OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 01-10

UNIVERSITY OF VICTORIA

David Loukidelis, Information and Privacy Commissioner
March 22, 2001

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Summary: In response to the applicant's request for all records containing personal information about him "at the University", UVic disclosed many records but withheld portions of records under ss. 3(1)(c), 13, 14 and 22 of the Act. Applicant alleged that UVic failed to perform its search obligation under s. 6, but UVic was found to have undertaken a reasonable search for records. Section 25 did not require disclosure in the public interest. UVic was authorized to withhold information under ss. 13 and 14 (ss. 3(1)(c) and 22 having been removed from inquiry by the parties' agreement).

Key Words: duty to assist – every reasonable effort – advice or recommendations – solicitor client privilege – waiver – public interest.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6, 13, 14 and 25.

Authorities Considered: **B.C.**: Order 00-06, [2000] B.C.I.P.C.D. No. 6; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 00-32, [2000] B.C.I.P.C.D. No. 35. **Ontario**: Order M-1112, [1998] O.I.P.C. No. 127.

Cases Considered: *Descoteaux* v. *Mierzwinski*, [1982] 1 S.C.R. 860, at p. 875; *Canada (Director of Investigation and Research)* v. *Canada Safeway Ltd.* (1972), 26 D.L.R. (3d) 745 (B.C.S.C.); *British Columbia (Ministry of Environment, Lands and Parks)* v. *British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. 3d 64; *Almecon Industries Ltd.* v. *Anchortek Ltd.* (1997), 85 C.P.R. 3d 30 (Fed. Ct., T.D.); *Legal Services Society (British Columbia)* v. *British Columbia (Information & Privacy Commissioner)* (19960, 42 Admin. L.R. 271 (B.C.S.C.); *Buttes Gas & Oil* v. *Hammer & Others (No. 3)*, [1980] 3 All E.R. 475 (C.A.); *Vancouver Hockey Club Ltd.* v. *National Hockey League* (1987), 18 B.C.L.R. (2d) 91 (S.C.); *Zein* v. *Canada*, [1990] B.C.J. No. 2843 (S.C.).

1.0 INTRODUCTION

[1] This inquiry arises out of the applicant's concerns about how he was treated by certain staff at the University of Victoria ("UVic") and by UVic itself. More directly, the disputed records relate to a number of legal processes initiated by the applicant in relation to his concerns about his not having received an academic position in one of UVic's faculties.

[2] On November 1, 1999, the applicant asked that an earlier letter he had sent to UVic, dated August 23, 1999, be treated as a new request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for access to "all the records containing personal information about me at the university." His request referred to the following sources, which he believed might have responsive records:

> … members of the Board of Governors, the President, the Vice President Academic, Associate Vice-President Legal Affairs, the Associate Vice-President Academic, the department of Human Resources, the Faculty of Law.

[3] The letter indicated that the applicant's intention in making the request was to determine whether his personal information was "accurate".

[4] UVic responded to this request in four successive disclosures of records, under cover of letters dated November 30, 1999, December 22, 1999, January 6, 2000 and January 26, 2000. UVic applied ss. 14 and 22(1) to information in various records. In one instance, it applied s. 3(1)(c).

[5] Dissatisfied with UVic's decision, the applicant requested, under s. 53 of the Act, a review of that decision. He initially made a separate review request for each of UVic's successive disclosures. Effective February 9, 2000, these review requests were consolidated into one request for review. During mediation by this Office, it was agreed that UVic's application of ss. 3(1)(c) and 22(1) to various records would not proceed to inquiry. As a result, this inquiry deals with UVic's refusal to disclose information from records covered by its decision letters dated November 30, 1999, December 22, 1999 and January 6, 2000, but not January 26, 2000.

[6] The records in dispute are described as follows in the Amended Portfolio Officer's Fact Report: pages Law 44-68 (November 30, 1999 decision); pages Law 8, AVPLA 6-12, 18-23, 26, 30-34, 40-45, 49, 50, 52-55, 62-70, 73, 78, 81, 82, 85 and 86 (December 22, 1999 decision); and VPAC 1 (January 6, 2000 decision). The acronym AVPLA stands for Assistant Vice President, Legal Affairs. The acronym VPAC stands for Vice President Academic and Provost.

[7] This inquiry also deals with two other records, which are not numbered. The first is an internal UVic e-mail message, which UVic severed under s. 14. That e-mail message forwarded a September 13, 1998 e-mail, that the applicant had sent to a UVic official, to Lyman Robinson, Q.C., UVic's Associate Vice President, Legal Affairs ("LR"). (The applicant's September 13, 1998 e-mail to UVic was disclosed to him.) The

second record is an October 15, 1999 memorandum, which is one of five additional records that UVic, in a letter dated July 12, 2000, disclosed to the applicant. UVic severed part of that memorandum under s. 13(1) of the Act. Section 13(1) is in issue in relation to that record only.

[8] The University of Victoria Faculty Association was invited to, and did, make submissions as an intervenor and not as a party. The applicant asked me to invite two journalists to participate as intervenors, but I did not do so. I have considered the Association's submissions in reaching my decision. I appreciate the Association's efforts in putting together a thoughtful submission.

[9] After the close of the inquiry, the applicant delivered a one-page submission, citing another university's disclosure practices as an example of transparency and openness. This submission did not comply with the Policies and Procedures for inquiries, so I did not consider it in reaching my decision. The submission did not, in any case, assist with the issues before me.

2.0 ISSUES

[10] The inquiry issues set out in the Amended Portfolio Officer's Fact Report and the Notice of Written Inquiry are as follows:

1. Did UVic conduct an adequate search for records for the purposes of s. 6(1) of the Act?

2. Was UVic authorized by s. 13 of the Act to refuse to disclose information?

3. Was UVic authorized by s. 14 of the Act to refuse to disclose information?

[11] Under s. 57(1) of the Act, UVic bears the burden of establishing that it is authorized to withhold the disputed records. Consistent with previous orders on the point, it also bears the burden of proving that it has complied with its s. 6(1) obligations in searching for records.

[12] The applicant has also raised issues involving s. 25(1) of the Act and an alleged 'conflict of interest' on LR's part, as UVic's Associate Vice-President, Legal Affairs. I will first deal with these.

3.0 DISCUSSION

[13] **3.1 Allegation of Conflict of Interest** – At the very end of his initial submission, as part of his s. 6 arguments, the applicant for the first time raises the spectre of a 'conflict of interest' that he says affected LR, as UVic's Associate Vice-President, Legal Affairs. The applicant argues that LR was "legal counsel to a university party who does not consent to disclosure of records in the Harassment process", while also being an adviser to UVic's head on the s. 14 issues raised by the applicant's request. He says this

is inappropriate and that I should require UVic to reconsider its decision free of any 'conflict'.

[14] Even if LR provided legal advice to UVic's head respecting the applicant's requests under the Act, I do not consider UVic's decisions to have been tainted. The evidence establishes that LR made representations, on behalf of a UVic faculty member, about the applicant's attempt to force disclosure, through UVic's Harassment Policy and Procedures process, of allegedly privileged records. In those submissions, LR took the position that the applicant should not be permitted to use the harassment proceeding process "as a means to obtain a collateral review" of UVic's decision under the Act and noted that the applicant was pursuing a review under the Act.

[15] It is not clear to me whether the applicant argues that LR was acting for the faculty member personally. He simply says that LR was counsel to "a university party". Either way, I do not consider that LR's submissions under the harassment proceeding taint UVic's decisions on the applicant's requests.

[16] **3.2 Public Interest Disclosure** – The applicant raised s. 25(1)(b) in his initial submission, arguing that it requires disclosure of records in the public interest. UVic objects to the applicant raising s. 25(1)(b) so late in the day, noting that he did not raise s. 25 in his request for review and that it was not mentioned in the Amended Portfolio Officer's Fact Report or the Notice of Written Inquiry. It also said that, despite the extended mediation that took place here, the applicant did not advance s. 25 during that process. UVic submitted that I should not, in this light, consider the s. 25 issue.

[17] Although the applicant could have raised s. 25 at an appropriate stage, he did not do so. He has not, in his submissions, explained his failure to raise the issue earlier. Section 25 overrides all other sections in the Act. I therefore see no reason, in these circumstances, why the applicant should be entitled, by surprise, to raise the matter for the first time in his initial submission. I am not prepared to consider s. 25 and no decision is required in that respect.

[18] Having said that, even if I assumed for the purposes of discussion that s. 25 was properly before me, I would reject the applicant's contention that it applies. The applicant says, in essence, that four aspects of the public interest are involved here: fiscal responsibility, respect for public process, respect for human rights and the standard of teaching delivered by UVic. To my mind, the records in fact relate to the applicant's personal employment situation and the various grievance, harassment and other proceedings he has initiated because of how he was, he says, treated by UVic. Having regard to the records' contents, and the other relevant material before me, I would not find that disclosure of the records would be "clearly in the public interest", as contemplated by s. 25(1)(b).

[19] I should note, in passing, that I disagree with UVic's argument, at para. 13 of its initial submission, that the "determination to disclose records under section 25 is a matter within the discretion of the public body" and that the "Commissioner should not instruct the public body to act under section 25." Section 25 does not confer any "discretion" on

the head of a public body. The head exercises judgement in determining whether disclosure is required, but no discretion is involved. The orders of my predecessor cited by UVic on this point do not advance its position. The Act plainly contemplates that the commissioner can intervene in cases where he or she considers that s. 25 applies, whatever the head of a public body may or may not have decided.

[20] **3.3 UVic's Obligation to Assist the Applicant** – The Notice of Written Inquiry indicates that the adequacy of UVic's search for records is in issue. Section 6 of the Act requires public bodies to make every reasonable effort to assist applicants, including by making reasonable efforts to search for responsive records. While the Act does not expect perfection, a public body's efforts in searching for records must conform to what a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive. See, for example, Order 00-32, [2000] B.C.I.P.C.D. No. 35.

[21] In this case, the applicant alleges it has been difficult for him to obtain his records from UVic. At para. 18.2 of his initial submission, he says that he

> … would find it helpful if the executives of the university (and others with records) could be asked by the head to disclose records or information about me that they have. Some members of the executive have not yet been asked to disclose records in their possession.

[22] He says that, in November of 1999, he provided UVic with a list of "possible locations of files", but that UVic has so far declined to search for records that may be possessed by members of its Board of Governors, in the possession of two named academics at UVic, that may be possessed by a lawyer who was appointed chair of an Appeals Panel under UVic's Harassment Policy and Procedures, or that may be possessed by professors at a named faculty at UVic.

[23] UVic's submissions on the adequacy of its search efforts are detailed and lengthy. UVic relies on affidavits sworn by David Wardle and Sheila Sheldon-Collyer. David Wardle deposes that – in addition to time spent by Sheila Sheldon-Collyer and by representatives from each of the various faculties and departments at UVic that were involved in searching for responsive records – he personally spent over 50 hours in searching for records requested by the applicant.

[24] Using UVic's directory of records and registry of personal information banks, it was decided that two faculties, one department and five executive offices at UVic should be asked to search for responsive records. UVic's evidence establishes that each faculty, department or office then searched for records and produced the records yielded by those searches to David Wardle for review. As a result of these efforts, UVic identified and reviewed a considerable number of records. UVic on a number of occasions undertook further searches as a result of communications with the applicant. (I should note here that I have disregarded any mediation-related material, found in submissions before me, which discloses what was said or done during mediation, including by the Portfolio

Officer from this Office who conducted the mediation. Such material is not properly before me.)

[25] As for the applicant's suggestion that members of the Board of Governors and others should be asked whether they have responsive records, UVic says the chair of the Board of Governors was contacted twice during its searches, but that individual members of the Board of Governors were not contacted. Individual members were not contacted, according to UVic, because its policy and practice respecting Board of Governors documents and files indicated there was no reasonable basis on which to conclude Board members would have responsive records. There is evidence before me that UVic, as a matter of policy, requires its Board of Governors members not to keep personal files. Further, all correspondence to and from the Board of Governors is routed through the Board's office.

[26] As for the two academics whom the applicant believes may have further records, UVic's evidence establishes that these two individuals were actually contacted during UVic's search. They confirmed that they had no relevant records in their possession.

[27] As for the chair of the Appeals Panel, whom the applicant believes should be asked for records, UVic says that, because he never actually functioned as chair, there is no reason to believe he has any relevant records other than those that have already been retrieved through UVic's searches.

[28] Last, UVic says there is no reasonable basis to believe that any of the 25 individual members of the named faculty would have any records that are not already in the faculty's files. The faculty's files were searched for responsive records.

[29] The applicant alleges, at para. 19 of his initial submission, that a UVic faculty member destroyed records about the applicant, contrary to s. 31 of the Act. He does not specify which records were destroyed. He says this happened despite his request for access having been made within one year after the end of the relevant appeal process. He also alleges that "the e-mail referred to in record VPAC-11" is missing. Citing the affidavit of David Wardle, UVic rejects this contention. UVic says, at para. 44 of its initial submission, that all documents submitted to the Appeal Panel, and on which that panel's decision was based, were deposited with the Office of the Vice President Academic and Provost. It says files in that office were searched by David Wardle in responding to the applicant's requests. It has not, UVic says, withheld any records and none were destroyed. UVic acknowledges that personal notes of panel members were destroyed after the appeal, but says this was proper and that these records would, under s. 3(1)(b), in any case be outside the scope of the Act.

[30] Although it is not clear beyond doubt, it appears the Appeal Panel – which was constituted under UVic's Guidelines for Short Term Appointments – could only make recommendations to the ultimate decision-maker. Even if the destroyed notes were not, in light of the role of the panel members, excluded under s. 3(1)(b) of the Act – and I make no finding on this – the fact remains that they were apparently destroyed before the applicant made his access to information request.

[31] I conclude that UVic identified, in a methodical way, all likely sources of records, including in light of the applicant's stated belief as to which sources should be checked. It then carried out extensive searches, which it later supplemented at the applicant's request. Notwithstanding the applicant's view that the possible sources he has identified must be searched, I am of the view that UVic's search efforts met its s. 6(1) obligation to search for records. Applying the criteria articulated in earlier orders, a fair and rational person would conclude that a thorough and comprehensive search has been made.

[32] **3.4 Solicitor Client Privilege** – Most of the disputed records have been withheld from the applicant under s. 14 of the Act, which authorizes a public body to refuse to disclose information that is subject to solicitor client privilege. Of the two kinds of common law privilege protected by s. 14, UVic relies, as I understand it, only on legal professional privilege, *i.e.*, the privilege protecting confidential communications between a client (or her or his agent) and a legal adviser that are directly related to the seeking or giving of legal advice. The cases it cites as setting out the applicable principles all deal with this kind of privilege. (In relation to certain records, however, UVic relies on cases that the applicant says deal with litigation privilege, where two or more parties with a common interest share privilege. I deal with this issue below.)

[33] While it acknowledges that not every communication between a lawyer and her or his client is privileged, and that not everything done by a lawyer attracts privilege, UVic says that each of the disputed records is privileged for the purposes of s. 14. According to UVic, the records are privileged because they are confidential solicitor-client communications, legal opinions, working papers and drafts of documents. It says the privilege belongs to UVic or to two identified members of its teaching staff. (I will refer to these individuals as A and B.) UVic argues that, since the privilege has not been waived by those entitled to it, I should determine that it was authorized to refuse access under s. 14.

Applicant's General Points on Privilege

[34] UVic provided evidence that it has, in considering the applicant's access request, considered whether it should waive privilege that it was entitled to waive. LR deposed that UVic had, in fact, disclosed some records over which it says privilege could have been claimed. At all events, it is clear that UVic considered exercising its discretion under s. 14 in relation to the disputed records over which it claims privilege, but has declined to do so.

[35] It is convenient at this point to deal with three general points made by the applicant on the privilege issue. First, the applicant says that privilege was waived over communications that were identified by A as having been reported to LR and then to B. This supposed waiver arises because A is said to have answered, at the June 23, 1998 appeal panel hearing, that LR "probably told her" (*i.e.*, B) the contents of any such communications. Quite apart from the fact that this supposed chain of events is not relevant to any of the disputed records actually before me, I am not persuaded that this

single answer by A was intended to – or should, in fairness, be treated as – a waiver of privilege in relation to any of the records that might be touched by the statement.

[36] Second, in relation to one of the UVic faculty members involved at the time the disputed records were created, the applicant says the faculty member only retained a lawyer a week before June 23, 1998. He submits that for the period from April 2, 1998 until the week before June 23, 1998, that faculty member "cannot claim solicitor client privilege." The difficulty with this is that – insofar as the records relate to that faculty member in some way – they are all clearly communications between outside counsel retained to represent that faculty member and the faculty member or his agent. These communications all fall within the period beginning the week before June 23, 1998.

[37] Third, at paras. 11.8 and following of his initial submission, the applicant notes that LR is, according to UVic's Website, described as reporting to the Vice President Academic and Provost. He says the "position description does not indicate that Professor Robinson is the university's solicitor or solicitor to" the Dean of any Faculty. He notes that it "does say that he has liaison with outside counsel retained by the university" (para. 11.09). Be that as it may, the evidence establishes that LR is a lawyer and that he acted both as liaison to outside counsel and that he provided legal advice to the UVic and to A and B on various matters relating to the applicant.

[38] Before dealing with the merits of the s. 14 issue, I will comment on two submissions, by the applicant and by UVic, respectively.

Applicant's Request for List of Documents

[39] In a preliminary submission before the inquiry, and at the outset of his initial submission, the applicant asked that I require UVic to produce a list of the records over which it claims privilege. He asked that the list describe the contents of the records, but without such detail as would destroy privilege. He made this request on the basis – citing Order 00-06, [2000] B.C.I.P.C.D. No. 6 – that he might have an evidentiary burden to discharge respecting UVic's s. 14 claim.

[40] Such a list is not necessary in this case. The applicant's concern that he may bear a burden of proof in relation to s. 14 does not arise here. The comments in Order 00-06 about an applicant having a burden of proof were directed at cases where a party seeking disclosure claims that – the elements of solicitor client privilege having been established by the party resisting disclosure – some exception to common law solicitor client privilege applies to a record. I merely observed, in Order 00-06, that a party seeking disclosure in such cases will bear the burden of showing that the asserted exception to solicitor client privilege applies. This is not such a case.

[41] In any case, in its initial submission, UVic has broken the various kinds of disputed records into different classes and has addressed the solicitor client privilege issue in respect of each class. In doing so, it has described, in a general way, the records in each class. This enabled the applicant to address his reply submission to each class of records, which he did.

UVic's Submission About Private Interests and Section 14

[42] As regards solicitor client privilege and the private interests of A and B, UVic argues, at para. 20 of its initial submission, that I have "no jurisdiction to abrogate" any privilege to which either of these individuals is entitled. UVic goes on to say the following, at para. 20:

> It is apparent that many of the documents in issue relate to the provision of legal advice to those individuals in respect of their personal legal interests or rights which had been implicated in proceedings advanced by … [the applicant]. The fact that such documents may exist in the files of the Associate Vice-President of Legal Affairs, however, does not change the fact that the entitlement to the privilege is held by individuals who are not public bodies, and who, in respect of their personal legal right to claim privilege, are not subject to any jurisdiction of the Commissioner.

[43] I disagree with UVic's formulation of this issue as being whether I have jurisdiction over "individuals who are not public bodies". The Act affects records, specifically those "in the custody or under the control of a public body" (s. 3(1)). If such records belong to someone else, or contain information of, or affecting the interests of, a "third party" as defined in the Act, those interests are protected by, for example, ss. 17(1)(d), 21 and 22.

[44] Consistent with this, s. 14 does not recognize privilege on the basis of whether it belongs to a public body or to someone else. A record that is in the custody or under the control of a public body – and remains privileged despite that custody or control – is protected by s. 14 even if the privilege belongs to someone other than the public body.

[45] Section 14 is discretionary. The head of a public body "may" disclose a record or part of it even if it is privileged and therefore excepted from disclosure under s. 14. Does this mean it is open to the head of a public body to exercise the s. 14 discretion, and release a privileged record even if the privilege belongs to someone other than the public body? In my view, it does not.

[46] At common law, only the client can waive privilege. It seems to me that disclosure by a public body under the Act would not be a waiver of a private party's privilege in the circumstances just described. It would remain open to the private party to assert privilege against anyone who tried to use the disclosed record against that party, *e.g.*, in legal proceedings between those two parties. But a public body's disclosure of a privileged record would in many, if not most, cases effectively destroy the privilege. It could seriously damage the private party's interests.

[47] The Supreme Court of Canada has held that any statutory derogation from solicitor client privilege requires legislative language that expresses the derogation with irresistible clarity. See *Descoteaux* v. *Mierzwinski*, [1982] 1 S.C.R. 860, at p. 875. See, also, *Canada (Director of Investigation and Research)* v. *Canada Safeway Ltd.* (1972), 26 D.L.R. (3d) 745 (B.C.S.C.). This principle was recently affirmed by Thackray J. in a case dealing with s. 14 of the Act, *British Columbia (Ministry of Environment, Lands and*

Parks) v. *British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (S.C.). In my view, the Legislature did not – by providing in s. 14 that a public body "may" refuse to disclose information that is subject to solicitor client privilege – intend to give a public body the statutory authority to destroy a privilege enjoyed by a private party simply because the privileged record is for some reason in the public body's custody or under its control. The Legislature's use of the permissive "may" in s. 14 is not an irresistibly clear derogation from the fundamental right of solicitor client privilege.

[48] On the contrary, it is difficult to see how the head of a public body could, in such a case, properly exercise her or his s. 14 discretion to disclose a record that is subject to a third party's privilege. Subject to what is said below, the head should instead decline to disclose information that is privileged to someone else's benefit, including in cases where the public body shares the privilege with a third party. This is consistent with the position at common law – that solicitor client privilege can only be waived by all the parties to whose benefit it accrues. See, for example, *Almecon Industries Ltd.* v. *Anchortek Ltd.* (1997), 85 C.P.R. 3d 30 (Fed. Ct., T.D.).

[49] There are at least two exceptions to what I have just said. The first is where a third party has been notified of the request by the public body and has expressly waived privilege. The Act does not require a public body to consult a third party in such a case. There may, however, be cases where the public body's s. 6(1) duty to assist an applicant might, depending on the circumstances, require that it notify an affected third party whose privilege is in issue and seek the third party's representations or a waiver of privilege. The vast majority of public bodies are unlikely, of course, to often possess or control third-party privileged records, so this issue is not likely to arise very often. Further, it is important to bear in mind that the s. 6(1) duty is not absolute; it only requires a public body to make "every reasonable effort" to assist applicants. There will be circumstances in which it is not reasonable to expect a public body to undertake third party consultations, *e.g.*, where a privileged record is so old that it is reasonable to suppose the third party client cannot be located.

[50] The second exception would arise where the third party has a prior agreement with the public body that specified communications, in respect of which the third party is otherwise entitled to assert privilege, can be disclosed by the public body. One example of this is where a public body agrees to pay a third party's legal costs, but requires the third party to agree that any legal bills rendered to the third party, but paid by the public body, can be disclosed.

[51] I will now examine UVic's privilege claim in relation to each category of records identified by UVic, which is how UVic argued its s. 14 case. It is important to emphasize at this stage that, in respect of many of the disputed records discussed below, the privilege being claimed is a third party's. Those records engage the interests of A and of B, not of UVic.

[52] The background to all of the disputed s. 14 records is attested to in the affidavit of LR, Q.C., who was, at all relevant times, UVic's Associate Vice-President, Legal Affairs. He deposed that his role was to "act essentially as in-house counsel" for UVic, devoting

his "full time to the legal affairs" of UVic "and its officials." He deposed that his only other duties were to negotiate framework salary agreements for certain UVic employee groups and to act as President or Academic Vice President during the absence of the incumbents of those offices. His role in matters involving the applicant, he deposed, was strictly as counsel. LR deposed that, in relation to the disputed records, he gave legal advice to UVic "as a corporate body", as well as to A and B.

Category 1 – Communications Retaining and Instructing Counsel

[53] The first class of records contains communications to or from outside legal counsel, confirming counsel's engagement, giving instructions to counsel and communicating facts to counsel. This class of records consists of records AVPLA 20-21, 30, 31, 40, Law 8 and 68.

[54] AVPLA 20-21, 30 and 31 are confidential communications with outside counsel to UVic. AVPLA 40 (and Law 68, A's copy of AVPLA 40) is a communication between LR and outside counsel to A, retaining counsel on behalf of A. I am satisfied – on the basis of his affidavit and the records themselves – that, in retaining outside counsel, LR was acting as an agent for that employee. That communication stands on the same footing as a communication directly between A and outside counsel and it is privileged. Law 8 is a communication between A and outside counsel. That record is also privileged.

[55] In light of LR's evidence, and the records themselves, I conclude that they satisfy all of the criteria for legal professional privilege at common law and are excepted by s. 14 from disclosure.

Category 2 – Draft Submissions

[56] This class of records comprises Law 45-60, Law 61-64, AVPLA 32-34, 49, 52-55 and 62-66. (UVic has also included AVPLA 49 in the fifth class of records, as described below.)

[57] AVPLA 32-34 consist of a single communication from UVic's outside counsel to LR. It is a draft document, prepared by outside counsel for UVic, and sent for the client's review. These pages are privileged, as they clearly are confidential communications relating to the giving of legal advice to UVic.

[58] The other records in this class (*i.e.*, Law 45-60, 61-64, AVPLA 52-55 and 62-66) consist of draft submissions prepared by A's outside legal counsel for the harassment proceeding involving the applicant, A and B. They also include communications to and from outside counsel for A and advice on, or comments about, about the various draft submissions. The issue that arises is whether communications between A's outside counsel and LR – and similar records in other classes, discussed below – are privileged and, if so, on what basis.

[59] As I understand it, UVic only relies in this case on legal professional privilege. In relation to the communications between LR and A's outside counsel, however, it cites cases that arose in the context of existing or anticipated litigation. It argues, at paras. 43-48 of its initial submission, that communications between counsel for two or more parties involved in a proceeding remain privileged where the parties have a common interest in the outcome of the proceedings. It relies on *Buttes Gas & Oil* v. *Hammer & Others (No. 3)*, [1980] 3 All E.R. 475 (C.A.), and *Vancouver Hockey Club Ltd.* v. *National Hockey League* (1987), 18 B.C.L.R. 2d 91 (SC). It also seeks support in Ontario Order M-1112, [1998] O.I.P.C. No. 127.

[60] At para. 10.0.1 of his reply submission, the applicant argues that what he calls the "common interest litigation privilege" cases "have no application in this inquiry because there is no evidence that litigation privilege is claimed in respect of any of the records". The applicant argues elsewhere that UVic's harassment process is not 'litigation' for the purposes of the litigation privilege rule. At para. 10.0.02, he says that, in any case, any basis for litigation privilege has ended, since all relevant processes have terminated.

[61] UVic has not submitted evidence that would permit me to decide whether the harassment proceedings are 'litigation' for the purposes of the litigation privilege rule or that, even then, the disputed records are privileged under the litigation privilege rule. I conclude, in any case, that legal professional privilege applies. The reasons for this follow.

[62] It is evident that LR and A's counsel worked together on matters affecting A. At para. 2 of his affidavit, LR deposed as follows:

> … my responsibilities are entirely related to providing legal advice to the University and its officials, retaining and instructing external counsel, and advising on legal matters or on the legal implications of maters on which my advice is sought.

[63] LR deposed that outside counsel was retained by UVic to represent A in the applicant's harassment proceedings because LR was concerned that the interests of A and B in those proceedings could diverge at some point. LR deposed that he represented B in relation to the harassment proceedings, but that he continued to advise A in relation to other matters involving the applicant.

[64] Paragraph 8 of his affidavit reads as follows:

> In respect of each of the documents over which a claim of privilege is advanced, those documents were either provided to me or prepared by me on a confidential basis. Not only was it clearly understood that my advice was being sought on a confidential basis, whether by the University, by … [A] or by … [B], but at all times, in respect of my involvement with the records in issue in this inquiry, I understood that I was under an obligation of confidentiality with respect to them. *In each case, my involvement with the record in issue was in my capacity as a solicitor, either for the purpose of providing legal advice, either to the University, to … [A], or to … [B], or seeking and receiving such advice from*

> *external counsel*. My involvement was not in any executive or administrative capacity, but was at all times as a lawyer. [emphasis added]

[65] As the evidence and the contents of the records confirm, the efforts of both counsel advanced the interests of A. I consider that LR, in communicating with A's outside counsel, was doing so on A's behalf. He was, in effect, giving instructions to A's counsel on A's behalf and receiving advice on A's behalf. This conclusion is supported both by LR's evidence and by the contents of the disputed records themselves. In this light, the communications between A's outside counsel and LR are to be treated on the same footing as if they were communications directly between A's outside counsel and A, *i.e.*, as communications between lawyer and client. In this respect, this case is similar to *Legal Services Society (British Columbia)* v. *British Columbia (Information & Privacy Commissioner)* (19960, 42 Admin. L.R. 271 (B.C.S.C.), where Lowry J., at para. 16, treated the Legal Services Society as the agent of the client for the purposes of communications between lawyer and client related to the nature and terms of the lawyer's retainer.

[66] The fact that LR was, at the same time, acting for B does not mean that the confidential communications between A's outside counsel and LR are not privileged. LR was, to borrow a phrase, wearing two hats. There is no suggestion that, in communicating with A's counsel and providing instructions (including about draft submissions), LR was not able or obliged to keep such communications confidential from B. To the contrary, his evidence is that he regarded himself as being under an obligation of confidence in this respect. There is, in my view, nothing surprising in this. LR deposed that, at all relevant times, he acted for UVic officials and that outside counsel was retained for A only because LR was concerned that the interests of A and B might diverge. There is no suggestion in anything before me that the interests of A and B ever actually diverged. LR's role shifted from being legal adviser to A and B to being B's lawyer and A's agent in instructing outside counsel in confidence.

[67] Even if LR's role had gone beyond simply instructing outside counsel on A's behalf, I would still find these records are privileged. The evidence admits of only one explanation for LR's role other than the finding I have made. That is that LR was, in effect, acting as co-counsel for A. In that case, the communications between outside counsel and LR – created in the context of their joint efforts – would be confidential working papers of co-counsel, including communications between them seeking each other's input and so on.

[68] This conclusion does not turn on common interest privilege. It is based, rather, on the proposition that a draft submission created by a lawyer for a client is – even if it remains in the lawyer's file – privileged on the basis that its contents are related to confidential solicitor-client communications. Its contents reflect the research, thinking and strategy of the lawyer in advising the client and are therefore related to such communications. It is privileged even though the final submission, delivered to the relevant decision-maker, would not be privileged (*i.e.*, because the final submission is not a solicitor-client communication). See, for example, *Zein* v. *Canada*, [1990] B.C.J. No. 2843 (S.C.), a case relied on by UVic. Also, in Order 00-08, [2000] B.C.I.P.C.D. No. 8,

I found (at p. 17) that disclosure of the portion of a file memo that reflected a lawyer's legal analysis or advice to a client – and was therefore in relation to confidential solicitor-client communications – would reveal privileged information. There was no evidence that the file memo or its contents had ever been communicated to the client.

[69] In the present case, I would – if it was necessary to do so – find that the draft submissions prepared by A's outside counsel are, even if they had never been communicated to A or anyone else, privileged working papers on the basis that they relate to confidential solicitor-client communications. I would further find that they remain privileged even though they were communicated to LR, as co-counsel.

[70] Again, I find that LR was, on behalf of A, instructing A's outside counsel and therefore find that the confidential communications between outside counsel and LR are privileged. Accordingly, Law 45-60, 61-64, AVPLA 49, 52-55 and 62-66 are excepted from disclosure under s. 14. The privilege in those records is A's, not UVic's. The same finding applies to the records that I identify below as being subject to this conclusion.

Category 3 – Legal Advice from Counsel and Related Communications

[71] Records AVPLA 6-8, 18-19, 26, 44, 50, 68, 70, 73, 78 and 85-86, Law 65-67 and VPAC 1 consist of legal opinions and advice given by outside legal counsel to UVic through LR, as well as communications from LR requesting legal advice from outside counsel. They also include internal UVic communications, to and from counsel, on a variety of issues.

[72] I have no doubt that these records are privileged communications and that UVic is entitled, under s. 14, to refuse to disclose them to the applicant. This class of records includes AVPLA 43-44 and 67-68, which are communications from outside counsel for A to LR. For the reasons given above, I find that these communications between LR and A's lawyer are privileged.

Category 4 – Communications from Counsel and Draft Work Product

[73] The records described as Law 44, AVPLA 9-12, 22-23 and 41-42 comprise communications from counsel to various UVic officials. They include draft documents prepared by counsel, with accompanying transmittal communications, and memorandums setting out legal advice to UVic.

[74] My review of these records, in light of the *in camera* evidence of LR, leads me to conclude that these records are confidential communications between solicitor and client relating to the giving or seeking of legal advice. (For clarity, none of these records is a communication between LR and A's outside counsel.) They are excepted by s. 14 from disclosure.

Category 5 – Communications Between Counsel for Different Parties

[75] This last class of records consists of AVPLA 45, 49, 69 and 81-82. They are communications between LR and outside counsel to A about anticipated or actual submissions on behalf of A in the harassment proceedings brought by the applicant. For the reasons given above, I conclude that these communications are privileged.

Severed E-mail Message

[76] The e-mail message written to LR by the UVic official who, together with that message, forwarded the applicant's September 13, 1998 e-mail, was severed under s. 14. As I found above, LR at all relevant times acted as a lawyer for UVic and its officials in relation to matters involving the applicant. The content of the message to LR leaves me in no doubt that the severed information is excepted under s. 14, since it is directly related to the seeking or giving of legal advice.

[77] **3.5 Advice and Recommendations** – Section 13 of the Act authorizes a public body to refuse to disclose "advice or recommendations developed by or for a public body or a minister". In this case, UVic has applied s. 13(1) to one portion of a single record, *i.e.*, a memorandum dated October 15, 1999. It says the severed portion would, if disclosed, reveal advice given, or recommendations made, to UVic's President by UVic's Director of the Office for the Prevention of Discrimination and Harassment.

[78] I have reviewed the severed portion of this record and have no hesitation in finding that, since it consists of advice and recommendations to UVic's President, it is properly severed under s. 13(1). Section 13(2) does not apply to the severed information.

4.0 CONCLUSION

[79] For the reasons given above, under s. 58(2)(b) of the Act, I confirm the decision of UVic that it is authorized to refuse to disclose the information that it withheld under s. 13(1) and s. 14.

[80] Because I have found that UVic has fulfilled its s. 6(1) obligation to undertake a reasonable search for records, no order is called for under s. 58(3)(a).

March 22, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia