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Order F17-51

UNIVERSITY OF BRITISH COLUMBIA

Celia Francis
Adjudicator

November 6, 2017

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant requested records related to communications strategies regarding the Canadian International Resources and Development Institute (CIRDI). The University of British Columbia (UBC) disclosed the records in severed form, withholding information under s. 13(1) (advice or recommendations) and s. 22(1) (harm to third-party personal privacy) of FIPPA. The adjudicator confirmed UBC's decision regarding s. 13(1). The adjudicator also found that s. 22(1) applied to some information and ordered UBC to disclose other information to which s. 22(1) does not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 22(1), 22(2)(e), (f), (g) and (h).

Authorities Considered: BC: Order F15-03, 2015 BCIPC 3 (CanLII); Order F05-30, 2005 CanLII 32547 (BC IPC); Order 03-24, 2005 CanLII 1196 Order 01-15, 2001 CanLII 21569 (BC IPC), 4 (BC IPC); Order F10-41, 2010 BCIPC No. 61; Order F15-14, 2015 BCIPC 14 (CanLII); Order F15-60, 2015 BCIPC 64 (CanLII); Order F16 32, 2016 BCIPC 35 (CanLII); Order F15-52, 2015 BCIPC 55 (CanLII).

Cases Considered: *John Doe v. Ontario (Finance*), 2014 SCC 36; *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665.

INTRODUCTION

[1] In late 2015, an applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the University of British Columbia (UBC) for access to a number of records regarding the Canadian International Resources and Development Institute (CIRDI). UBC responded by disclosing some information. It withheld most of the information under s. 13(1) (advice or recommendations). It applied s. 22(1) (unreasonable invasion of third-party personal privacy) to a small amount of information.

[2] The applicant requested a review of UBC's decision by the Office of the Information and Privacy Commissioner (OIPC). Mediation by the OIPC did not resolve the issues and the matter proceeded to inquiry. The OIPC invited submissions from both UBC and the applicant. Only UBC made a submission.

[3] The records show that UBC applied s. 14 (solicitor client privilege) to one sentence.[1] This issue was not listed in the notice for this inquiry. The OIPC asked the applicant if he disputed UBC's decision to refuse access to this sentence under s. 14 but he did not respond. I conclude that the applicant does not dispute this severing and that s. 14 is therefore not at issue here.

ISSUES

[4] The issues before me are whether UBC is authorized by s. 13(1) and required by s. 22(1) to withhold information from the applicant. Under s. 57(1) of FIPPA, UBC has the burden of proof regarding s. 13(1). Under s. 57(2), it is up to the applicant to prove that disclosure of personal information would not be an unreasonable invasion of third-party personal privacy.

DISCUSSION

Information in dispute

[5] The information in dispute is contained in 205 pages of records. UBC withheld most of the disputed information under s. 13(1), including communications strategies and media plans, "key message" documents, issues management strategies and a strategy to address student activists. UBC also applied s. 22(1) to withhold the names of a few individuals, their email addresses and some comments.

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[1] Page 171.

Approach to applying s. 22(1)

[6] I noted above that the applicant has the burden of proof regarding third-party personal privacy. He did not make a submission and, on this basis alone, has failed to meet his burden of proof. However, s. 22(1) is a mandatory exception and I will, therefore, consider whether it applies to the information at issue.

[7] The approach to applying s. 22(1) of FIPPA has long been established. See, for example, Order F15-03:

> Numerous orders have considered the approach to s. 22 of FIPPA, which states that 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." This section only applies to "personal information" as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.[2]

[8] I have taken the same approach in considering the s. 22 issues here.

Is the information "personal information"?

[9] FIPPA defines "personal information" as recorded information about an identifiable individual, other than contact information. Contact information is defined as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."

[10] **Names and email addresses** – UBC said that the names and personal email addresses of students who wrote to UBC or CIRDI to make inquiries or express their views are personal information. UBC said that the names of other individuals, who CIRDI considered might be able to offer guidance to CIRDI, are also personal information.[3]

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[2] Order F15-03, 2015 BCIPC 3 (CanLII), at para. 58.
[3] UBC's initial submission, paras. 21-24; Affidavit of CIRDI's Governance Officer, paras. 17-21.

[11] The names and personal email addresses in question are about identifiable individuals and are not contact information. I find that they are personal information.

[12] **Comments** – The other information being withheld under s. 22 consists of comments in an issues management document prepared in late 2013 by an external consultant.[4] UBC said that these comments refer to "a limited number of professors" who had worked on CIRDI since its inception. UBC submitted that these professors were not named in the records but "it would be relatively easy to determine" to whom the consultant referred.[5]

[13] These comments date back some years and are about people collectively. UBC did not say how many professors were involved. It also did not explain, even on an *in camera* basis, how one might identify them individually. It did not, for example, provide copies of publicly available records identifying these professors as having worked on or for CIRDI at the time in question. The professors are not named anywhere in the records. From the material before me, I do not see how they are identifiable.

[14] I find that these withheld comments are not personal information. This finding is consistent with past orders which found that aggregate comments, views or opinions of or about groups of people are not personal information, because the people in question are not identifiable.[6]

Does s. 22(4) apply?

[15] Section 22(4) of FIPPA sets out a number of situations in which disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. UBC did not address this issue.

[16] There is no basis for finding that s. 22(4) applies here. The names and personal email addresses do not, for example, relate to a third party's position, functions or remuneration as an officer, employee or member of a public body (s. 22(4)(e)).

Presumed unreasonable invasion of third-party privacy – s. 22(3)

[17] The next step is to consider whether disclosure of the information in issue is presumed to be an unreasonable invasion of a third party's personal privacy. UBC did not expressly deal with this issue. I find that no s. 22(3) presumptions apply to the names and personal email addresses.

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[4] First paragraphs on pp. 67 and 68.
[5] UBC's initial submission, para. 17; Affidavit of CIRDI's Governance Officer, para. 15.
[6] For example, Order F05-30, 2005 CanLII 32547 (BC IPC), at para. 36.

Relevant circumstances – s. 22(2)

[18] In determining whether disclosure of personal information is an unreasonable invasion of third-party personal privacy under s. 22(1) or 22(3), a public body must consider all the relevant circumstances, including those set out in s. 22(2). UBC raised the relevant circumstances in s. 22(2)(e)-(h) regarding the names and personal email addresses, arguing, for example, that students should be able to express critical views about CIRDI in confidence. UBC also said that disclosure of the names could cause harm to the reputations of the individuals in question, as the applicant might rely on their names in public statements.[7]

[19] Sections 22(2)(e)-(h) read as follows:

> 22 (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
> …
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence,
>
> (g) the personal information is likely to be inaccurate or unreliable,
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, …

[20] **Supply in confidence –** The records in question (meeting minutes and emails) do not contain any markers of confidentiality. UBC's evidence did not elaborate on its assertion that the information was supplied in confidence.

[21] In the case of two of the students mentioned, the disclosed information in the records indicates that, in addition to expressing their concerns in emails to UBC and CIRDI, they also spoke about their views in CBC interviews and in open discussion forums held at UBC, in which the applicant also participated.[8] This suggests to me that these two students did not intend to supply their views in confidence in these records. There is also no evidence that the third student intended to supply his or her views in confidence.[9] I am not satisfied that s. 22(2)(f) applies here.

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[7] UBC's initial submission, paras. 19-24.
[8] Names and email addresses withheld on pages 144, 156-160, 165, 166 (first name), 171-173, 200, 201.
[9] Name and other identifying information withheld on pages 166 (bottom name), 167, 168-170.

[22] Regarding the other individuals, UBC said that they had no relationship with CIRDI at the time and were “simply identified as potential points of contact that could provide guidance to CIRDI”.[10] It is not clear if these individuals were approached or even knew that their names had been provided to CIRDI. I accept that their names were supplied in confidence for the purposes of s. 22(2)(f).[11]

[23] **Other s. 22(2) factors** – UBC did not provide sufficient argument or evidence to support its assertion that ss. 22(2)(e),(g) and (h) are relevant factors in this case. First, it is not clear how the personal information might be inaccurate or unreliable and UBC does not explain. The students are not talking about themselves but about CIRDI. The references to the other individuals (those who CIRDI thought might assist it) are straightforward. I also do not see how disclosure of the names and email addresses could expose the individuals involved unfairly to harm or cause harm to their reputations, in the way UBC suggests.

[24] **Applicant’s knowledge –** Previous orders have found that a relevant circumstance under s. 22(2) is the fact that an applicant already knows the personal information in issue. It may or may not favour disclosure, depending on the case.[12]

[25] UBC’s evidence and the disclosed information in the emails indicate that the applicant knows two of the students, that he participated in joint meetings and public discussion forums with them and that the students aired their views publicly.[13] The disclosed information also shows that the applicant was the joint recipient with these two students of meeting invitations and emails from UBC. In addition, UBC disclosed the name of one of the students in some places in the records.

Conclusion on s. 22(1)

[26] I found above that some of the withheld information is not personal information. This means that s. 22(1) does not apply to it. UBC applied no other exceptions to this information. UBC must therefore disclose this withheld information, *i.e.*, the first paragraph on each of pages 67 and 68.

[27] I found that the withheld names and personal email addresses are personal information. None of the presumptions in s. 22(3) applies to this information.

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[10] UBC’s initial submission, para. 24.
[11] Withheld names on pages 134 and 139.
[12] See, for example, Order 03-24, 2005 CanLII 11964 (BC IPC), Order F10-41, 2010 BCIPC No. 61, and Order F15-14, 2015 BCIPC 14 (CanLII).
[13] Affidavit of CIRDI’s Manager, Communications and Media Relations, para. 12.

[28] I found that the factor in s. 22(2)(f) applies to two of the names, favouring withholding this information. I also found that the factors in ss. 22(2)(e), (g) and (h) do not apply to this information. No relevant circumstances favour disclosure of this information. The applicant did not address this information and did not meet his burden of proof. I find that s. 22(1) applies to these two names.[14]

[29] I also found above that the relevant circumstances in s. 22(2)(e)-(h) do not apply to the other names and email addresses. The applicant's knowledge of the names of two of the students heavily favours their disclosure. I find that s. 22(1) does not apply to this information.[15]

[30] However, no relevant circumstances favour disclosure of the name of the third student. The applicant did not address this information and did not meet his burden of proof. I find that s. 22(1) applies to this information.[16]

Advice or recommendations – s. 13(1)

[31] Section 13(1) is a discretionary exception which 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." The courts have said that the purpose of exempting advice or recommendations is "to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice",[17] recognizing that some degree of deliberative secrecy fosters the decision-making process.[18] They have interpreted the term "advice" to include an expression of opinion on policy-related matters[19] and expert opinion on matters of fact on which a public body must make a decision for future action.[20] They have also found that advice and recommendations include policy options prepared in the course of the decision-making process.[21] Previous orders have found that a public body is authorized to refuse access to information, not only when it directly reveals

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[14] Withheld names on pages 134 and 139.
[15] Names and email addresses withheld on pages 144, 156-160, 165, 166 (first name), 171-173, 200, 201.
[16] Name and other identifying information withheld on pages 166 (bottom name), 167, 168-170.
[17] *John Doe v. Ontario (Finance*), 2014 SCC 36 [*John Doe*], at paras. 34, 43, 46, 47. The Supreme Court of Canada also approved the lower court's views in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC), that there is a distinction between advice and factual "objective information", at paras. 50-52. In Order 01-15, 2001 CanLII 21569 (BC IPC), former Commissioner Loukidelis said that the purpose of s. 13(1) is to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations.
[18] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College of Physicians*].
[19] *John Doe.*
[20] *College of Physicians.*
[21] *John Doe.*

advice or recommendations, but also when it would enable an individual to draw accurate inferences about advice or recommendations.[22]

[32] 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.

Is the severed information advice or recommendations?

[33] UBC said that the withheld information is advice or recommendations about communications issues and strategies or is information that would reveal such advice or recommendations. It said that the records include advice to CIRDI on messaging, guidance on communications strategy, “notes to draft and questions for comment”. UBC also said that some of the records were not approved, finalized or relied upon, and were abandoned, showing that they were part of the deliberative process.[23]

[34] The withheld information consists primarily of potential questions from the public CIRDI, together with suggestions on how to respond.[24] Some of the questions have no proposed answers but rather have recommendations for internal action, indicating to me that CIRDI had not completed its deliberations on how to deal with these issues. The proposed answers contain promotional messaging and are worded strategically, so as to present CIRDI’s position in the best light. A small amount of the withheld information consists of a CIRDI employee’s recommendations on how to deal with communications issues, including the concerns of student activists. Other withheld information consists of an external consultant’s opinions on internal management issues she thought CIRDI should deal with, as well as her recommendations on how to deal with them. I find that the withheld information consists of advice, opinions, implications and considerations of various communications issues CIRDI was dealing with. In my view, this withheld information consists of advice or recommendations.

By or for a public body

[35] UBC argued that the advice and recommendations were developed by or for a public body. UBC provided evidence on this issue as follows:

- CIRDI was established in 2013 as a coalition between UBC, Simon Fraser University (SFU) and École Polytechnique de Montréal (EPM) and was

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[22] See, for example, Order F15-60, 2015 BCIPC 64 (CanLII), at para. 12. See also Order F16-32, 2016 BCIPC 35 (CanLII). Order F15-52, 2015 BCIPC 55 (CanLII), also discusses the scope and purpose of s. 13(1).
[23] UBC’s initial submission, paras. 39-51; Affidavits of CIRDI’s Governance Officer and Manager, Communications and Media Relations. UBC referred here to pages 2-139 of the records in dispute. UBC did not explain why it had retained these records.
[24] There are several versions of these question and answer documents and thus considerable repetition.

implemented and funded by way of a contribution agreement between the Canadian International Development Agency (CIDA) and UBC.

- CIRDI was not created as a separate legal entity from UBC, was not legally incorporated and continues to operate as a coalition of UBC, SFU and EPM.
- CIRDI is housed in offices in Vancouver that UBC leases and CIRDI's records are housed in those offices or on UBC servers.
- CIRDI's employees are employed and paid by UBC, are subject to UBC's policies and procedures and are hired and terminated under UBC authority.[25]

[36] UBC's evidence, taken together, establishes that CIRDI is part of UBC, a public body under FIPPA. I find that the severed advice or recommendations were "developed by or for a public body".

Does s. 13(2) apply?

[37] Section 13(2) of FIPPA states that a public body may not refuse to withhold certain types of information under s. 13(1). UBC argued that s. 13(2) does not apply.[26] I agree. I find that any "factual material" is intertwined with information to which s. 13(1) applies, such that it would not be reasonable to disclose it. As such, I find that s. 13(2)(a) does not apply to the withheld information in the records. I also find that the information does not consist of any other information listed in ss. 13(2)(b)-(m).

Exercise of discretion

[38] UBC argued that it exercised its discretion properly in withholding some information under s. 13(1). It said that it disclosed some information that it had relied on publicly.[27]

[39] It is clear that UBC conducted a line by line review of the emails and that it disclosed some advice or recommendations in the records that it could technically have withheld under s. 13(1). I am therefore satisfied that UBC exercised its discretion properly in this case.

Conclusion on s. 13(1)

[40] I find that s. 13(1) applies to the information that UBC withheld under that section. I also find that s. 13(2) does not apply to this information.

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[25] UBC's initial submission, para. 50; Affidavit of UBC's CIRDI's Governance Officer; UBC's supplementary submission, paras. 3-16; Affidavit of UBC's Legal Counsel, Information and Privacy.
[26] UBC's initial submission, paras. 52-60.
[27] UBC's initial submission, paras. 61-65. Affidavit of CIRDI's Governance Officer, para. 20.

CONCLUSION

[41] For reasons given above, under s. 58(2) of FIPPA, I make the following orders:

1. Under s. 58(2)(b), I confirm that UBC is authorized to withhold the information it withheld under s. 13(1).

2. Under s. 58(2)(c), subject to para. 3 below, I require UBC to refuse the applicant access to the information it withheld under s. 22(1).

3. Under s. 58(2)(a), I require UBC to give the applicant access to the information it withheld under s. 22(1) on pages 67 and 68 and to the names and email addresses it withheld under s. 22(1) on pages 144, 156-160, 165, 166 (first name only), 171-173, 200 and 201, by December 19, 2017. UBC must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

November 6, 2017

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F16-65298