



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
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Order F18-23

UNIVERSITY OF BRITISH COLUMBIA

Elizabeth Barker
Senior Adjudicator

June 19, 2018

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Summary: UBC refused a journalist access to the rubric, criteria and scoring instructions it uses to assess the personal profiles of prospective students under ss. 3(1)(d) and 3(1)(e) (outside scope of Act), s. 13 (policy advice and recommendations) and s. 17 (harm to the financial or economic interests of a public body) of FIPPA. Order F15-49 held that none of those provisions applied and ordered the University to disclose the records. UBC filed a petition for judicial review of the part of Order F15-49 that dealt with ss. 3(1)(d) and 17. The Court of Appeal quashed the ss. 3(1)(d) and 17 orders and remitted the matter back, and this is the resulting decision. The adjudicator finds that the records are outside the scope of FIPPA because s. 3(1)(d) applies. Given that FIPPA does not apply, the adjudicator declines to consider whether s. 17 applies.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 3(1)(d) and s. 4.

Cases Considered: *University of British Columbia v. Lister*, 2018 BCCA 139; *University of British Columbia v. Lister*, 2017 BCSC 41; Order F15-49, 2015 CIPC 52.

INTRODUCTION

[1] This order arises from the remittal back to the Office of the Information and Privacy Commissioner (OIPC) by the BC Court of Appeal for reasons set out in *University of British Columbia v Lister*, 2018 BCCA 139.

DISCUSSION

Judicial history of case

[2] In March 2013 a journalist asked the University of British Columbia (UBC) for access to the rubric, criteria and instructions used to assess the personal profiles submitted by prospective students as part of their applications to certain UBC faculties. UBC withheld the requested records in their entirety under ss. 3(1)(d) and (e) (outside scope of Act), 13 (policy advice and recommendations) and 17 (harm to the financial or economic interests of a public body) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant asked the OIPC to review UBC's decision, which resulted in Order F15-49. In that order, I found that the records were within the scope of FIPPA because ss. 3(1)(d) and (e) did not apply. I then went on to consider ss. 13 and 17 and found that neither applied. I required UBC to give the applicant access to the records by October 22, 2015.

[3] The University filed a petition for judicial review of Order F15-49 regarding ss. 3(1)(d) and 17 only. The court dismissed the petition with reasons in *University of British Columbia v. Lister* 2017 BCSC 41. The University appealed the BC Supreme Court order. On appeal, the court set aside the ss. 3(1)(d) and 17 orders and remitted the matter back to the OIPC to make the appropriate orders in accordance with the court's reasons.

ISSUES

[4] The issues in this inquiry are as follows:

1. Are the requested records outside the scope of FIPPA pursuant to s. 3(1)(d)?
2. If s. 3(1)(d) does not apply, is UBC authorized to refuse access to the requested records under s. 17?

Background and the records in dispute

[5] Over the last decade, UBC has developed and implemented a broad based admissions (BBA) process to select students who apply for admission to its undergraduate programs. In this process, prospective students are assessed on their written answers to several "personal profile" questions in addition to their secondary school grade point average. The personal profile questions are designed to assess the following characteristics: intellectual readiness, concept of self and others, expression/communication, initiative, commitment and contributions to community, leadership, setting and achieving goals, team work/group work and problem solving. The personal profile scores are combined with the student's grade point average to determine their place in the applicant

pool. The BBA was piloted in 2003 by UBC's Sauder School of Business and has gradually been introduced into other academic programs. By 2013, all direct-entry applicants to UBC first-year programs were required to participate in the BBA process.

[6] The personal profiles are scored by readers comprised of faculty, alumni and volunteers who have received training in using faculty-specific rubrics. The applicant sought access to these rubrics. UBC identified three rubrics as responsive to the applicant's request and these are the records in dispute.¹ All three rubrics were withheld in their entirety under ss. 3(1)(d), 3(1)(e), 13 and 17 of FIPPA.

Analysis and findings

[7] Section 4 of FIPPA states that a person who makes a request for records under FIPPA has a right of access to any record in the custody or under the control of the public body, subject only to information that is outside the scope of FIPPA and to information excepted from disclosure under Division 2, Part 2 of FIPPA.

[8] Section 3(1) specifies what records and information are outside the scope of FIPPA. Section 3(1)(d), which is the provision at issue in this case, says:

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

...

(d) a record of a question that is to be used on an examination or test;...

[9] UBC submitted that the rubrics are excluded from the scope of FIPPA because s. 3(1)(d) applies. The applicant submitted that UBC's interpretation of "record of a question" is inaccurate and that the phrase does not include rubrics.

[10] The Court of Appeal held that there was only one reasonable interpretation of s. 3(1)(d), namely that the phrase "record of a question" in s. 3(1)(d) includes "anything that is integral to the question such that disclosure would defeat the purpose of the question for future use."² It also said that a record which discloses a question, either explicitly or implicitly, is included within the exclusion in s. 3(1)(d).

¹ They are the rubrics used by the Sauder School of Business and the Faculties of Arts, Applied Science, Forestry, Kinesiology and Land and Food Systems.

² *University of British Columbia v. Lister* 208 BCCA 139 at para. 40.

[11] In accordance with the reasons and direction of the Court of Appeal, I find that the rubrics are a record of a question that is to be used on an examination or test under s. 3(1)(d). Therefore, FIPPA does not apply to the rubrics and the applicant has no right of access to them under s. 4. Given that FIPPA does not apply, I decline to consider the remaining issue.

CONCLUSION

[12] For the reasons above, and pursuant to s. 58 of FIPPA, I confirm UBC's decision that s. 3(1)(d) applies to the records in dispute.

June 19, 2018

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

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