although s. 54 says that notice is to be given "on receiving a request for review," the Commissioner retains the authority to control his processes and provide notice at a later step in proceedings.[60] For instance, there may be cases where the need for notice to third parties may only become apparent to the Commissioner at a point after the request for review stage has passed (i.e., after investigation and mediation). The BC Court of Appeal has said the following about the Commissioner's authority and discretion when it comes to notifying individuals:

> The emphasized category of parties to whom notice is to be given is phrased in such a way as to afford a fair measure of discretion to the Commissioner. The Commissioner must engage in a process of consideration and analysis to reach an informed decision on such an issue. The use of the terminology "that the Commissioner considers

[59] For similar statements, see: Order 01-26, 2001 CanLII 21580 (BC IPC), para. 47 and 48; Order F14-39, 2014 BCIPC 42 (CanLII), paras. 62-63.
[60] *Golden Valley Golf Course Ltd. v. British Columbia (Minister of Transportation and Highways)*, 2001 BCCA 392 at para. 31.

> appropriate" is an indication that the Commissioner is to exercise his judgment as to who might reasonably be thought to be affected by his decision; this of course will inform any decision as to those groups or individuals who should receive notice and be given formal standing at any inquiry.
> …
> There is in my respectful opinion an obvious factual component to any decision made by the Commission under s. 54 concerning notice and participation. The effective administration of the *Act* requires that the Commissioner be afforded a reasonable ambit of discretion in deciding who it is appropriate to notify and to allow to formally participate in any inquiry.[61] [Emphasis in original]

[96] When deciding whether to invite a third party as an appropriate person after the close of an inquiry, the Commissioner will consider if the prejudice to the third party would be greater than the prejudice to the applicant.[62] In this case, if the inquiry were reopened to notify students 1 and 2 and allow them to provide submissions (and the applicant and the University to respond), the decision will be delayed. This prejudices the applicant who initiated the request for review and inquiry.

[97] On the other hand, I can see no prejudice to students 1 and 2 if they do not receive notice and an opportunity to make a submission. The only information that I have found may not be withheld under s. 22, and should be disclosed to the applicant, is information that is:

- not the students' personal information;
- in the students' own communications with the applicant;
- innocuous, administrative process information about the students that has already been disclosed to the applicant or that he obviously knows because he was the students' supervisor;
- information the applicant already has because he provided it to the University, the University already gave it to him, or he was present for the events described by the record.

[98] I cannot see what purpose it would serve to invite the two students to make submissions about the type of information listed. I am satisfied that disclosing this information to the applicant would not be an unreasonable invasion of the students' personal privacy. In my view, the greater prejudice in this case would be to the applicant if the inquiry were delayed in order to give the students notice and an opportunity to make a submission about this information.

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[61] *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*, 2004 BCCA 210 at paras. 29 and 33 affirming Order 01-52, 2001 CanLII 21606 (BC IPC). May 10, 2002 reconsideration decision at https://www.oipc.bc.ca/decisions/140), p. 11.
[62] Order F17-39, 2017 BCIPC 43 at para. 26.

[99] In conclusion, I have decided that student 1 and 2 are not appropriate persons under s. 54(b). Therefore, they will not be provided with a copy of the applicant's request for review or a chance to make representations.

CONCLUSION

[100] For the reasons above, I make the following order under s. 58 of FIPPA:

1. I confirm the University's decision to refuse to disclose information to the applicant under s. 14 of FIPPA.

2. I confirm, in part, the University's decision to refuse to disclose information to the applicant under ss. 13(1) and 22(1) of FIPPA. The University is only authorized or required under ss. 13(1) and 22(1) to refuse the applicant access to the information I have highlighted in the copy of the records that is being sent to the University with this decision.

3. The University is required to give the applicant access to the information that is not highlighted by July 18, 2018. The University must concurrently provide the OIPC Registrar of Inquiries with a copy of its cover letter and the records sent to the applicant.

June 5, 2018

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

OIPC File No.: F16-67191