



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

Order F10-11

LANGARA COLLEGE

Jay Fedorak, Adjudicator

April 1, 2010

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Summary: A student requested records relating to an investigation that resulted in the College terminating her enrolment in her educational program. The College withheld all records in their entirety under s. 22(1). Section 22(1) does not apply to information solely about the applicant or information of which she was already aware from participating in the conversations and actions documented and from receiving other documentation from the College. Section 22(1) applies to some information solely about third parties and of which the applicant was not already aware.

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

Authorities Considered: **B.C.:** Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 00-18, [2000] B.C.I.P.C.D. No. 21; Order F06-11, [2006] B.C.I.P.C.D. No. 18; Order No. 330-1999, [1999] B.C.I.P.C.D. No. 43; Order 04-33, [2004] B.C.I.P.C.D. No. 34; Order No. 131-1996, [1996] B.C.I.P.C.D. No. 59; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order 00-53, [2000] B.C.I.P.C.D. No. 57; Order 00-44, [2000] B.C.I.P.C.D. No. 48.

1.0 INTRODUCTION

[1] This inquiry arises from a request by a student of Langara College for records that the Manager Health and Human Services & the Centre for Holistic Health Studies (“the Manager”) used in support of a decision to expel the student from the Integrative Energy Healing Program. Langara College responded by withholding all of the information under s. 22(1) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”), also citing ss. 22(2)(f), 22(3)(d) and 22(3)(h). The applicant was dissatisfied with this response and requested

a review by the Office of the Information and Privacy Commissioner (“OIPC”). Mediation was not successful in resolving the issue and an inquiry was held under Part 5 of FIPPA.

2.0 ISSUE

[2] The issue at this inquiry is whether s. 22(1) of FIPPA requires Langara College to withhold the requested information.

[3] Under s. 57(2) of FIPPA, the applicant has the burden of proving that release of third-party personal information would not be an unreasonable invasion of the third party’s personal privacy.

3.0 DISCUSSION

[4] **3.1 Background**—The applicant complained to the Manager about inappropriate conduct with respect to how certain instructors treated her during an educational retreat as part of the Integrative Energy Healing Program. The complaint was that some of her instructors ignored her, while another made a negative comment about witches that offended the applicant because she practiced what she described as Wicca. The Manager interviewed all of the instructors involved as part of an investigation into the complaint. The instructors provided the Manager with details of their conversations with the applicant, from which the Manager concluded that it was the applicant, rather than the instructors, who had been behaving inappropriately. The Manager presented her findings to the Dean of Continuing Studies. The Dean subsequently instructed the Manager to tell the applicant that her participation in the program was terminated for breaching the College’s code of conduct policy. The applicant appealed the expulsion. The President of Langara College reviewed the decision and determined that the investigation was flawed. The President reinstated the student and initiated a new investigation that ultimately overturned the Manager’s decision. The finding of the final investigation was that neither the applicant nor any of the instructors had breached the code of conduct policy.¹

[5] **3.2 Records in Dispute**—The records consist mostly of notes of conversations the applicant had with the instructors in the program and one she had with the Manager. The instructors and the Manager created these records to assist the Manager in her investigation of the complaint that the applicant made against the instructors. Most of the information consists of almost verbatim accounts of what the applicant said to the instructors and what they said to the applicant in response. The records document very little other than what the applicant said, heard or saw during the interactions, although there is some information about what the instructors thought about the applicant and what the instructors said to each other.

¹ Langara College’s initial submission, paras. 4-14; Applicant’s initial submission, paras. 1-14 and Exhibit A.

[6] **3.3 Harm to Personal Privacy**—The relevant provisions of s. 22 in this case are as follows:

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,
...
- (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if ...
- (d) the personal information relates to employment, occupational or educational history ...
- (h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation ...

[7] Numerous orders have considered the application of s. 22 and the principles for its application are well established.² I have applied those principles here without repeating them.

Whose personal information is it?

[8] The records consist almost entirely of the personal information of the applicant and third party instructors, administrators, and students, much of it intermingled. For the purpose of this analysis, I have divided this personal information into four categories:

1. Personal information solely about the applicant.

[9] There is a small amount of personal information solely about the applicant. Section 22 does not apply to this information.

2. The opinions of third parties about the applicant.

[10] There is a small amount of information that falls within the category of an opinion or comment that a third party has expressed about the applicant. This is

² See for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56 and Order 00-18, [2000] B.C.I.P.C.D. No. 21.

separate from the accounts of conversations and events in which the applicant and third party participated. Adjudicator Francis held in Order F06-11 that opinions and comments about an individual are the personal information of the individual.³ The only issue with respect to this information is whether the disclosure to the applicant of the identity of the third party, who expressed the opinion in the record, would be an unreasonable invasion of the third party's personal privacy.

3. Accounts of conversations and actions involving the applicant and third parties.

[11] Most of the information at issue consists of the accounts by third parties of conversations with the applicant. In most cases, the conversations are documented with the actual words that the parties spoke identified in quotations marks. In that sense, the records resemble transcripts of the conversations. These records also describe the actions of the applicant and third parties. It is possible to segregate some of the information about the applicant from the information about the third parties. In some cases, the information is so intertwined that it cannot be separated. I will refer to this information as joint personal information. Order F06-11 confirmed that in cases where there is personal information that is shared between an applicant and a third party, the public body has the burden of proof with respect to the application of s. 22(1) to an applicant's own personal information.⁴ With respect to this joint personal information, it is necessary to determine whether disclosure of the information would be an unreasonable invasion of third-party privacy.

4. Personal information solely about the third parties.

[12] There is a small amount of personal information that is solely about the staff and students of Langara College or the applicant's mother, who attended a meeting between the applicant and the Manager. This information is not connected in any way to the applicant. With respect to this information, it is necessary to determine whether disclosure would be an unreasonable invasion of these individuals' privacy.

[13] Having determined that the information in categories 2, 3 and 4 is the only personal information involving third parties, I now move to the application of s. 22 to those categories.

[14] As none of the factors in s. 22(4) of FIPPA applies in this case, I will turn to s. 22(3) to determine whether disclosure would be presumed to be an unreasonable invasion of privacy.

³ [2006] B.C.I.P.C.D. No. 18, para. 41.

⁴ Order F06-11, paras. 77-79; Order No. 330-1999, [1999] B.C.I.P.C.D. No. 43.

Does information in the records constitute the instructors' employment history and/or the students' educational history?

[15] A key factor in this case is that the third-party instructors are employees of the public body. In most cases, records that employees of public bodies create during the course of fulfilling their job functions do not constitute their employment history. Previous orders have held, however, that information in records created as part of a workplace investigation involving an employee does constitute the employee's employment history.⁵

[16] Langara College argues that, as the information was collected as part of a workplace investigation into the conduct of the instructors, it constitutes the employment history of those instructors exclusively. It describes the records as consisting of workplace interactions between the applicant and the instructors. It argues that the "entirety of all of the records should not be disclosed because they relate to the Third Parties' employment history".⁶ In this case, I agree that the information that is solely about the instructors consists of their employment history. Section 22(3)(d) therefore applies to the information as it relates to the instructors and disclosure of such third-party personal information is presumed to be an unreasonable invasion of the personal privacy of the instructors

[17] There is information in the records about other students. This information constitutes their educational history, because it discloses information about their participation in particular college courses. Section 22(3)(d) applies to this information as well and its disclosure is presumed to be an unreasonable invasion of the personal privacy of the students.

[18] In addition, the joint personal information in the accounts of the conversation and actions of the instructors and the applicant is both the employment history of the instructors and the educational history of the applicant and the other students mentioned in the records. Section 22(3)(d) therefore applies to the information as it relates to the instructors and disclosure of such third-party personal information is presumed to be an unreasonable invasion of the personal privacy of the instructors and the students.

[19] Langara College has also applied s.22(3)(d) to a comment by the Manager to the effect that she knew nothing about an issue that the applicant had raised relating to her complaint. Langara College claimed that this was the Manager's educational history. I disagree. Educational history is about what programs and courses an individual took and what institution they attended. I see nothing in the comment that would reflect this. The comment is the Manager's personal information, but it does not constitute educational history. Section 22(3)(d) does not apply to this information.

⁵ See for example, Order 04-33, [2004] B.C.I.P.C.D. No. 34, paras. 20-25.

⁶ Langara College's initial submission, para. 20.

Does information in the records constitute confidential personal recommendations or evaluations, character references or personnel evaluations?

[20] In support of its position that s. 22(3)(h) applies to the records, Langara College cites the finding of Commissioner Flaherty in Order No. 131-1996.⁷ He found that this provision is applicable in a college or university setting where an instructor makes a confidential personal evaluation of a student that is analogous to a personal evaluation of an employee in an employment setting. Langara College does not explain, however, how this applies to the records in dispute.⁸

[21] While I agree with Commissioner Flaherty that s. 22(3)(h) can apply in an academic environment with respect to comments made in confidence by instructors about their students, it does depend on the nature of those comments. Commissioner Loukidelis established the principles for the application of s. 22(3)(h) and s. 22(3)(g) in several orders.⁹ His comments on s. 22(3)(g) are relevant to the analysis of s. 22(3)(h) because the two provisions use the same terminology with respect to personal evaluations, recommendations, or character references. He found that for the information to be considered a personal evaluation there must be a formal evaluation of an individual's performance. In Order 01-07, he held:

The witness statements themselves - as recorded in the interview notes or in the reports themselves - are not evaluations within the meaning of s. 22(3)(g). The witnesses' statements of fact are not evaluative material, which is what I conclude the Legislature intended to cover under this section.

[22] In Order 01-53, he found that the information in dispute did not constitute personal evaluations, recommendations or character references because:

They contain, rather, various parties' statements, or evidence, as to facts relevant to the applicant's specific allegations against the third party in relation to a complaint under the collective agreement. They are along the lines of 'she said this' or 'she did that', and are not the kind of evaluative material or recommendations contemplated by s. 22(3)(g).

[23] He found the same with respect to allegations that one party made about another:

They are hardly recommendations or evaluations of a kind contemplated by that section. Even though the allegations in some sense convey the

⁷ [1996] B.C.I.P.C.D. No. 59.

⁸ Langara College's initial submission, paras. 24-26.

⁹ See for example Order 01-53, [2001] B.C.I.P.C.D. No. 56, paras. 44-47; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order 00-53, [2000] B.C.I.P.C.D. No. 57; Order 00-44, [2000] B.C.I.P.C.D. No. 48.

applicant's view of the third party's workplace behaviour, they do not constitute evaluative material as intended by s. 22(3)(g).

[24] Most of the information in the records consists of accounts of conversations or factual observations of the actions of the applicant, similar to those Commissioner Loukidelis described above. This factual information does not constitute personal evaluations as past orders have interpreted this term. There are a couple of comments about what the instructors thought the applicant's state of mind was at a particular time, but they also do not constitute personal evaluations. The Manager did not ask the instructors to provide her with a personal evaluation, recommendation or character reference of the applicant. She did not ask for an assessment of the applicant's academic performance. She merely asked them to respond to the applicant's concerns and provide comments on her conduct at the retreat.

[25] Therefore, I find that s. 22(3)(h) does not apply in this case.

[26] I will now turn to the relevant considerations to determine whether any rebut the presumption of unreasonable invasion of third-party privacy.

Was the information provided in confidence?

[27] There is some dispute over whether the instructors provided their evaluations in confidence. The instructors have all provided affidavits to the effect that the Manager indicated that she would treat the information they supplied in confidence and not disclose it to anyone other than the Dean. This means that they believed that the information would not be disclosed to the applicant. The applicant contends that, according to College policy, the copies of the complaint and witness statements must be provided to the respondent. The applicant concludes that there can be no expectation of confidence with respect to these documents.¹⁰

[28] Langara College replies that its policy on code of conduct investigations is not relevant in this case because the investigation was informal, but apparently still conducted in confidence. It submits that the:

[i]Investigation was not a formal investigation conducted in accordance with Langara's policy regarding conducting investigations. [The Manager] did not receive a formal written complaint from [the applicant] or her mother. Rather, in their meeting on ... the Applicant and her mother expressed certain concerns to [the Manager], and [the Manager] assured them that she would look into these concerns, which she did. In investigating these concerns, [the Manager] asked the instructors to provide their observations regarding their interactions with the Applicant during the Retreats and assured them that their statements would be kept confidential.¹¹

¹⁰ Applicant's initial submission, para. 30.

¹¹ Langara College's reply submission, para. 11.

[29] Langara College adds:

In any event, [the Manager] was not investigating a complaint against the Applicant. The Applicant was not a Respondent to any complaint and the College was not required to provide her with a copy of any witness statements.¹²

[30] Whether the Manager ought to have conducted this investigation under the College policy is not for me to determine. The fact was she did not. She also gave the instructors assurances of confidentiality.

[31] I find the information the instructors provided to the Manager was supplied in confidence. Section 22(2)(f) therefore applies to this information. This consideration weighs against disclosure.

Applicant's awareness of personal information

[32] The key consideration about the information in dispute is that the vast majority of it consists of factual accounts of conversations between the applicant and the instructors and the instructors' observations of the actions of the applicant and third parties in the presence of the applicant. The applicant is already aware of this information because she participated in the conversations and the actions. Most of the information can be disclosed to her without revealing anything about the instructors or other students that is confidential or otherwise unknown to her. This consideration argues strongly in favour of disclosure.

Information previously disclosed to the applicant

[33] Furthermore, much of the information withheld from the applicant in response to the request was disclosed to the applicant in two letters from the President to the applicant in which the President described the results of the final investigation and invited her to comment.¹³ These letters quote numerous extensive passages from the accounts that the instructors provided to the Manager (as part of the original investigation) and the letters identify those instructors. Therefore, the applicant has already received much of the detail and most of the substance of the records that Langara College has refused to disclose in response to her FIPPA request. The remaining information is similar in character to the information already disclosed. These considerations argue strongly in favour of disclosure.

Would disclosure be an unreasonable invasion of privacy?

[34] The key point with most of the information at issue is that the applicant is already aware of it through participating in the discussions and actions and

¹² Langara College's reply submission, para. 20(b).

¹³ Langara College's reply submission, Exhibit A.

having received significant excerpts of the records at issue from the President of Langara College. I find that, even though some of the information was supplied in confidence and consists of the educational history of students and the employment history of instructors, disclosure of the personal information of the third parties that she already knows would not be an unreasonable invasion of the personal privacy of these third parties. Section 22(1) of FIPPA does not require the Ministry to withhold this type of information. I find that s. 22(1) also does not apply to the comment by the Manager to the effect that she knew nothing about an issue that the applicant had raised that related to her complaint.

[35] However, there is information in the records that is about the instructors only and information about another student only, of which the applicant is not already aware. The applicant has not rebutted the presumption in this case and I find that disclosure of this information would be an unreasonable invasion of the personal privacy of these third parties.

[36] As Langara College has applied s. 22(1) correctly to some information but not to other information, I have highlighted in yellow for the Ministry the third-party personal information it must continue to withhold, so that the remainder may be disclosed.

4.0 CONCLUSION

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

1. Subject to paragraph # 2 below, I require Langara College to refuse to disclose, in accordance with s. 22(1), the information in the requested record, as highlighted in yellow in copies provided to the Langara College with a copy of this order
2. I require Langara College to disclose the remaining information to the applicant.
3. I require Langara College to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before May 18, 2010 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

April 1, 2010

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

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