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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 97-1996
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INQUIRY RE: A decision by Simon Fraser University to sever information from a report of a Committee of Inquiry

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner in Victoria on March 14, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of Simon Fraser University (SFU)'s decision to sever information from a record that an applicant, Charlie Smith, the News Editor of The Georgia Straight, had requested.

2. Documentation of the inquiry process

On September 8, 1995 the applicant requested from Simon Fraser University "all notes, memos, internal communications, written conclusions, and transcripts of comments or testimony involving the SFU administration, SFU Board of Governors, criminology department faculty, researchers, and students concerning any official examinations, hearings or inquiries into the research or conduct of" two specific third parties. On October 19, 1995 SFU released some of the requested records to the applicant but severed information from a report of a Committee of Inquiry itself on the basis of sections 15 and 22 of the Act. On October 27, 1995 the applicant wrote to my Office to request a review of SFU's decision.

3. Issues under review at the inquiry and the burden of proof

The issues under review in this inquiry are whether portions of the report of the Committee of Inquiry should be withheld under sections 15 and 22 of the Act. The relevant portions of those sections are as follows:

Disclosure harmful to law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm a law enforcement matter,

...

(d) reveal the identity of a confidential source of law enforcement information, ...

Disclosure harmful to personal privacy

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(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

....

(f) the personal information has been supplied in confidence,

...

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

....

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,

(d) the personal information relates to employment, occupational or educational history,

...

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

....

(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,

(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body

....

Section 57 of the Act establishes the burden of proof. Under section 57(1), at an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the public body to prove that the applicant has no right of access to the record or part thereof. In this case, SFU has to prove that the applicant has no right of access to the records in dispute under section 15.

However, under section 57(2), if the record or part of the record to which the applicant is refused access contains any personal information of a third party, it is up to the applicant to prove that disclosure of this information would not be an unreasonable invasion of the third party's personal privacy. In this case, the applicant must prove that disclosing the third-party information withheld by SFU under section 22 would not be an unreasonable invasion of the third party's privacy.

4. The record in dispute

The record in dispute consists of a severed version of a 40-page report to Dr. John Stubbs, the President of Simon Fraser University, concerning certain events involving various faculty and personnel of the School of Criminology. It is titled "President's Committee of Inquiry," is dated September 12, 1994, and was written by two professors at SFU. The University withheld more than 25 pages of the report. In its submission to this inquiry, SFU indicated that it was prepared to disclose portions of 12 of these severed pages, which I expect it to do. By my rough estimate this will provide the applicant with a total of another 6 pages. Thus the possible disclosure of portions of about 19 pages remains in dispute.

5. The Georgia Straight's case

The applicant for the newspaper claims that various SFU faculty and staff have revealed aspects of what occurred in connection with the Committee of Inquiry and that others have questioned the rationale and process associated with this occurrence. He asserts that there are intimations of leaked reports, uninvestigated allegations, and abuse of a quasi-judicial process: "SFU is a publicly funded institution, and I believe it is in the public interest to determine if this occurred. If this did occur, this raises very serious questions - questions very much in the public interest - about the authority vested in the office of a university president in British Columbia. Furthermore, if this occurred, it raises very serious questions about the degree of due process that exists at SFU, not only for professors, but for staff and students as well."

The applicant concludes that the decision of the President of SFU to delete certain sections of the Committee of Inquiry report "must be reviewed independently, if for no other reason than to eliminate any perception that the decision might have been made with one eye on the effect it might have on administrators mentioned in the report."

6. Simon Fraser University's case

SFU's primary argument against disclosure of the information severed from the report depends on section 22 of the Act. It also argued initially on the basis of section 15 that the Committee of Inquiry was engaged in a law enforcement matter as defined in the Act, but subsequently

abandoned this line of argument in the course of its submission. I address these matters in greater detail below.

7. The views of the third parties

There were four principals involved in the report of the Committee of Inquiry and the events leading up to it. I received very brief submissions from all of them urging me not to release the names of the witnesses and the parties under investigation in order to protect their privacy. One set of principals also objected specifically to the disclosure of very precise information in the Committee of Inquiry report. I have considered these views in the decision I have reached below.

8. Discussion

Since this is my first Order involving a university in this province, I wish to be open about the following information. I remain a professor myself while on leave from the University of Western Ontario. I was also a member from 1988 to 1990 of the Council of Ontario Universities' Committee on Freedom of Information and Protection of Individual Privacy, which was chaired by John Stubbs, the current president of SFU.

The context for this case is approximately as follows. There was a dispute about payment for services rendered between a consultant/research assistant and a professor at SFU which resulted in an angry exchange. A third party then initiated a "security review" of any potential threat that one of the angry persons posed to others in the university community. No official action ensued on the basis of this investigation; however, the person who was the subject of the investigation received an "unauthorized' copy of the security report. Subsequently, a third party complained to the President of SFU, who set up a Committee of Inquiry. Its report (a separate one from the security report mentioned above) is now at issue in this inquiry in terms of a media request for its full disclosure.

As can be surmised from my presentation above, I have received very limited submissions from all of the parties in this case. There are a number of procedural matters that concern me greatly about the promises of confidentiality, or lack thereof, made to parties and witnesses in both the security review and the work of the Committee of Inquiry. Such procedures need to be established in a formal written policy. There are also issues about how the existence of this Committee of Inquiry became public in the first place. If the SFU investigations had remained truly private, the media would not be making the request that inspired this request for review. As I discuss further below, various breaches of security and confidentiality have already occurred that have made this whole episode more of a public matter than it might normally have been. It is impossible for me to make it fully "private" again, because of the requirement to hold SFU generally accountable under the Act.

I received a submission from one set of principals that included a letter from a senior SFU official stating that another principal had provided the media applicant in this case with "several sections of the Committee of Inquiry report ...." The official stated: "I would remind you that the report was provided to you on the condition that you keep the report confidential unless you were exercising a legal right of redress." I find it regrettable that SFU made no direct submissions to

me on this matter, nor on the history of how SFU has treated previous Committees of Inquiry with respect to publicity and confidentiality. If the unauthorized disclosure to the media did occur, the event may not have been in compliance with the requirements of section 33 of the Act.

The four parties (three of them professors) who were the principals in the investigation are now asking me to protect their privacy by not ordering any more information to be disclosed. I had some initial difficulties in being very sympathetic to their situation, since the expenditure of public funds, or at least funds dispensed by a public body, SFU, was at issue in the initial problem. Public money also paid for the Committee of Inquiry, because its primary staff, three persons, are on the payroll of SFU. As the applicant argues, the public has a right to know not only how its money is being spent but also how employees of a public body, like SFU, are conducting themselves.

The goal of the Act is to make public bodies like SFU more accountable. However, the accountability rests with the institution, not the specific groups of people who comprise it. This encourages me to require disclosure of the substance and findings of the report in dispute, subject to section 22 considerations for the protection of privacy.

As will be developed further below, there are significant privacy interests at stake in this inquiry, especially with respect to witnesses and the sensitive details of the lives and interactions of the principals and those who lived with and worked around them. I am inclined to keep as much of that personal information as possible confidential, subject to the public's right to know what happened at SFU around this particular episode.

Individuals who become the subjects or targets of public controversy risk losing some of their privacy rights. Thus, although I have accepted the severances of personal names and other identifiers, including genders, throughout the draft report, there will be members of an inner circle in the university community, and even readers of The Georgia Straight, who will "know" something about the identities of various parties to the affair. Such leakages can occur on the basis of inside knowledge, gossip, intentional disclosures by interested parties, and other unauthorized releases of information. It is almost impossible to avoid limited residual disclosure in such circumstances because of the principle of accountability of public bodies under the Act.

Counsel for some of the third parties objected to the form of notice given by my Office for this inquiry. Counsel argued that this constituted dissemination of protected third party information. With respect, I disagree. The Notice of Inquiry in the disputed form was only circulated to parties to the inquiry and accurately reflected the actual request made by the applicant.

Section 15(1)(a): The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to (a) harm a law enforcement matter,

The applicant wonders if this subsection can be applied "to a situation where, to my knowledge, the police were never involved and which is no longer under investigation." The President of SFU states that he launched this investigation because he was concerned "that there may have been a breach of the University's laws, consisting of the rules, policies and procedures laid down by the Board of Governors, the Senate and the faculties of the University." Depending on the

finding of the Committee of Inquiry, he "was prepared to consider suspension of any individual from their employment with the University, as well as any other appropriate disciplinary action including making recommendations to the Board of Governors for dismissal." (Affidavit of John O. Stubbs, paragraphs 3 and 5)

In order to make its claims for the application of section 15, SFU emphasizes the President's power under section 57(2) of the *University Act* to suspend any member of the University staff from his or her employment:

It is submitted the President is therefore exercising a law enforcement function when he commissions an inquiry or investigation to be undertaken which could lead to the imposing of a penalty or a sanction which includes suspension or other disciplinary action against any member of the faculty or staff. (Submission of SFU, p. 2)

On the basis of the report of the Committee of Inquiry, the President could have taken "whatever action he deemed appropriate as a result of their findings, including the suspension or firing of personnel." In light of the University's argument on this point, I find it somewhat ironic that the Committee of Inquiry in this case recommended that SFU put in place "disciplinary measures in various degrees besides dismissal for faculty who breach university policies." (Committee of Inquiry Report, p. 36)

However, the University's submission on section 15 took an abrupt turn when its counsel admitted that:

With the Committee of Inquiry concluded, the public body is hard pressed to prove that disclosure of the information exempted could be expected to *harm* a law enforcement matter as per the exemption claimed under s. 15(1)(a) .... the public body does not have any evidence to suggest harm to a law enforcement matter could occur if the information were disclosed. S. 15(1)(a) was relied on in error. (Submission of SFU, p. 3)

On the basis of this admission, I find that SFU was not entitled to rely on section 15 to withhold portions of the report in dispute from the applicant. I am also of the opinion that it is exceptionally difficult to characterize work of the type involved in this Committee of Inquiry as a law enforcement matter under the Act. Thus, I have no sympathy with the abandoned efforts of SFU to rely on section 15(1)(a) for any of the information in dispute. (Submission of SFU, p. 4)

Section 22: Disclosure harmful to personal privacy of third parties

The applicant appropriately argues that it is difficult for him to present an argument on his burden of proof under this section, since he does not know what has been deleted; he is content to leave the review of the severances in the record to my independent discretion and review as Commissioner. I have done so by a detailed review of the records.

Section 22(3)(b): A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if ... (b) the personal information was compiled

and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,

SFU indicated in its submissions that it should have relied on this section for those severances where it in fact relied previously on section 15(1)(a). I am prepared to consider this argument because the public body had already invoked section 22 generally. In this connection, the University attempts to argue that "law" within the meaning of this section should include "those laws made by institutions, vested by the government with law-making powers, such as those made by the universities as provided in the *University Act*." (Submission of SFU, pp. 3, 4) Thus, it is claimed, the purpose of the Committee of Inquiry was to determine whether any University "laws" were broken. I am inclined to restrict the meaning of "a possible violation of law" to matters against the *Criminal Code* of Canada, the by-laws of municipalities, and various regulatory offenses under provincial law. While I acknowledge that law enforcement in this sense can occur on a university or college campus, the present matter does not qualify under those criteria as a "possible violation of law."

However, I am more sympathetic to the argument that the Committee of Inquiry collected personal information on a confidential basis for purposes of its inquiry. (Submission of SFU, p. 4) I address these matters below with respect to other parts of section 22.

Section 22(3)(d): the personal information relates to employment, occupational or educational history

These criteria establish the basis for treating the possible disclosure of personal information as a presumptive unreasonable invasion of a third party's personal privacy. I have established in previous Orders that this section covers the contents of a personnel file (Order No. 52-1995, September 15, 1995, p. 6), the particular details of a disciplinary action taken against a teacher (Order No. 62-1995, November 2, 1995, p. 12), and the performance appraisal of an employee (Order No. 78-1996, January 1, 1996, p. 5).

In applying this section to the report in dispute, a distinction must be made between information protected as "employment history" from that which must be disclosed under section 22(4)(e) about the "position, functions or remuneration" of an employee of a public body. See the discussion below.

Section 22(3)(g): the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party

These criteria establish a further basis for treating the possible disclosure of personal information as a presumptive unreasonable invasion of a third party's personal privacy. Based on my conclusions in previous Orders about the nature and character of what should be protected here, and my review of the report in dispute, I find that the personal information in the report does not fall into this protected category. (See Order No. 81-1996, January 25, 1996, p. 9.)

Section 22(2)(f): 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 ... (f) whether the personal information has been supplied in confidence

SFU argues that the personal information collected for the Committee of Inquiry was done on a confidential basis. I did not receive any "written policy on confidentiality" for the investigative interviews conducted by SFU around these matters, the importance of which I have emphasized in previous orders. (See Order No. 83-1996, February 16, 1996, p. 5; Order No. 70-1995, December 14, 1995, p. 5.) I have also accepted that disciplinary proceedings should enjoy a significant element of confidentiality as a basic component of employer-employee relations, but that was not the issue under consideration by this Committee of Inquiry. (See Order No. 62-1995, pp. 12, 13.) Although it is plausible to argue that the Committee of Inquiry intended to collect information in confidence, I am of the view that this "relevant circumstance" is not a factor that argues for an unreasonable invasion of privacy in the circumstances of this case, except for unique personal identifiers.

Section 22(2)(h): the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

SFU argues that some of the personal information in dispute falls into this category, and I agree that this creates a "relevant circumstance" weighing against disclosure. This conclusion applies to a few specific descriptions and findings about the behaviour of individuals that appear in the record in dispute. My Order No. 70-1995, p. 8, which deals with a media request for access to harassment information, is a relevant precedent for non-disclosure in this regard:

... public bodies should not disclose personal information that may unfairly damage the reputation of any person(s) referred to in the record requested by an applicant. The goal of the investigative process is to secure justice for the complainant, the alleged harasser, and those asked to provide evidence ... The process is highly invasive for any parties involved in such a matter without subjecting them to invidious attention in public that will not serve the purposes of such procedures.

Although this present inquiry does not concern as sensitive a matter as sexual harassment, it does deal in some part with the intimate details of the daily lives of individuals in the workplace. In this connection, I have accepted very limited severance of information or identifying particulars in the report that are descriptive of intimate events, or injurious to the reputations of persons.

Section 22(4)(e): 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

Neither SFU nor the applicant relied on any parts of section 22(4), which establishes what types of disclosures of personal information about third parties are not an unreasonable invasion of their privacy. As noted above, the problem that I have to address is how to protect "employment history" under section 22(3)(d) and yet disclose information about a person's position, functions, and remuneration under

section 22(4)(e). In the present matter, my sense is that the records largely deal with the second category rather than the first and thus must be disclosed. I note in particular that the principal parties in this dispute were employees of SFU, either as regular faculty or consulting staff, with business cards describing themselves as what I choose to call "officials" of the University. (See Committee of Inquiry Report, p. 6)

I interpreted and applied section 22(4)(e) in Order No. 54-1995, September 19, 1995, p. 9:

Information about the `position, functions or remuneration' means general information about exactly that. The public has a right to know about job descriptions and job qualifications in general terms, not the private information of a public servant with respect to these topics.

The information at stake in this case is not fully covered by that statement. A good part of the information that SFU has severed as "employment history" is in fact descriptive of what individuals did in their workplaces on particular projects. I refer here not to the behaviour of individuals but rather to their tangible activities in the workplace, such as research projects and related activities. I find that much of this information in the report describes the "functions" of the employees and thus should be released to the applicant. My goal is to disclose such information without identifying specific individuals to the general reader, because of other privacy interests worthy of protection. However, I have no control over information that SFU has already disclosed or agreed to disclose.

Section 22(4)(f): the disclosure reveals financial and other details of a contract to supply goods or services to a public body,

The submission of SFU did not raise this exception. Yet parts of the severed report discuss the central issue of what one of the principals was paid, or not paid, in connection with research and consulting projects and what this person claimed in compensation in connection with the current dispute. Thus some of this information should be disclosed to the applicant without unnecessarily revealing identifiable personal information supplied in support of the requests for payment.

Review of the records in dispute

SFU has severed the names of the parties and witnesses in this matter. I find it appropriate to rely on section 22 of the Act to refuse to disclose this and related identifying information on the basis that it would be an unreasonable invasion of the personal privacy of the principals and the third parties.

I think it is important to establish that the Committee of Inquiry process did not promise confidentiality to witnesses that were interviewed. The report explains that this was because of the "Committee of Inquiry's mandate to let all parties see all relevant material." Witnesses were given a choice of not being interviewed and of not answering questions. (Committee of Inquiry Report, p. 2) I find the former precondition quite extraordinary for an inquiry process that subsequently attempts to maintain confidentiality for its findings. In my view, the Committee of Inquiry should have distinguished between sharing information with the main interested parties and sharing information with the general public, including the university community. My

previous Orders have given considerable weight to explicit promises of confidentiality as a precondition for non-disclosure of the results of an investigation. (See Order No. 83-1996, February 16, 1996.)

The Committee of Inquiry subsequently explained that it did desire to preserve confidentiality for those drawn "unwittingly into the issues." (Committee of Inquiry Report, p. 3) In future, such important matters should be dealt with more explicitly in advance of such an undertaking.

With respect to the issue of confidentiality for the entire report, the following statement by its authors deserves consideration:

We will make recommendations about university policy and management practices that have been suggested by the events covered in this report. These recommendations have been written to avoid mention of the parties, details of the various events, and any mention of the School of Criminology. We hope that this will enable these general recommendations to be circulated more widely without compromising the confidentiality of this inquiry. (Committee of Inquiry Report, pp. 5, 6)

In fact, SFU has already disclosed most of these policy recommendations and has agreed to release one-half page that had been severed.

The result of my review of the report in dispute is that almost all of it will now be disclosed to the applicant, but in a manner that minimizes the risk of identification of those involved without actually removing the risk completely.

Protection of personal information under the Act

Section 30 of the Act reads as follows:

The head of a public body must protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal.

The Committee of Inquiry report indicates that one of the most unfortunate events in this saga involved the unauthorized disclosure of the initial security report on the behaviour of one of the parties to that person. (See Committee of Inquiry Report, pp. 3, 11, 18-20) This security report contained sensitive personal information collected by SFU personnel in the course of an investigation, which might truly be characterized as a "law enforcement matter" under the Act. Its disclosure not only had serious consequences in the present affair but was a serious breach of the Act. The Committee of Inquiry was unable to discover how this breach of security occurred.

The Committee of Inquiry recommended in some detail that SFU needs to develop a "clearer sense of guarantees of confidentiality to witnesses ...." It regarded this as especially important for the Security Department, but I regard it as a significant matter with respect to the collection of any personal information during inquiries or investigations conducted by the University itself, as in the present case. (Committee of Inquiry Report, pp. 35, 36)

9. Order

I find that the President of Simon Fraser University is not required to refuse access to all of the record requested by the applicant under section 22 of the Act. Under section 58(2)(a), I require the President of SFU to give the applicant access to the record in dispute, subject to the severances that I have accepted and indicated on the record that I have prepared for release. Under section 58(2)(c), I require the President of SFU to refuse access to the severed sections on the record that I have prepared for release.

April 18, 1996

David H. Flaherty
Commissioner