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COMMISSIONER  
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Order F14-52

## THOMPSON RIVERS UNIVERSITY

Celia Francis  
Adjudicator

December 18, 2014

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**Summary:** A professor at Thompson Rivers University requested records of the committee that considered his application for a promotion. The adjudicator found that all of the records were assembled for and integral to the committee's deliberations, that they consisted of advice or recommendations and that s. 13(1) therefore applied to them.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act* (FIPPA), s. 13(1).

**Authorities Considered: B.C.:** Order F07-17, 2007 CanLII 35478 (BC IPC); Order 01-15, 2001 CanLII 21569 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC); Order F13-09, 2013 BCIPC 10 (CanLII); Order 02-50, 2002 CanLII 42486 (BC IPC).

**Cases Considered:** *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII); *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII); *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC).

## INTRODUCTION

[1] A professor at Thompson Rivers University ("TRU") requested access to records about his application for promotion for the period September to November of a specific year. His request encompassed emails and documents sent to and from departmental promotion committee members, including

references that three individuals from other universities (“external referees”) had provided.

[2] TRU told the professor it had located 125 records and was disclosing 44 of them to him in full. It said it was withholding the other 81 records under ss. 13(1) (advice or recommendations), 17(1) (harm to public body’s financial interests) and 22(1) (third party privacy) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[3] The professor requested a review by the Office of the Information and Privacy Commissioner (“OIPC”) of TRU’s decision to deny him access to the 81 records. He noted that the 44 records TRU had disclosed to him were all correspondence he had either sent or received. He said that the 81 withheld records included the three reference letters he had specifically requested. He questioned why he could not receive the reference letters, when TRU had quoted from them in a recommendation to TRU’s Senate Promotion Committee.

[4] Mediation by the OIPC did not resolve the request for review and an inquiry under FIPPA took place. The OIPC received initial and reply submissions from the professor and TRU.

## **ISSUES**

[5] The issues in this case are as follows:

1. Is TRU authorized by ss. 13(1) and 17(1) of FIPPA to withhold information?
2. Is TRU required by s. 22(1) of FIPPA to withhold information?

[6] Under s. 57 of FIPPA, TRU has the burden of proof respecting ss. 13(1) and 17(1), while the professor has the burden regarding s. 22(1).

## **DISCUSSION**

### ***Background***

[7] Under the Collective Agreement between TRU and its Faculty Association (“Collective Agreement”), a candidate’s application for promotion goes first to the appropriate departmental promotion and tenure committee (“DPT Committee”) for consideration. The DPT Committee identifies appropriate committee members to consider each candidate’s promotion application. At least two members of the DPT Committee (“area specialists”) must be from the candidate’s discipline.<sup>1</sup>

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<sup>1</sup> The Collective Agreement provides for the selection of other qualified faculty, if sufficient suitable faculty from the candidate’s department or division are not available; Article 6.4.4(c).

[8] The DPT Committee also obtains and considers references (“reference letters”) from three external referees for each candidate. A majority of the external referees who provide the reference letters must be drawn from a list the candidate provides to the DPT Committee chair. In addition to the reference letters, the DPT Committee considers and assesses the candidate’s application materials according to certain criteria.

[9] The DPT Committee must invite the candidate to meet with it and the candidate may decide whether or not to accept this invitation. The DPT Committee must then consider its recommendation *in camera*.<sup>2</sup> If the DPT Committee determines that its recommendation will be to deny promotion, it must invite the candidate to meet with it about its concerns.

[10] The DPT Committee then prepares a reporting letter, recommending whether or not to grant a promotion to the candidate. The reporting letter must include reasons for the DPT Committee’s recommendation. Where the recommendation is not to grant promotion, the reasons in the reporting letter are to be “substantive”, are to pertain to the relevant criteria and standards and “shall include enough particulars to enable the Member [the candidate] to know the basis for the recommendation”.<sup>3</sup> The candidate receives a copy of the reporting letter.

[11] The DPT Committee’s reporting letter goes to the TRU Senate Promotion and Tenure Committee (“SPT Committee”), along with the reference letters and other documentation, for its review and consideration. The SPT Committee then provides its recommendation on the promotion application to TRU’s President, along with the reference letters and other documentation on the candidate. The President then provides his recommendation to TRU’s Board of Governors which makes and communicates the final decision about the candidate’s application for promotion.

[12] The professor (the applicant in this case) is a tenured faculty member at TRU who was unsuccessful in his application for promotion. In late November of the year he applied for promotion, the professor received a copy of the DPT Committee’s reporting letter to the SPT Committee recommending that his application for promotion be denied. It was at this point he submitted his FIPPA request.<sup>4</sup>

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<sup>2</sup> Article 6.4.5, Collective Agreement. If the candidate has attended this meeting, he or she must withdraw before the DPT Committee begins to consider its recommendations *in camera*.

<sup>3</sup> Article 6.4.7, Collective Agreement.

<sup>4</sup> Background drawn from paras. 22-30 of TRU’s initial submission, paras. 3-13, Scherf affidavit, and Articles 6.4 to 6.6 of the Collective Agreement, Exhibit B, Scherf Affidavit.

**Records in dispute**

[13] The records in issue in this case comprise the following:

- three reference letters (records 45-47)
- handwritten notes of DPT Committee members and emails among Committee members and others (records 48-125)

[14] I discuss the records in more detail below.

**Section 13(1) – Advice or recommendations**

[15] TRU argued that s. 13(1) applies to all of the 81 withheld records and that ss. 17(1) and 22(1) apply to portions of them. I will begin by considering s. 13(1) as, if I find that it applies to all 81 withheld records, the matter ends there.

[16] Section 13(1) is a discretionary exception. It says that 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.

[17] Section 13(2) of FIPPA states that a public body may not refuse to withhold certain types of information under s. 13(1). The relevant provisions in this case are s. 13(2)(a) (“any factual material”) and s. 13(2)(d) (“an appraisal”).

[18] Numerous orders have considered the application of s. 13(1) of FIPPA, for example, Order F07-17,<sup>5</sup> where Adjudicator Boies Parker stated that:

[18] In making a determination regarding s. 13, a public body must first determine whether the material fits within the scope s. 13(1). If it does, the public body must then go on to determine whether the material falls within any of the categories set out in s. 13(2). If the records at issue are caught by one of the categories under s. 13(2), the public body must not refuse disclosure under s. 13(1). If the public body determines that the material falls within s. 13(1) and is not caught by any of the s. 13(2) categories, the public body must then decide whether to exercise its discretion to refuse disclosure.

**Standard for applying s. 13(1)**

[19] Many orders and court decisions have considered the purpose, interpretation and application of s. 13(1), for example, Order 01-15.<sup>6</sup>

<sup>5</sup> Order F07-17, 2007 CanLII 35478 (BC IPC).

<sup>6</sup> Order 01-15, 2001 CanLII 21569 (BC IPC), at para. 22.

[20] Evans J considered the purpose of the equivalent federal provision and the distinction between “advice” and “recommendations” in *3430901 Canada Inc. v. Canada (Minister of Industry)*<sup>7</sup> (“Telezone”):

[50] ... by exempting “advice and recommendations” from disclosure, Parliament must be taken to have intended the former to have a broader meaning than the latter, otherwise it would be redundant.

[51] In addition, the exemption must be interpreted in light of its purposes, namely, removing impediments to the free and frank flow of communications within government departments, and ensuring that the decision-making process is not subject to the kind of intense outside scrutiny that would undermine the ability of government to discharge its essential functions. [citations omitted]

[52] On the basis of these considerations, I would include within the word “advice” an expression of opinion on policy-related matters, but exclude information of a largely factual nature, ....

[21] The leading case in BC on s. 13(1) is *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*<sup>8</sup> (“*College of Physicians*”), which dealt with whether expert opinions constituted advice or recommendations. The Court there expressed its view on the purpose and scope of s. 13(1):

[105] In my view, s. 13 of the **Act** recognizes that some degree of deliberative secrecy fosters the decision-making process, by keeping investigations and deliberations focussed on the substantive issues, free of disruption from extensive and routine inquiries. ...

[106] ... the deliberative process includes the investigation and gathering of the facts and information necessary to the consideration of specific or alternative courses of action. ...

...

[113] ... [advice] should be interpreted to include an opinion that involves exercising judgment and skill to weigh the significance of matters of fact. In my opinion, “advice” includes expert opinion on matters of fact on which a public body must make a decision for future action.

[22] More recently, the BC Supreme Court referred to *College of Physicians* in considering the purpose and scope of s. 13(1) in *Insurance Corporation of British Columbia v. Automotive Retailers Association (ICBC)*<sup>9</sup>:

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<sup>7</sup> *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC), (leave to appeal denied June 13, 2002, [2001] S.C.C.A. No. 537). Former Commissioner Loukidelis referred to this discussion in Order 02-38, 2002 CanLII 42472 (BC IPC), at para. 116.

<sup>8</sup> 2002 BCCA 665.

<sup>9</sup> 2013 BCSC 2025. See also para. 23 for reference to *College of Physicians*.

[52] ... the purpose of s. 13(1) is to prevent harm that would occur if a public body's deliberative process was exposed to public scrutiny. Hence, documents created as part of a public body's deliberative process are protected from disclosure under s. 13(1) regardless of whether they contain or use background facts necessary to the analysis. The background facts in isolation are not protected. Disclosure of them can be requested in the usual way. Section 13(2) expressly requires the disclosure of "factual material". But where that factual material is assembled from other sources and becomes integral to the analysis and views expressed in the document that has been created, the assembly is part of the deliberative process and the resulting work product is clothed with the same protection as the opinions or advice themselves. Otherwise disclosure of the facts that have been assembled would allow an accurate inference to be drawn as to advice or recommendations developed by or for the public body.<sup>10</sup>

[23] In arriving at my decision on s. 13(1), I have considered the principles for applying s. 13(1) as set out in the court decisions and orders cited above, as well as others I discuss below.

*Professor's submissions on s. 13(1)*

[24] The professor's principal argument is that the process that TRU used to assess his promotion for application was "faulty". This was so, he argued, because, among other things:

- he was assessed according to criteria that he considered did not apply to him
- TRU used a "secret" process to evaluate his application
- the DPT Committee violated the Collective Agreement in its selection of the external references and "area specialists" who were not, in his view, "true peers"
- although, in his view, he met and exceeded the criteria, he was denied promotion

[25] The professor argued that the DPT Committee's recommendation "created a heavy bias" against his application and, when it was finally denied, he was told there were no grounds for appeal. The professor argued that TRU is using secrecy to protect a "bad decision" and its "flawed" process. In the professor's view, TRU should disclose the records to demonstrate good faith and promote fairness, accountability and transparency.<sup>11</sup>

[26] I make no comment on the professor's allegations regarding the supposed flaws in TRU's promotion process as it applied to him. I accept that he feels

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<sup>10</sup> ICBC, at para. 51

<sup>11</sup> Pages 1-2, professor's initial submission; pages 2, 3, 37, professor's reply.

aggrieved by the way his application was assessed and denied, but this is not something I have any authority to deal with. My task here is to decide whether s. 13(1) applies, in whole or in part, to the records in dispute. I note parenthetically that TRU said that, whether or not the professor could have appealed the decision to deny him promotion, he could have grieved it under Article 4 of the Collective Agreement.<sup>12</sup> There is no indication in the material before me that he did so.

[27] Turning to s. 13(1), the professor argued that the terms “advice” and “recommendations” must involve an action and do not include an opinion, a discussion of an issue or reasons for advising an action. He suggested that s. 13(1) applies to matters of creating public policy, whereas the processing of his application for promotion was determining the facts, that is, whether he met the specified criteria for promotion. He suggested further that the records in dispute may reveal whether TRU went “out of bounds” in assessing his application<sup>13</sup> and might also reveal that there was an “internal disagreement” within the DPT Committee about his application.<sup>14</sup>

*TRU’s submissions on s. 13(1)*

[28] TRU argued that the withheld records were created as part of the DPT’s deliberative and decision-making process regarding the professor’s application for promotion. TRU said that the process in this case included:

- the assembly of records
- the investigation and gathering of facts and information
- internal communications on these two things, as well as on procedural matters that arose and on the decisions to be made, including: options; reasoning; evaluations or characterization of material the DPT Committee was considering; and advantages or disadvantages of different decisions, including drafts of any evaluations, analysis, advice or the decision itself<sup>15</sup>

[29] TRU argued that the courts have “consistently” taken a broad view of the deliberative process and have “clearly found” that s. 13(1) applies to all records created for and part of a deliberative process. In TRU’s view, this involves the development and formulation of advice or recommendations for a public body, even if the records only reflect the assembly of factual information, set out background information or identify areas of risk to be considered in the deliberative process.

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<sup>12</sup> Paragraphs 5 & 8, TRU’s reply.

<sup>13</sup> Page 7, professor’s initial submission.

<sup>14</sup> Pages 3, 12, 14-22, professor’s reply.

<sup>15</sup> Paragraph 17, TRU’s initial submission.

[30] TRU also rejected the professor's allegations of secrecy, noting he was given reasons (in the reporting letter) as to why the DPT Committee found that his application for promotion met two of the specified criteria but not the third.

*Application of s. 13(1) to records in dispute*

**The reference letters**

[31] The reference letters (Records 45 to 47) are from three external referees. The material before me (e.g., Records 56, 91a) indicates that the DPT Committee took care to ensure the three external referees had the appropriate qualifications to assess the professor's application for promotion. I accept that TRU selected the three referees on the basis of their expertise in their field.

[32] In their reference letters, the external referees reviewed and analyzed the professor's application materials in the three areas in which he was being assessed. They also evaluated the merits of his work in these areas, provided their opinions as to whether or not the professor met the relevant criteria and made recommendations as to whether or not his application for promotion should be approved. In my view, the three reference letters consist of opinions that involved the exercise of skill and judgement by the external referees to weigh the significance of matters of fact (that is, the professor's academic work, service to TRU and teaching) and their merit in the context of his application for promotion.

[33] It is also clear that the reference letters were developed for TRU and that both the DPT Committee and the SPT Committee considered the reference letters during their deliberations on the professor's application for promotion. For example, references to the letters in the DPT Committee members' notes (e.g., Records 50a, 50b) and emails (e.g., Records 99-101) show that the DPT Committee considered the reference letters during its deliberations. The DPT Committee's reporting letter to the Chair of the SPT Committee referred to some of the external referees' evaluative comments and attached copies of the reference letters for the SPT Committee's review. The three reference letters were also among the materials that TRU's president received from the SPT Committee in order to consider and make recommendations on the professor's application.<sup>16</sup> The reference letters were, in my view, an integral and critical part of the chain of deliberations on the professor's application for promotion that started with the DPT Committee and ended with the Board of Governors.

[34] I agree with TRU that the three reference letters "fall squarely" under *College of Physicians*. The information in the reference letters is the external referees' expert opinions and the facts and information gathered for those opinions were developed to advise and recommend to TRU about whether or not

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<sup>16</sup> Paragraph 5, Scherf affidavit.

to promote the professor. In my view, this is the type of information described in *College of Physicians*.

[35] I recognize that the professor is of the view that s. 13(1) should not apply to his personal information.<sup>17</sup> However, it is clear that s. 13(1) may apply to an access applicant's own personal information. See, for example, Order F13-09, which found that s. 13(1) applied to emails on potential discipline of the applicant.<sup>18</sup> *College of Physicians* also found that s. 13(1) applied to the applicant's personal information.<sup>19</sup>

[36] I am satisfied that the information in the three reference letters consists of advice or recommendations, as past orders and court decisions have interpreted these terms. For reasons given above, I find that s. 13(1) applies to them.

### **Remaining records**

[37] In my view, the information in the rest of the records (Records 48-125) also consists of advice or recommendations, for the purposes of s. 13(1), as follows:

- emails among the DPT Committee members and other TRU employees, which concern procedural matters, such as: the assembly of appropriate materials for the professor's application for promotion; how the committee would proceed; how Committee members were to conduct themselves with respect to the confidentiality of the promotion process; and on appropriate ways of assessing the candidates for promotion, including with regard to the Collective Agreement's requirements
- annotated copies of materials the professor submitted as part of his application, which reflect the DPT Committee members' analysis and evaluation of these materials
- emails which concern the identification of appropriate area specialists and external referees
- emails about issues and concerns the professor raised about the promotion process (*e.g.*, whether or not a particular area specialist should be on the DPT Committee) and which consist of advice or recommendations on formulating responses to the professor on these matters
- emails on the drafting of communications, such as the DPT Committee's reporting letter to the Chair of the SPT Committee, which consist of advice or recommendations on the content of the reporting letter

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<sup>17</sup> Page 7, professor's initial submission.

<sup>18</sup> Order F13-09, 2013 BCIPC 10 (CanLII), at para. 14.

<sup>19</sup> At para. 115.

- the DPT Committee members’ handwritten notes, which reflect their analysis and evaluation of, and deliberations on, the three reference letters and the professor’s application materials

[38] These records were assembled for, were an integral part of and were critical to the DPT Committee’s confidential deliberations on the professor’s application for promotion. They are like the “internal dialogue” found to fall under s. 13(1) in Order F13-09.<sup>20</sup>

[39] I find support for this finding in *Telezone* where the Court found that a working group’s internal notes were “advice”, even though they did not go to a decision-maker, because they were an integral part of the deliberative process. In that case, information on options, issues and decisions needed was also found to be “advice”.<sup>21</sup> As for the records related to the drafting of the DPT Committee’s final recommendations and other communications, I find that they were an integral part of TRU’s deliberative process and are advice or recommendations, consistent with the Supreme Court of Canada discussion of advice and recommendations in *John Doe v. Ontario (Finance)*.<sup>22</sup> For these reasons, I find that s. 13(1) applies to Records 48-125 as well.

### **Section 13(2)**

[40] Having concluded that s. 13(1) applies to all of the information in dispute, I must now determine if any parts of s. 13(2) apply to the information.

#### *Factual material – s. 13(2)(a)*

[41] The professor argued that s. 13(2) says that “factual material” does not fall under s. 13(1). He said that the processing of his application for promotion was largely a matter of determining facts, that is, whether his application met certain criteria.<sup>23</sup>

[42] I could find no explicit mention of s. 13(2) in TRU’s submissions. I gather however that it considers that any “factual material” cannot reasonably be separated from the rest of the information.

[43] In my view, any factual material in the records has been compiled or assembled as part of the deliberative process. It is intertwined with, and integral to, the analytical and evaluative information, such that it cannot reasonably be severed from the deliberative information or cannot be disclosed without allowing

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<sup>20</sup> At para. 14.

<sup>21</sup> *Telezone*, at para. 60.

<sup>22</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII) at paras. 61-70, TRU’s initial submission; paras. 16-25, Scherf affidavit.

<sup>23</sup> Page 7, professor’s initial submission.

an accurate inference to be drawn about advice or recommendations developed by or for TRU.

*An appraisal – s. 13(2)(d)*

[44] The applicant made a passing reference to the fact that “appraisals” cannot be withheld under s. 13(1) but did not expand on this idea.

[45] Few BC Orders have dealt with the term “appraisal” in s. 13(2)(d). Order F07-17<sup>24</sup> said this about it, however:

[35] ... An examination of other sections of FIPPA suggests that “appraisal” does not refer to assessments of an employee’s skills or performance evaluations. ...

[46] If the professor is suggesting that the records contain an “appraisal” of him, I disagree, for the reasons set out above, in Order F07-17.

***Exercise of discretion***

[47] As I noted above, s. 13(1) is a discretionary exception. Thus, having concluded that certain information is “advice or recommendations”, public bodies must nevertheless exercise their discretion in deciding whether or not to disclose requested information, having regard for the relevant factors.

[48] TRU said it exercised its discretion in deciding whether or not to disclose some or all of the records in dispute. It considered relevant factors such as TRU’s past practice regarding these types of records, the nature and sensitivity of the records, the expectations of confidentiality of third parties and the potential negative effect on the integrity of TRU’s promotion and tenure process. TRU concluded that it would not exercise its discretion in favour of disclosing the records.<sup>25</sup>

[49] Having regard for past orders on this topic,<sup>26</sup> I find that TRU exercised its discretion properly in deciding not to disclose the records in dispute. In arriving at this conclusion, I have borne in mind the DPT Committee Chair’s evidence, including on the following: her views on the importance of protecting the integrity and strength of a university’s tenure and promotion process; her experience with the “blind peer review” process at TRU and other universities;<sup>27</sup> the assurances

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<sup>24</sup> Order F07-17, 2007 CanLII 35478 (BC IPC).

<sup>25</sup> Paragraph 70, TRU’s initial submission; para. 27, Scherf affidavit.

<sup>26</sup> See, for example, Order 02-50, 2002 CanLII 42486 (BC IPC), at paras. 142-151, where former Commissioner Loukidelis discussed the exercise of discretion and concluded that the public body in that case had exercised its discretion properly.

<sup>27</sup> Paragraphs 28-30, Scherf affidavit.

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of confidentiality she gave to the three external referees; and the importance of protecting the confidentiality of the peer review and promotion processes.<sup>28</sup>

**Conclusion on s. 13(1)**

[50] I have found that s. 13(1) applies to all of the records in dispute and that s. 13(2) has no application. I have also found that TRU exercised its discretion appropriately in deciding not to disclose the records in dispute.

[51] Because I have found that s. 13(1) applies to all of the records in dispute, I need not consider whether ss. 17(1) and 22(1) apply as well.

**CONCLUSION**

[52] I confirm that TRU is authorized by s. 13(1) to refuse the professor access to all of the records in dispute.

December 18, 2014

**ORIGINAL SIGNED BY**

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Celia Francis, Adjudicator

OIPC File No.: F13-52050

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<sup>28</sup> Paragraphs 10 & 12-13, Scherf affidavit.