ISSN 1198-6182

Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 267-1998
October 22, 1998

INQUIRY RE: Disclosure of divisional planning records by the University of Victoria

Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: http://www.oipcbc.org

1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on April 15, 1998 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 the decision by the University of Victoria (the University) to withhold some of the information in divisional planning records prepared for eight university faculties.

2. Documentation of the inquiry process

On September 3, 1997 the University of Victoria Faculty Association (the applicant) submitted a request to the University for access to eight University divisional planning records (the records) concerning the faculties (or divisions) of Social Sciences, Education, Humanities, Sciences, Fine Arts, Human and Social Development, Engineering, and Law.

On September 12, 1997 the University, relying on section 13(1) and 17(1) of the Act, refused access to the records. The applicant asked the University to reconsider its decision on September 29, 1997.

On October 10, 1997 the applicant asked me to review the University's decision to refuse access to the records pursuant to section 53(2)(a) of the Act. On the same day the University disclosed some information in each of the records to the applicant. However, information had been severed from each on the basis that the severed information was properly withheld under sections 13(1) and 17(1) of the Act. The applicant informed my Office that it had received severed versions of each of the records on October 29, 1997.

Mediation resulted in the disclosure of certain additional information in the records. However, on March 9, 1998 the applicant confirmed that it wished to proceed with an inquiry of the University's decision to withhold some of the information in each of the records.

At the request of the applicant, Professor John McClaren and Professor Colin Bennett were invited to intervene in the inquiry. Both made submissions on the issues. The University did not object to the participation of these two individuals as intervenors.

The parties subsequently consented to an extension of the deadline for the inquiry to April 15, 1998.

3. Issue under review and the burden of proof

The issue under review in this inquiry is whether the University properly applied sections 13(1) and 17(1) of the Act to information withheld in the records in dispute

The relevant sections of the Act are:

Policy advice, recommendations or draft regulations

13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

(2) The head of a public body must not refuse to disclose under subsection (1)

(a) any factual material,

...

(k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,

...

(m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy,

Disclosure harmful to the financial or economic interests of a public body

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

...

(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;

(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

(e) information about negotiations carried on by or for a public body or the government of British Columbia.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to information in the record has been refused under section 13(1) or 17(1), it is up to the public body, in this case the University, to prove that the applicant has no right of access to the record or part of the record

4. The records in dispute

The records in dispute are divisional planning records prepared by eight university faculties and submitted to the University's administration in the spring of 1997.

5. The University of Victoria Faculty Association's case as the applicant

The applicant is a professional association and is registered as a not-for-profit society under the *Society Act*. The applicant functions like a trade union in its representation of full-time and part-time University faculty members and academic librarians in respect of both grievances and collective bargaining with the University over salary, benefits, and other terms and conditions of employment. Currently ninety-two percent of full-time faculty members and librarians are members of the Association, including Department Chairs, Directors of Schools / Centres, and Deans of Faculties.

In October 1996 the University initiated, for the first time in its history, a university-wide strategic planning exercise for a three year planning window, incorporating the fiscal years 1997-1998, 1998-1999, and 1999-2000. The planning process was based on an assumption that there would be a three percent budget cut over each of the three years. All departments, schools, and faculties were required to participate in this planning exercise. Each department or school was directed to submit its plan to the Dean of its faculty (or division). Each faculty Dean, in turn, was directed to incorporate those plans into a plan for the entire faculty. The format for the plans was prescribed in a master Planning Document.

The applicant contends that "the intent of this exercise was a public and consultative endeavour in which all faculty members were encouraged to participate." (Submission of the applicant, p. 2) In support of this contention, the applicant points out that the Dean of Social Sciences distributed a copy of his faculty or divisional plan to faculty members following an open discussion of the draft plan in May 1997. Similarly, the divisional plan for the Faculty of Education was released to its faculty members. A draft copy of the divisional plan for the Faculty of Humanities was also released to its faculty members.

The applicant requested access to the records in dispute under the Act because of concerns expressed by its members about the planning exercise. The applicant submits that all of the information in the records should be disclosed, because the records constitute "information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy." Under section 13(2)(m) of the Act, a public body cannot refuse to disclose this information.

6. The University of Victoria's case

The University emphasizes that its planning exercise was predicated upon an assumption of a three percent budget cut over each of three successive years, ending in 1999-2000. (Submission of the University, paragraph 2) The resulting planning records "emanated directly from the Deans' offices, and there was no expectation that the proposals, information, and recommendations in the planning documents would be discussed within a faculty." (Submission of the University, paragraph 3)

The University's position on disclosure of the records in dispute can be summarized as follows:

> In short, the University seeks to uphold the principle that advice and recommendations provided to the Administration from the Deans should be kept confidential, and that the Deans should be encouraged to put forward a full and candid range of options and recommendations for evaluation by the Administration. (Submission of the University, paragraph 17)

A further summary point made by the University in its reply submission merits emphasis in this inquiry:

> The overarching concern expressed in the submissions of the Faculty Association and the Intervenors is that they allege that they have been excluded from the decision-making process, and wish to ensure that there is an open decision-making process within the University. The University endorses the openness and transparency of its decision-making process. ... [I]f any of the programs, cutbacks, or initiatives proposed by the Deans were ever to become official University 'proposals,' they would then be subjected to full and open discussion within the University community

> when being considered by the respective faculties, University planning bodies, Administration and governance bodies. (Reply Submission of the University, paragraph 17)

In its view, the University is entitled to rely on the provisions of the Act that protect its decision-making processes: "The Deans must be permitted to provide full and frank advice to the University Administration so that it might be able to consider the widest possible range of options and alternatives for its future."

I discuss below the University's submissions on the application of specific sections of the Act.

7. The Intervention of Professor Colin Bennett, University of Victoria

Professor Bennett, who participated in the planning exercise for the Department of Political Science at the University, submits that the strategic planning exercise at the University was intended to be a communal activity, beginning with departmental self-evaluations, conducted in an open and collaborative manner: "I would ask how these collaborations are possible if portions of the plans are to be kept confidential." Many professors participated in data gathering, etc.: "To assert confidentiality for the documents that were the final products of this exercise contradicts the spirit of strategic planning. To my knowledge, this expectation of confidentiality was never articulated at the outset of the process."

Professor Bennett emphasizes that universities are "communities of scholars that function best when decisions are made through open consultation and when its members are fully informed of the nature and reasons for decisions.... The faculty and their association are not then just another external 'applicant' but a group intimately involved in the formulation and implementation of policy decisions across the entire University."

Professor Bennett urges me to order full disclosure of the records in dispute: "This assertion of secrecy contradicts the spirit of the strategic planning exercise and can only reduce the trust between administration, faculty and the Faculty Association."

I have presented below certain of Professor Bennett's submissions on the application of specific sections of the Act.

8. The Intervention of Professor John McLaren

Professor McLaren, the Lansdowne Professor of Law at the University, emphasizes his interest in "openness in the formulation of policy by public institutions, not least universities in which consultation and frank discussion are the life-blood of these bodies." He also encourages an interpretation of the Act that is "purposive in the sense of countering unnecessary claims of secrecy and confidentiality which, alas, tend to be the 'stock in trade' of large institutions of all sorts."

Professor McLaren emphasizes that all faculty members on regular appointments in the Faculty of Law participated in the strategic planning exercise. It was "a democratic process in which individual faculty members would invest significant time and effort." The goal was an emulation and working through of the University's own Strategic Plan, which "is a document that is entirely public." The "exercise had a wider purpose than merely providing a confidential progress report to the senior administration of the University." In sum, Professor McLaren's position is that the University's restrictive position on access is not in the spirit of the planning exercise.

Professor McLaren makes a general point:

> Whatever the traditions of the past, the modern university works in a consultative mode in which academic policy and changes in programming are worked out not by **diktat**, but by processes of group discussion, planning, review, and implementation. It is, of course, understood that change, especially that which has costs attached, requires vetting and approval by University bodies and administrators in the context of decisions on resource allocation. That does not mean, however, that the information and data which is necessary to those decisions is or should be somehow magically insulated from general view, because subject to that institutional process of scrutiny.

Professor McLaren urges me to order full disclosure of the records in dispute.

9. Discussion

The applicant emphasizes that it has been denied access to information in the divisional strategic plans for certain faculties that it has already received by other means, such as from individual faculty members. (Submission of the Applicant, p. 5) Such circumstances, in my view, do not dictate the access that an applicant can later achieve under the Act. (See Order No. 104-1996, May 24, 1996, part 7; and Order No. 217-1998, March 6, 1998, part 8) Similarly, the fact that members of the Faculty Association participated in the planning process does not establish that the Faculty Association itself has a right of access to the resulting records under the Act. These considerations have particular application if, as in the present inquiry, a public body decides to sever some of the information in the records in dispute.

The intervenors on the side of openness have emphasized that universities are intended to be "communities of scholars that function best when decisions are made through open consultation and when its members are fully informed of the nature and reasons for decisions." (Intervention of Colin Bennett) I agree, further, that the faculty and their Association are as a group "intimately involved in the formulation and implementation of policy decisions across the entire University." But according to the Act, decisions on the disclosure of records are made by the head of the public body, or his delegate, as in the present inquiry. They are presumed to be fully aware of the collegial nature of academic life; they are also responsible for decisions under the Act. If

they make "legal" decisions that impact negatively upon faculty or students, they are assumed to be aware of the possible consequences. The decision makers will have to live with the results of their exercise of discretion not to disclose records, such as under section 13 of the Act, which is the case in this inquiry.

In the context of the collegial nature of academic life, I have no reluctance to recommend to the administration of the University that it disclose the full contents of the records in dispute to the applicant itself. But there is no requirement under the Act for it to do so.

Section 13(1): Policy advice, recommendations or draft regulations

The University points out, correctly, that I have made a series of decisions protective of a "zone of confidentiality" around the policy-making process within public bodies, which permits full and frank discussion of advice or recommendations. See Order No. 159-1997, April 17, 1997, p. 9; Order No. 215-1998, February 23, 1998, p. 4; Order No. 212-1998, January 16, 1998, p. 3.

The University submits that the Deans' planning records contain advice and recommendations developed by and for the University about the implementation of proposed budget cuts:

> The information that was withheld can roughly be divided into two groups. First, there is information relating to proposed measures or recommendations for implementation of the budget cuts. Second, there is information on proposed programs and initiatives that the Deans of the faculties are considering for implementation during the three year planning window, notwithstanding the prospect of budget cuts. (Submission of the University, paragraph 15)

In its view, such information should and can be kept confidential on the basis of section 13(1) of the Act, which gives the University the discretion to refuse to disclose information that would reveal advice or recommendations developed by or for a public body.

The Faculty Association claims that "many" faculty members would not have participated in the strategic planning exercise if the intent of maintaining confidentiality of the resulting product had been made public at the outset of the exercise, and that the advice to the University in this case came from inside sources who are members of the Faculty Association. It is certainly correct that public bodies should establish in advance the conditions of confidentiality affecting the collection, use, storage, and disclosure of general and personal information.

In its reply submission, the University emphasizes that although there was broad consultation with faculty at the departmental level, the "Deans were then responsible for sifting through the local plans to identify priorities for the faculty and to make

recommendations to the University Administration on those priorities." (Reply submission of the University, paragraph 4) This clearly implies a request for Deans to produce policy advice or recommendations in the language of the Act. The University expected confidentiality for this end product, even for faculty who served on the Planning & Priority Committee of the University. (Reply submission of the University, paragraph 5)

The University's position is that it has largely disclosed the background or factual material that faculty members assisted in assembling: "The information that the University continues to insist on the right to withhold consists of the recommendations and advice (the 'selection [of] priorities') provided by the Deans to the Administration... Such recommendations were solicited from the Deans alone, and not from the faculty members." (Reply Submission of the University, paragraph 8)

I agree with the general submission of the University that Deans and other administrators should be able to present advice and recommendations fully and frankly on a wide variety of matters, as the University determines an appropriate course of action on any issue. (Submission of the University, paragraph 18) This finding is in accordance with other Orders that I have made on the application of section 13 of the Act.

Section 13(2)(k): a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,

Professor Bennett advanced an argument that this subsection of the Act promotes disclosure. The Faculty Association made the further point that the collegial nature of University administration, in which senior administrators are primarily professors themselves, makes this subsection relevant to disclosure in this inquiry. It also emphasizes that the Faculty Association is not an external pressure group as in the circumstances of Order No. 159-1997 and Order No. 215-1998: "It is an employee association composed of faculty members and administrators who provided the strategic planning information to the Administration in the first place." (Reply Submission of Professor Bennett, p. 3)

The University's reply position, as noted above, is that the policy advice and recommendations being withheld were prepared by the Deans, not individual faculty members, so that this subsection has no application. (Reply Submission of the University, paragraph 9) I agree with the University on this point.

Section 13(2)(m): information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy,

The applicant submits that the original conditions for undertaking the planning exercise require the disclosure of the information in dispute. (Submission of the Applicant, p. 2) The administration of the University announced a "communal exercise" involving members of the Faculty Association:

> Background information was collected by Association members and forwarded to the university Administration with the understanding that the information would be used as a basis for institutional decision-making in the future and, also, that the strategic plans would be accessible to interested parties, such as the Faculty Association Executive Committee. (Submission of the University, p. 6)

Professor Bennett submits as well that strategic plans should be disclosed on the basis of this exception.

The University emphasizes that one of the two crucial element of this subsection, that is a decision having been made by a public body, does not exist at present, because "**no decision** has been made by the public body. The University is simply gathering advice and recommendations on how it may -- or may not --- make a **future decision** on implementing potential budget cutbacks." (Reply Submission of the University, paragraphs 10 to 14)

I agree with the University that section 13(2)(m) cannot be applied in the factual circumstances of the present inquiry, where advice and recommendations have not been acted upon.

Section 17(1): Disclosure harmful to the financial or economic interests of a public body

The University maintains that much of the withheld information falls within section 17(1)(c) of the Act. It gives a discretion to the University to refuse to disclose information the disclosure of which "could reasonably be expected to harm the financial or economic interests of a public body," including "(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public." The University argues:

> The sensitive nature of the information, and the harm that the University fears will result from disclosure, flows in large part from the fact that the Deans of the faculties have proposed initiatives and budget cutbacks that have not been endorsed or approved by their respective faculties, the University's planning bodies, the University administration, or the University's governing bodies. (Submission of the University, paragraph 23)

The University provided me with the *in camera* affidavit of University Secretary Sheila Sheldon Collyer, which provides specific illustrations of the sensitivity of the withheld information.

The applicant Association submits that "it is difficult to understand how disclosure of information to an employee association, which is concerned with the welfare of the institution and whose members supplied the

information to the Administration in the first place, can constitute a threat to the economic integrity of the university." (Submission of the Applicant, p. 7)

The Faculty Association contests the application of section 17(1)(c) in this inquiry because the plans in dispute "are being made public and are being implemented over the 1997/98 academic year." It also emphasizes that some Deans at the University are discussing cutbacks and initiatives with their respective faculties "with little evidence of undue apprehension among affected individuals of the magnitude that would seriously impair the economic interests of the university." The University, in its view, has failed to identify "the specific nature of that harm."

> Indeed, the complete contents of the divisional strategic plans that have been given to the Association by members who received copies from their respective Deans indicate that the segments deleted by the University Secretary under Sections 13(1) and 17(1) do not contain information that would lead to undue anxiety on the part of Association members or financial harm to the university. (Reply Submission of the Faculty Association, pp. 3-4)

The Faculty Association further states that it has in its possession the complete strategic plans of three faculties (one in draft form) "and has honored the proposed undertaking to keep these plans as restricted access documents for use by the Association Executive Committee members." (Reply Submission of the Faculty Association, p. 40) While the option to classify certain potentially sensitive records as "restricted access documents" offers a potentially useful vehicle for the University, it - unfortunately - offers me no further avenues under the Act to bring the Faculty Association any closer to obtaining the access it seeks, since my authority is limited to the options set out in section 58(2) of the Act. However, I encourage the University to pursue the possibility of using this classification to allow greater access to records by the Faculty Association in the present inquiry.

Professor Bennett is also skeptical, to say the least, about reliance on section 17(1)(c): "One might infer that some of the excised material might discuss faculty replacements. If this is the case, I would have thought that the Faculty Association's case is all the stronger."

In Order No. 1-1994, January 11, 1994, I had an opportunity to set out specific standards for the burden of proof and submission of evidence in the application of section 17. It might be useful to review those criteria in this discussion:

First, the test is the civil burden of proof: the balance of probabilities;
Second, the harm asserted must be both specific and real; and,
Third, the evidence presented in support of that harm must be detailed and convincing.

The "detailed and convincing" standard of evidentiary proof has been moderated somewhat, as a result of an Ontario court decision, in favour of a "reasonable expectation of probable harm" - I discussed this in Order 159-1997, page 8.

As corollaries of the above criteria, I noted in Order No. 1 that there must be a link between the disclosure of specific information and the harm which is expected from the release (cited in the *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual, Province of British Columbia, section C.4.8, p. 6), and that the head of a public body must have reasonable grounds to expect harm in order to apply the exception. (Manual, section C.4.8, p. 9)

Having reviewed all of the records in dispute and applying the above criteria, I find that disclosure of the information in dispute to this applicant cannot reasonably be expected to harm the financial or economic interests of the University. It cannot withhold the information in dispute on the basis of section 17(1) of the Act.

Review of the Records in Dispute

I have reviewed each of the specific severances in the records in dispute in order to decide whether the exceptions in sections 13 and 17 of the Act have been properly applied. I have already indicated that section 17 has no application in the case of a disclosure to this applicant, (which has also agreed to maintain the confidentiality of the information within the Faculty Association).

With respect to the university's application of section 13(1) of the Act, it is my view that the "advice or recommendation" protected from disclosure are the advice or recommendations of the Deans made to the Administration. I have therefore treated suggestions from the faculty Deans as to future options, new directions, and the like as advice and recommendations. Factual or descriptive information in the records should be disclosed. Simple reporting, or what faculty units have been instructed or chosen to do, falls within this latter category.

Public bodies contemplating the kind of strategic planning exercise at issue in this inquiry should structure submissions so that advice and recommendations are clearly separated from background information in particular.

Bearing in mind these principles, my review of the withheld information in the records reveals that most, but not all, of this information was properly withheld by the University under section 13(1) of the Act. That information in the records which I have determined is not properly withheld must therefore be disclosed to the applicant. For this purpose, I have marked records for disclosure.

9. Order

I find that the University of Victoria was not authorized under section 17 of the Act to refuse access to the records in dispute.

I also find that the University of Victoria was not authorized or required to withhold parts of the record under section 13(1) of the Act. Under section 58(2)(a) of the Act, I require the University to give the applicant access to parts of the record. I have prepared a severed copy of the record to indicate which parts of the record must be disclosed.

I also find that the University of Victoria was authorized under section 13(1) of the Act to refuse access to parts of the record in dispute. Under section 58(2)(b) of the Act, I confirm the decision of the University to refuse access to parts of the record withheld on the basis of section 13.

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David H. Flaherty
Commissioner

October 22, 1998