



Order F21-16

UNIVERSITY OF BRITISH COLUMBIA

Laylí Antinuk
Adjudicator

April 19, 2021

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Summary: The applicant requested that the University of British Columbia provide access to records related to a specific news release. The University withheld information in the responsive records under ss. 13(1) (advice and recommendations) and 22(1) (unreasonable invasion of third-party privacy) of FIPPA. The adjudicator decided that ss. 13(1) and 22(1) applied to most of the information in dispute and ordered the University to disclose the rest to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2), 13(3), 22(1), 22(2)(a), 22(2)(h), 22(3)(d), 22(4).

INTRODUCTION

[1] The applicant requested that the University of British Columbia (the University) provide records related to a specific news release. The responsive records pertain to the University's public relations strategy respecting a 2015 referendum about funding an expanded regional transportation plan in Metro Vancouver. The University withheld information in the responsive records under ss. 13(1) (advice and recommendations) and 22(1) (unreasonable invasion of third-party privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the University's decision to withhold information. Mediation did not resolve the issues between the parties and they proceeded to inquiry.

Preliminary matters

[3] In his inquiry submission, the applicant says the University is infringing his constitutional rights, specifically s. 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*).¹ Section 2(b) of the *Charter* says that everyone has the fundamental freedoms of thought, belief, opinion and expression, including freedom of the press. The University objects to the applicant raising this issue for the first time in his response submission.²

[4] As described in the notice of inquiry (Notice) received by both parties, the OIPC investigator's fact report (Fact Report) sets out the issues for the inquiry. The Notice also states that OIPC adjudicators will not generally consider issues that do not appear in the Fact Report. If a party wants to add a new inquiry issue, it must request and receive permission to do so.³ The OIPC grants such permission in exceptional circumstances only. To allow otherwise would undermine the effectiveness of the mediation process which exists, in part, to assist the parties in identifying, defining and crystallizing the issues prior to inquiry.⁴

[5] The Notice and the Fact Report do not identify the *Charter* issue as a matter to be decided in this inquiry. The applicant did not request permission to add this new issue or point to any exceptional circumstances that would justify doing so at this late stage. In my view, there are no exceptional circumstances here, so I will not add this issue or consider the applicant's constitutional arguments.

ISSUES

[6] This inquiry raises the following issues:

1. Does s. 13 authorize the University to refuse to disclose the information withheld under that section?
2. Does s. 22 require the University to refuse to disclose the information withheld under that section?

[7] The University bears the burden of proving that the applicant has no right to access the information withheld under s. 13.⁵

¹ Applicant's response submission at paras. 7-8.

² University's reply submission at paras. 6-7.

³ Order F12-07, 2012 BCIPC 10 at para. 6; Order F10-37, 2010 BCIPC 55 at para. 10; Decision F07-03, 2007 CanLII 30393 (BC IPC) at paras. 6-11, and Decision F08-02, 2008 CanLII 1647 (BC IPC).

⁴ Order 15-15, 2015 BCIPC 16 at para. 10; Order F08-02, 2008 CanLII 1647 (BC IPC) at paras. 28-30.

⁵ Section 57(1).

[8] The applicant bears the burden of proving that disclosing any personal information at issue would not constitute an unreasonable invasion of third-party personal privacy.⁶

DISCUSSION

Background

[9] In 2015, registered voters in Metro Vancouver had the opportunity to vote in a referendum for or against a proposed increase in provincial sales tax to fund new transit projects in the region.⁷ The referendum attracted significant media coverage. The University and other large organizations in the region made public statements regarding the position they would support in the referendum.

[10] The University's media relations team (the Team) worked on the University's public response to the referendum. Part of this response included a news release titled "Post-secondary leaders: Transit expansion needed to ensure campus access and boost region's innovation economy". The applicant requested records related to this particular news release.

Records

[11] There are 291 pages of records at issue in this case, many of which are emails. There are also various iterations of public relations materials prepared by the Team for senior University officials (Officials), including media statements, key messages, questions and answers, talking points, and a submission to the University Executive related to the referendum. Some of the public relations materials are attachments to the emails.

[12] I will begin with a discussion of s. 13.

ADVICE AND RECOMMENDATIONS – SECTION 13

[13] Section 13 allows a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. Section 13 protects a public body's internal decision-making and policy-making processes by encouraging the free and frank flow of advice and recommendations.⁸ Section 13 applies both to information that explicitly contains

⁶ Section 57(2).

⁷ The information summarized in the background section comes from UBC's initial submission at paras. 2 and 18; and the FOI specialist's affidavit at paras. 9-11. I accept all this uncontested evidence.

⁸ *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at para. 65.

advice and recommendations, and to information that would enable an individual to make accurate inferences about underlying advice or recommendations.⁹

[14] The s. 13 analysis involves two steps.¹⁰ First, I must determine if disclosure of the information in dispute would reveal advice or recommendations developed by or for the public body. If it would, then I must determine whether the information falls into any of the categories listed in ss. 13(2) or 13(3). If it does, the public body cannot refuse to disclose it.

[15] Section 13(2) lists categories of information that public bodies cannot withhold under s. 13(1). For example, s. 13(2)(a) says that public bodies cannot withhold factual material under s. 13(1). Section 13(3) says that public bodies cannot use s. 13(1) to withhold information in a record that has been in existence for 10 or more years.

Parties' positions

[16] The University submits that the information withheld under s. 13 sets out the Team's public relations advice and provides insight into the deliberative processes of University staff.¹¹ If disclosed, the University says, this information would reveal advice or recommendations developed by the Team regarding the University's communication and media strategy respecting the referendum. According to the University's affidavit evidence, material created by the Team is advice only and the University department or spokesperson that receives it ultimately makes their own decision about how much of that advice to incorporate when making an operational decision, or a public announcement, statement or other communication.

[17] The University says that any factual information included in the disputed information is entwined with, and forms an integral part of, the advice and recommendations, so s. 13(2)(a) does not apply. The University also argues that none of the other parts of s. 13(2) apply. In addition, the University says 13(3) does not apply because the records have not been in existence for 10 or more years.

[18] The applicant contends that disclosure of the disputed information will not cause any harm because more than five years have passed since the

⁹ Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 135; Order F15-12, 2015 BCIPC 12 at para. 42; and Order F16-28, 2016 BCIPC 30 at para. 22.

¹⁰ For examples, see Order F07-17, 2007 CanLII 35478 (BC IPC) at para. 18 and Order F17-01, 2017 BCIPC 01 at para. 14.

¹¹ The information summarized in this paragraph and the one that follows comes from the University's initial submission at paras. 45-47 and 49-50; the University's reply submission at paras. 2-3; and the Senior Director's affidavit at para. 5.

referendum.¹² He says the University opposes disclosure because disclosure would expose the University's excessive spending on public relations to reasonable public scrutiny. The applicant argues that the University is using s. 13 to prevent the public from knowing how reliant it is on corporate communications and marketing. The applicant also submits that several of the categories listed in s. 13(2) apply to the disputed information.

Analysis and findings

[19] Prior to delving into the heart of my s. 13 analysis, I pause to note that in a few instances, the University withheld the same information in one place under s. 13 but disclosed it elsewhere.¹³ I will not consider whether s. 13 applies to this information because the applicant has already received it and the University has not explained why it severed the records inconsistently.¹⁴

[20] Having reviewed the information withheld under s. 13, I find that most of it comprises advice and recommendations related to the University's public response to the referendum. It includes recommendations and advice about:

- Options for how the University could respond publicly to the referendum;
- Who the appropriate spokespersons for the University would be;
- How to deliver messaging effectively;
- What wording should be included or removed from proposed public statements and why;
- What works best for attracting media attention and why;
- What types of public events or media activities would be effective given the University's goals, when those events or activities should occur, who should attend, and how the events or activities should be organized;
- How the budget for the University's referendum response should be allocated;
- What content should be included in creative and other media materials; and
- What University spokespersons should say publicly about the referendum, how they should respond to certain questions if asked, and what facts they should focus on.

¹² The information summarized in this paragraph comes from the applicant's response submission at paras. 1-2 and 4.

¹³ For example, pp. 109-110, 119-120, 148 and 152 contain information released elsewhere in a duplicate record.

¹⁴ For similar reasoning, see Order F18-41, 2018 BCIPC 44 at para. 26; and Order F07-11, 2007 CanLII 30396 (BC IPC) at para. 41.

[21] In my view, all the above clearly fits within the meaning of advice or recommendations under s. 13(1).

[22] However, I find that s. 13(1) does not apply to a small amount of the information in dispute. Specifically, I find that the following types of information do not reveal advice or recommendations:

- generic headings, footers and page numbers;¹⁵
- basic factual information related to the Team’s work and interactions, such as information about what an email attachment contains, statements about when certain things will occur or what documents must be sent where, and details about the work certain people have done, will do, or are willing to do;¹⁶
- basic factual information about transit use that the University released elsewhere in the records;¹⁷
- explanations about why a Team member needs an Official’s cell phone number and why a Team member wants to review a document again;¹⁸
- instructions to staff;¹⁹
- fact-based questions and/or answers;²⁰
- notes from a meeting that record administrative decisions made in that meeting, such as task assignments amongst Team members;²¹
- background facts contained in a submission to the UBC Executive;²² and

¹⁵ For example, at pp. 17-24, 67-71, 78-82, 93, 105, 115, 191, 194, 204, 207, 266, and 269 of the records.

¹⁶ For example, at pp. 3, 4, 9, 15, 39, 42, 131 (repeated at 140 and 146), 162, and 165 of the records. Basic factual information does not fit within the meaning of advice or recommendations under s. 13(1). See Order F17-08, 2017 BCIPC 9 at para. 23; Order F17-03, 2017 BCIPC 3 at para. 29; Order F15-60, 2015 BCIPC 64 at para. 16; and Order F15-59, 2015 BCIPC 62 at para. 32.

¹⁷ At pp. 72-73, 83-85, 199-200, 211-212, and 274-275 of the records.

¹⁸ At pp. 1 and 130 (repeated at 145) of the records.

¹⁹ For example, at pp. 4-5 (duplicate email at 6-7) and 99 of the records. Previous orders have found that instructions to staff do not fit within the meaning of advice and recommendations under s. 13. For example, see Order F19-27, 2019 BCIPC 29 at para. 32.

²⁰ For example, at pp. 1, 6, 8, and 39 of the records.

²¹ At pp. 57-58 of the records. Previous orders have said that information that communicates a decision does not qualify as advice or recommendations. For example, see Order F15-33, 2015 BCIPC 36 at para. 25. For similar reasoning, see also Order F18-04, 2018 BCIPC 04 at para. 83. In that Order, Adjudicator Lott found that an insurance adjuster’s assessment and decision about an individual’s injuries did not qualify as advice or recommendations. See also Order F15-37, 2015 BCIPC 40 at para. 22 in which Adjudicator Alexander found that information related to decisions already made by a public body’s staff did not qualify as advice provided by those staff members.

²² At p. 17 of the records.

- short lines of computer code for formatting rendered in a few emails.²³

[23] In my opinion, s. 13(1) does not apply to this information, so I will not consider it further. Previous orders have also decided the same regarding this type of information.²⁴

Exceptions – sections 13(2) and 13(3)

[24] The applicant says that several of the categories of information listed in s. 13(2) apply to the disputed information, but he does not explain how. On my review, I find it clear that nothing in s. 13(2) applies to the advice or recommendations in the records.

[25] I also find that the records have not been in existence for 10 or more years. Therefore, s. 13(3) does not apply.

[26] Given my findings respecting ss. 13(2) and (3), I conclude that s. 13(1) authorizes the University to withhold the information that I have found reveals advice or recommendations.

[27] I will now turn to the information in dispute under s. 22(1), which is not the same as the information withheld under s. 13(1).

UNREASONABLE INVASION OF THIRD-PARTY PRIVACY – SECTION 22(1)

[28] Section 22(1) requires public bodies to refuse to disclose personal information if disclosure would constitute an unreasonable invasion of a third party's personal privacy.

[29] The information in dispute under s. 22(1) comprises:

- The telephone number and email address of an identifiable individual;
- One University employee's negative opinion about the abilities of another employee (Person A); and
- That same University employee's previous work experience and her personal opinion about politics and someone else.

[30] The analysis under s. 22 involves four steps:²⁵

- 1) Determine whether the information in dispute is personal information.

²³ At pp. 7-8, 35, and 215-217 of the records.

²⁴ For examples, see footnotes 16, 19, and 21.

²⁵ For example, see Order 01-53, 2001 CanLII 21607 (BC IPC) at paras. 22-24.

- 2) Determine whether any of the circumstances described in s. 22(4) apply. If they do, then disclosure is *not* an unreasonable invasion of personal privacy.
- 3) Determine whether any of the presumptions listed in s. 22(3) apply. If they do, disclosure is *presumed* to be an unreasonable invasion of personal privacy. Presumptions may be rebutted by considering all relevant circumstances (the next step in the analysis).
- 4) Consider the impact that disclosure would have in light of all the relevant circumstances, including those listed in s. 22(2). Do the relevant circumstances weigh in favour of or against disclosure?

Personal information

[31] FIPPA defines personal information as recorded information about an identifiable individual other than contact information.²⁶ Previous orders have held that information is about an identifiable individual when it is reasonably capable of identifying an individual alone or when combined with information from other available sources.²⁷

[32] FIPPA defines contact information as information to enable an individual at a place of business to be contacted. Contact information includes an individual's name, position or title, and their business telephone number, address, email or fax number.

[33] The University submits that it is clear on the face of the disputed information that s. 22 “has been properly applied to redact a small amount of information withheld in order to protect third party personal privacy.”²⁸

[34] Based on my review, I find that most of the information withheld under s. 22(1) qualifies as personal information. This information consists of the opinions of an identifiable individual and some information about the employment history of two identifiable individuals.²⁹

[35] However, some of the information withheld under s. 22(1) does not qualify as personal information. Specifically, the University withheld the email address and phone number of an identifiable individual in the signature line and the sender/recipient lines of a few emails.³⁰ In my view, this email address and phone number fit within the definition of contact information because they are

²⁶ Schedule 1 of FIPPA contains its definitions.

²⁷ For examples, see Order F16-38, 2016 BCIPC 42 at para. 112; and Order F13-04, 2013 BCIPC 4 at para. 23.

²⁸ The University's initial submission at para. 59.

²⁹ At pp. 7 and 29 of the records.

³⁰ At pp. 45 and 100 of the records.

clearly being used for business purposes. The University cannot withhold this contact information under s. 22(1).

Not an unreasonable invasion of privacy – section 22(4)

[36] The next step in the s. 22 analysis requires a consideration of whether s. 22(4) applies to the personal information at issue. Section 22(4) lists situations in which disclosure of personal information is not an unreasonable invasion of personal privacy.

[37] The applicant argues that, under s. 22(4), disclosure of “research, financial details of supply of goods or services to a public body, third party expenses, or a discretionary benefit” is not an unreasonable invasion of third-party privacy.³¹ From this, I understand the applicant to argue that ss. 22(4)(d), (f), (h), (i) and/or (j) apply here. The University says none of the categories of information listed in s. 22(4) apply to the disputed information.³²

[38] I have considered the various subsections of s. 22(4) and find that none of them apply to the personal information at issue here. As noted, the personal information consists of a third party’s opinions and some details about her work history. This information clearly does not relate, for example, to the financial details of a contract to supply goods or services to a public body, nor is it about expenses or discretionary benefits.

Presumed unreasonable invasion of privacy – section 22(3)

[39] The third step in the s. 22 analysis requires determining whether any of the presumptions in s. 22(3) apply to the personal information at issue. Section 22(3) lists circumstances in which disclosure of personal information is presumed to constitute an unreasonable invasion of third-party personal privacy.

[40] The University and the applicant did not make submissions respecting the presumptions in s. 22(3). However, in my view, the presumption in s. 22(3)(d) applies to some of the personal information at issue. This particular subsection says that disclosure of personal information that relates to a third party’s employment, occupational or educational history is presumed to constitute an unreasonable invasion of third-party personal privacy. In my assessment, some of the information withheld under s. 22(1) relates to the employment history of two identifiable individuals.³³ I find that s. 22(3)(d) applies to this information, meaning that its disclosure is presumed to constitute an unreasonable invasion of third-party personal privacy.

³¹ Applicant’s response submission at para. 5.

³² University’s reply submission at para. 5.

³³ At pp. 6 and 29 of the records.

[41] I find that none of the other presumptions in s. 22(3) apply to the personal information at issue.

Relevant circumstances – section 22(2)

[42] The last step in the s. 22 analysis requires a consideration of all the relevant circumstances to determine whether disclosure of the personal information at issue would constitute an unreasonable invasion of personal privacy. The relevant circumstances might rebut the s. 22(3)(d) presumption discussed immediately above.

[43] Section 22(2) lists some relevant circumstances to consider at this stage. None of the parties raise any of the subsections of s. 22(2) directly in their submissions. However, I take the applicant's argument that disclosure of the disputed information would expose the University's excessive spending on public relations to reasonable public scrutiny as an argument that s. 22(2)(a) weighs in favour of disclosure. Section 22(2)(a) asks whether disclosure of personal information is desirable for the purpose of subjecting the activities of a public body to public scrutiny.

[44] As mentioned previously, the specific personal information at issue consists of:

- One University employee's negative opinion about the abilities of Person A; and
- That same University employee's previous work experience and her personal opinion about politics and someone else.

[45] I do not see how the disclosure of this information will allow the public to scrutinize the activities of the University. This information relates solely to the individual expressing the personal opinions and the people she is talking about. It does not relate to the University or its activities. I find that s. 22(2)(a) does not weigh in favour of disclosure.

[46] I also find s. 22(2)(h) relevant here. Section 22(2)(h) asks whether disclosure may unfairly damage the reputation of a person referred to in the records. In my view, disclosure of one employee's negative opinion about the abilities of Person A may unfairly damage the reputation of Person A. Nothing before me shows that Person A knew their abilities were being discussed or had the opportunity to defend or explain themselves. Furthermore, nothing in the evidence suggests that the negative opinion about Person A is (or was) accurate. In the circumstances, I find that s. 22(2)(h) weighs in favour of withholding this particular information.

[47] I have considered the other circumstances listed in s. 22(2) and I am not satisfied that any of them apply.

Conclusion – section 22

[48] I find that some of the information withheld under s. 22(1) is personal information. However, the phone number and email address withheld under s. 22(1) are contact information, not personal information.

[49] The presumption against releasing personal information that relates to the employment history of third parties applies to some of the personal information at issue. I am not satisfied that any relevant circumstances weigh in favour of the disclosure of this personal information, so the presumption stands.

[50] When it comes to the small amount of remaining personal information withheld under s. 22(1), I do not see any relevant circumstances that weigh in favour of its release. Additionally, the applicant did not make any persuasive arguments to support disclosure of the personal information at issue. Taking all this into account, I find that s. 22(1) applies.

[51] In short, s. 22(1) requires the University to withhold some, but not all, of the information in dispute.

CONCLUSION

[52] For the reasons given above, I make the following orders under s. 58 of FIPPA:

- 1) Subject to item 2 below, I confirm in part the University's decision to refuse to disclose information to the applicant under ss. 13(1) and 22(1).
- 2) The University is not authorized or required under ss. 13(1) or 22(1) to refuse to disclose the information highlighted in blue in the copy of the records it receives with this order.
- 3) The University must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

I require the University to give the applicant access to the highlighted information by June 1, 2021.

April 19, 2021

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

OIPC File No.: F15-62507