



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
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Order F15-49

UNIVERSITY OF BRITISH COLUMBIA

Elizabeth Barker
Senior Adjudicator

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Summary: UBC refused access to the rubric, criteria and scoring instructions it uses to assess the personal profiles of prospective students under ss. 3(1)(d) and 3(1)(e) (outside scope of Act), s. 13 (policy advice and recommendations) and s. 17 (harm to the financial or economic interests of a public body) of FIPPA. The adjudicator found that ss. 3(1)(d) and (e) did not apply, and the records were within the scope of FIPPA. The adjudicator also found that the information in dispute was not advice or recommendations under s. 13 and that disclosure could not reasonably be expected to harm UBC's financial or economic interests under s. 17. UBC was ordered to disclose the requested information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(d), 3(1)(e), 13, 17. *Interpretation Act*, RSBC 1996, c. 238, s. 8.

Authorities Considered: **B.C.:** Order 00-36, 2000 CanLII 14401 (BC IPC); Order 01-15, 2001 CanLII 21569 (BC IPC); Order 02-38, 2002 CanLII 42472 (BCIPC); Order F06-16, 2006 CanLII 25576 (BCIPC); Order F10-15, 2010 BCIPC 24 (CanLII); Order F10-42, 2010 CanLII 77328 (BC IPC); Order F11-17, 2011 BCIPC 23 (CanLII); Order F14-34, 2014 BCIPC 37. **AB:** F2002-012, 2002 CanLII 61574 (AB OIPC); F2003-015, 2005 CanLII 78653 (AB OIPC); F2013-41, 2013 CanLII 75500 (AB OIPC). **PEI:** Order No. FI-10-008, 2010 CanLII 97251 (PE IPC). **NFLD:** *Report A-2008-013: Memorial University of Newfoundland (Re)*, 2008 CanLII 71147 (NL IPC).

Cases Considered: *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254 (CanLII); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *John Doe v. Ontario (Finance)*,

2014 SCC 36; *John Doe v. Ontario (Finance)*, 2014 SCC 36; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.

Other: *Webster’s New World College Dictionary*, 5th ed.; *Oxford English Dictionary (OED Online)*, 2013 Oxford University Press.

INTRODUCTION

[1] A journalist with the University of British Columbia’s (“UBC”) student newspaper, The Ubysey, requested the rubric, criteria and instructions used to assess the personal profiles submitted by prospective students as part of their applications to certain UBC faculties.¹ UBC withheld the requested records in their entirety under ss. 3(1)(d) and 3(1)(e) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) (outside scope of Act). It also withheld the records in their entirety under s. 13 (policy advice and recommendations) and s. 17 (harm to the financial or economic interests of a public body) of FIPPA.

[2] The applicant asked the Office of the Information and Privacy Commissioner (“OIPC”) to review UBC’s decision. Mediation did not resolve the matter, and the applicant requested that it proceed to inquiry under Part 5 of FIPPA.

ISSUES

[3] The issues in this inquiry are as follows:

1. Are the requested records excluded from the scope of FIPPA pursuant to s. 3(1)(d) and/or s. 3(1)(e) of FIPPA?
2. Is UBC authorized to refuse access to the requested records under s. 13 of FIPPA?
3. Is UBC authorized to refuse access to the requested records under s. 17 of FIPPA?

[4] Section 57 of FIPPA establishes the burden of proof in an inquiry. Although, s. 57 is silent regarding the burden of proof in cases involving s. 3(1), previous orders have established that the public body bears the burden of establishing that the records are excluded from the scope of FIPPA.² When access to information has been refused under ss. 13 and 17, it is up to the public body to prove that the applicant has no right of access to the records or parts of the records.

¹ Faculty of Arts (Vancouver Campus); Faculty of Science; Faculty of Applied Sciences (Engineering); Sauder School of Business; and School of Kinesiology.

² For example: Order 170-1997, 1997 CanLII 1485 (BCIPC); Order 02-29, 2002 CanLII 42462 (BC IPC); Order 03-14, 2003 CanLII 49183 (BC IPC); Order F13-23, 2013 BCIPC 30 (CanLII).

DISCUSSION

[5] **Background** – Over the last decade, UBC has developed and implemented what it refers to as a broad based admissions (“BBA”) process to select students who apply for admission to its undergraduate programs. In the BBA process, prospective students are assessed on their written answers to several “personal profile” questions in addition to their secondary school grade point average. The personal profile questions are designed to assess the following characteristics: intellectual readiness, concept of self and others, expression/communication, initiative, commitment and contributions to community, leadership, setting and achieving goals, team work/group work and problem solving. The personal profile scores are combined with the student’s grade point average to determine their place in the applicant pool. The BBA was piloted in 2003 by UBC’s Sauder School of Business and has gradually been introduced into other academic programs. By 2013, all direct-entry applicants to UBC first-year programs were required to participate in the BBA process.³

[6] The profiles are scored by “readers” consisting of faculty, alumni and volunteers who have received training in using the faculty-specific scoring criteria or rubrics. For ease of reference, I will refer to these scoring criteria and rubrics collectively, as the “rubrics”, which is the term UBC uses. It is these rubrics that the applicant seeks. The personal profile questions are not at issue in this inquiry.⁴

[7] UBC’s Associate Registrar, Student Recruitment and Undergraduate Admissions (“Associate Registrar”) provides background about the rubrics:

In the BBA process, applicants have to answer between four and six “personal profile” questions (the number varies depending on the program they are applying to) in addition to providing their secondary school marks. Generally, the same questions are used in each annual admissions process. Sometimes a few of the questions may be modified or replaced, but this is very infrequent. The questions are intended to give applicants the opportunity to self-reflect on what they have learned about themselves and the world around them through their experiences inside and outside of the classroom.

The answers to the personal profile questions are scored by “readers” using confidential faculty-specific “rubrics” (i.e. criteria used for consistent scoring of the answers to questions in a test or examination). The rubrics identify the applicant characteristics that are to be assessed (e.g. leadership) and provide guidance about how to rate the answers in relation to each characteristic on a numerical scale. Some of this guidance is very specific, such as examples of specific wording choices that correspond to a particular score. The purpose of the rubrics is to minimize subjectivity and to maximize

³Associate Registrar’s initial affidavit, paras. 5- 6.

⁴ The personal profile questions were not included in any of the inquiry materials.

consistency in the scoring process. Therefore, all readers are trained carefully on how to apply them...

At UBC, the BBA process has had several measurable benefits. It has resulted in a somewhat more engaged and socially aware student body (for example, newly admitted students are significantly more likely to engage with their peers in relation to schoolwork). Also, first-year students admitted under the BBA process have shown a small but statistically significant improvement in retention rates.⁵

[8] UBC explains that it is “happy for prospective students to know which qualities it is measuring, but it does not want them to know how it measures these qualities.”⁶

[9] **The Records** – UBC identified three records as responsive to the applicant’s requests. They are the rubrics used by: the Faculty of Arts; the Sauder School of Business; and the Faculties of Applied Science, Forestry, Kinesiology and Land & Food Systems.⁷ All three rubrics have been withheld in their entirety under ss. 3(1)(d), 3(1)(e), 13 and 17 of FIPPA.

[10] The rubrics provide a scale of numerical values to score each characteristic (leadership, intellectual readiness, etc.) being assessed in the personal profile. They also contain instructions, guidance and explanations for the readers to illustrate the type of answer that would merit a certain score.

Record of a question – s. 3(1)(d)

[11] UBC submits that the rubrics are excluded from the scope of FIPPA because s. 3(1)(d) applies. Section 3(1)(d) reads as follows:

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

...

(d) a record of a question that is to be used on an examination or test;...

[12] UBC submits that the BBA process is a “test” for the purposes of s. 3(1)(d) because it is a “procedure intended to establish the quality, performance, or reliability of something.”⁸ UBC also submits that s. 3(1)(d) “exempts not just

⁵ Associate Registrar’s initial affidavit, paras 7-8 and 13.

⁶ UBC’s reply submission, para. 25. Emphasis in original.

⁷ Pages 1, 2-5 and 6-11, respectively.

⁸ UBC is quoting from: *Report A-2008-013: Memorial University of Newfoundland (Re)*, 2008 CanLII 71147 (NL IPC), para. 29.

questions on a test or exam, but also records that are integral to those questions, such as answer keys and scoring rubrics”.⁹

[13] UBC refers to orders from other provinces in support of its submission that the scoring criteria and rubrics, while not themselves questions, are integral to the questions, so s. 3(1)(d) must apply. First, it cites three orders from Alberta where s. 4(1)(g) of Alberta’s *Freedom of Information and Protection of Privacy Act* says that Act does not apply to “a question that is to be used on an examination or test”. In Order F2002-012, the adjudicator found that s. 4(1)(g) applied to the reading passages upon which English exam questions were based as well as the instructions to the students because both were “integral to the questions”.¹⁰ In Order F2003-015, the adjudicator found that s. 4(1)(g) applied to questions from a training program examination.¹¹ In Order F2013-41, the adjudicator found that s. 4(1)(g) applied to questions as well as records setting out the techniques the applicant was asked to perform as part of a practical evaluation.¹²

[14] UBC also refers to Prince Edward Island Order FI-10-008.¹³ Section 4(1)(e) of PEI’s *Freedom of Information and Protection of Privacy Act* employs the same language as Alberta’s: “a question that is to be used on an examination or test”. In that order, the PEI Commissioner found that while s. 4(1)(e) applied to the questions asked of a job applicant, it did not apply to the description of the job criteria, the total available score or a comment about the mark required to pass.

[15] Finally, UBC refers to the Newfoundland and Labrador Privacy Commissioner’s *Report A-2008-013: Memorial University of Newfoundland (Re)*.¹⁴ Section 5(1)(f) of Newfoundland and Labrador’s *Access to Information and Protection of Privacy Act* contains identical wording to BC’s s. 3(1)(d). That case involved a request for records relating to a candidate’s interview for admission to Memorial University’s School of Pharmacy. For each interview, the interviewers had a 13 page “Interview Form” containing the questions to be asked of the candidate, instructions for the interviewer, criteria with weighted values for assessing candidate responses, a column for the interviewer to enter the score assigned, and an area for the interviewer to take notes. The Commissioner found that interview questions, the instructions to

⁹ UBC’s reply submissions, para. 5.

¹⁰ F2002-012, 2002 CanLII 61574 (AB OIPC). para. 12.

¹¹ 2005 CanLII 78653 (AB OIPC).

¹² 2013 CanLII 75500 (AB OIPC).

¹³ 2010 CanLII 97251 (PE IPC).

¹⁴ 2008 CanLII 71147 (NL IPC).

interviewers, and the scoring rubric all constituted a record of a question because they were all “integral to the question”.¹⁵

[16] The applicant submits that UBC’s interpretation of “record of a question” is inaccurate and that the phrase does not include rubrics.

Analysis – s. 3(1)(d)

[17] The first issue to be considered here, in the application of s. 3(1)(d), is what does “record of a question” mean? To my knowledge, this is the first BC Order where s. 3(1)(d) of FIPPA, and the meaning of the phrase “record of a question”, has been considered.

[18] The *Interpretation Act*¹⁶ requires that every enactment be construed as remedial and be given a fair, large and liberal construction and interpretation that best ensures the attainment of its objects. Further, the Supreme Court of Canada has stated that the modern approach to statutory interpretation requires that the words of an act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the act and the intention of the legislators.¹⁷

[19] With that in mind, I have considered the BC legislators’ choice to use the phrase “record of a question” when other equivalent provincial statutes use the briefer phrase “a question”.¹⁸ The added word “record” is a defined term in BC’s FIPPA, and the rubrics clearly fall within that definition.¹⁹ Section 3 enumerates the types of records that are excluded from the scope of FIPPA. In my view, the use of “record of” in s. 3(1)(d) emphasizes and clarifies what is already expressed above in 3(1) – that what is being excluded from the scope of FIPPA by s. 3 are records as opposed to just information within records. The phrase “record of” does not expand the meaning of the word “question” beyond its grammatical and ordinary sense. The word “question” is defined by *Webster’s New World College Dictionary*, as “something that is asked; interrogative sentence, as in testing another’s knowledge; query”.²⁰ In my opinion, the rubrics clearly do not meet this plain and ordinary meaning of the word “question”.

¹⁵ At para. 29. At para 34, he found that the interviewers’ notes of the candidate’s answers were not excluded by s. 5(1)(f) because they “would not allow accurate inferences to be made about either the interview questions, the instructions to interviewers, or the scoring rubric.”

¹⁶ RSBC 1996, c. 238, s. 8.

¹⁷ See, for example: *John Doe v. Ontario (Finance)*, 2014 SCC 36, para. 18.

¹⁸ Alberta, Manitoba, Prince Edward Island and the Northwest Territories. Ontario and New Brunswick do not contain an equivalent scope provision, instead addressing such information by way of exceptions to disclosure.

¹⁹ Schedule 1 of FIPPA: “record” includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records.

²⁰ *Webster’s New World College Dictionary*, 5th ed.

The rubrics are instructions and scoring guides to the readers who mark the personal profiles. They do not contain the personal profile questions, nor is it possible to infer from them what the personal profile questions might be.

[20] The purposes of FIPPA are described in s. 2 and include making public bodies more accountable by giving the public a right of access to records subject only to specified and limited exceptions. To expand the meaning of “question” as broadly as UBC suggests would not be a correct approach to the section given the purposes of FIPPA set out in s. 2. Section 3(1)(d) recognizes the necessity of maintaining the fairness and integrity of examinations and tests by ensuring that test-takers do not have advance access to the *questions* to be asked. However, the meaning and application of s. 3(1)(d) should not be stretched to include records that do not fall within the ordinary meaning of the words chosen by the legislators unless there is some indication that that this was their intention. Given the stated purpose of FIPPA to set only specific and limited exceptions to access rights, I am not convinced that when s. 3(1)(d) was drafted that the intent was to include records which in no way contain a question to be used on an examination or test or would allow one to accurately infer such a question.

[21] Finally, I am not persuaded that the four orders cited by UBC support its submission that the rubrics in this case are “a record of a question” pursuant to s. 3(1)(d). The records in those cases were clearly questions or they were integral parts of questions, without which the questions would not be complete or understandable to the test administrator or test taker. The rubrics at issue here are not at all the same. The rubrics are instructions to guide the readers in objectively assessing and scoring the personal profiles, but the rubrics do not contain (or allow one to accurately infer) the actual personal questions.

[22] In conclusion, I find that s. 3(1)(d) does not apply to the rubrics because none of them are a record of a question that is to be used on an examination or test. Therefore, FIPPA does apply to the rubrics.²¹

Teaching materials – s. 3(1)(e)

[23] UBC submits that the records at issue are teaching materials, so they are excluded from the scope of FIPPA pursuant to s. 3(1)(e) which reads as follows:

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following: ...

(e) a record containing teaching materials or research information of

²¹ Given my finding, I need not address whether the personal profile questions process is a “examination or test”.

- (i) a faculty member, as defined in the *College and Institute Act* and the *University Act*, of a post-secondary educational body,
- (ii) a teaching assistant or research assistant employed at a post-secondary educational body, or
- (iii) other persons teaching or carrying out research at a post-secondary educational body;

[24] UBC submits that the records at issue are “teaching materials” because they are used to teach the readers how to score the personal profiles. UBC also submits that - despite the fact that the records were created for the institutional purpose of selecting suitable students - the rubrics were produced collaboratively by identifiable UBC faculty members and other staff who “retain a professional interest” in the materials.²² UBC argues that the rubrics are both the teaching materials “of” those faculty and the teaching materials “of” the institution, so s. 3(1)(e) applies.

[25] UBC’s evidence regarding the creation of the rubrics is provided by the Associate Registrar:

The personal profile questions and rubrics were created and are periodically updated by working committees composed of UBC faculty members and administrative staff. The questions and rubrics were carefully designed and incorporate a substantial amount of professional knowledge, experience and judgement...

Readers go through a rigorous training process to ensure they use the rubrics consistently. UBC invests at least \$75,000 per year to select, train and compensate readers.²³

[26] The applicant submits that there is no academic component to the records at issue, and that UBC’s interpretation of “teaching materials” is too broad.²⁴

Analysis – s. 3(1)(e)

[27] This is the first time that the meaning of the term “teaching materials” in s. 3(1)(e) has been considered in a BC Order. Although other provinces have similar provisions, it appears that they also have not yet adjudicated this issue or interpreted that phrase. However, previous BC Orders have considered the purpose and rationale for s. 3(1)(e). In Order 00-36, former Commissioner Loukidelis said:

²² UBC’s initial submission, para 4, reply submissions, para. 28 and Associate Registrar’s affidavit, para. 9.

²³ Associate Registrar’s affidavit, paras. 9 and 11.

²⁴ Applicant’s submissions, paras. 24-25.

Section 3(1)(e) is intended to protect individual academic endeavour. It will protect the intellectual value in teaching materials or research information developed by an employee of a post-secondary educational body, for her professional purposes, by protecting it from disclosure to those who might exploit it to her disadvantage.

I will give an example of information that would likely not be excluded from the Act under s. 3(1)(e). If an expert on water quality, who happens to be employed by a university, is retained by a local government to conduct water quality tests, the results of those tests will not be “research information of” that person. If the person is retained to develop new methods for water testing (or does so in the course of conducting tests for a public body) and has or retains no intellectual property in the methods she devises, the methods – assuming they truly qualify as “research information” within the meaning of s. 3(1)(e) – will not be research information “of” that person. They will, at best, be research information of the public body and thus will not be excluded from the Act by s. 3(1)(e).²⁵

[28] Definitions of the word “teaching” include “something taught; precept; doctrine or instruction” and “showing the way; direction, guidance”. Definitions of “material” include: “The tools, equipment, or other items needed for a particular activity. Freq. with distinguishing words, as *cleaning*, *writing materials*, etc.” or “Text or images in printed or electronic form; also with distinguishing word, as *reading material*, etc.”²⁶

[29] Having considered the above definitions, in my view, the plain meaning of “teaching materials” refers to the resources a teacher uses to deliver instruction and assist or support students’ learning. Marking guides or rubrics could certainly be part of an instructor’s teaching materials. They would be part of the tools that enable a teacher to judge whether the student has learned what they were taught by the educational institution. However, the rubrics in this case do not pertain to what the prospective students were taught by UBC. Rather they provide a framework for consistently assessing applicants’ personal profiles and self-reflection about their life experiences. That being the case, they are not teaching materials in the sense that they would allow a teacher to assist and support student learning.

[30] I have also considered whether the rubrics are “teaching materials” because UBC uses them to teach the readers how to score the profiles. From my review of the rubrics, I conclude that they serve a dual purpose. While the primary purpose of the rubrics is as a tool to score the profiles, they also provide

²⁵ Order 00-36, 2000 CanLII 14401 (BC IPC), p. 5. See also Order F10-42, 2010 CanLII 77328 (BC IPC) at para. 21.

²⁶ *Webster’s New World College Dictionary*, 5th ed., and *Oxford English Dictionary (OED Online)*, 2013 Oxford University Press.

guidance and instructions to the readers on how to score the profiles, so in that sense they are teaching materials.

[31] In order for s. 3(1)(e) to apply to the rubrics, UBC must also establish that they are the teaching materials “of” a faculty member, a teaching assistant, research assistant employed at a post-secondary educational body, or other persons teaching or carrying out research at a post-secondary educational body. I find that UBC has not done so in this case. It does not explain how the rubrics play any role in the teaching of UBC faculty and staff, such that they could be characterized as the “teaching materials of” those individuals. Nor does UBC explain what it means when it says that the faculty and staff who worked on the rubrics “retain a professional interest” in the rubrics. If certain individuals, whether alone or collaboratively, assisted UBC to develop rubrics for its use in selecting entrants, it is not obvious that those individuals retain any proprietary interest or intellectual value in those rubrics as teaching materials.

[32] Finally, UBC’s evidence and argument does not establish how excluding the rubrics from the scope of FIPPA would foster the rationale for s. 3(1)(e), namely to protect individual academic endeavour and the intellectual value in teaching materials or research information developed by an employee of a post-secondary educational body for his or her own professional purposes. Therefore, I find that s. 3(1)(e) does not apply to the rubrics, so they do fall within the scope of FIPPA.

[33] Given my conclusion that the records are within the scope of FIPPA, I will now consider whether UBC is authorized to withhold the requested information under ss. 13 and 17 of FIPPA.

Policy Advice or Recommendations – s. 13

[34] Section 13(1) states that the head of a public body may refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. This section has been the subject of many orders that have consistently held that the purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.²⁷

[35] The rationale for this exception is explained in *John Doe v. Ontario (Finance)* where the Supreme Court of Canada (addressing Ontario’s equivalent of s. 13) said:

²⁷For example, Order 01-15, 2001 CanLII 21569 (BC IPC) and Order F11-17, 2011 BCIPC 23 (CanLII).

Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada... The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.²⁸

[36] BC orders have also found that s. 13(1) applies not only when disclosure of the information would directly reveal advice and recommendations but also when it would allow accurate inferences about the advice or recommendations.²⁹

[37] The process for determining whether s. 13(1) applies to information involves two stages. The first is to determine whether the disclosure of the information would reveal advice or recommendations developed by or for the public body. If it does, it is necessary to consider whether the information falls within any of the categories listed in s. 13(2). The effect of s. 13(2) is that, even in cases where information would reveal advice or recommendations developed by or for a public body, the public body may not withhold the information if it falls within any of the s. 13(2) categories.

[38] UBC submits that the rubrics are an integral part of the admissions decision-making process, and it explains why it believes they constitute "advice":

The majority of the readers were selected and trained to follow the rubrics, and do not have any significant latitude in how they apply them. From the point of view of these readers, the rubrics have all of the characteristics of a policy manual, as described in F14-34.

However, some of the readers are also members of the working committees that designed the BBA process. These individuals exercised a high degree of initiative and discretion in creating the rubrics. They intended the rubrics to assist them to produce their advice about the suitability of applicants for entry to UBC. From the viewpoint of these readers, the rubrics are comparable to the "percentage weightings and scoring methods" and the "ways of assessing the candidates for promotion" that were found to be "advice" in *Telezone* and Order F14-52 respectively.

In summary, the UBC faculty and staff who designed the BBA process intended the rubrics to serve as tools to assist them to formulate advice or recommendations. As these rubrics are integral to the deliberative process,

²⁸ 2014 SCC 36, at para. 45.

²⁹ Order F10-15, 2010 BCIPC 24 (CanLII); Order 02-38, 2002 CanLII 42472 (BCIPC); Order F06-16, 2006 CanLII 25576 (BCIPC).

they constitute “advice” within the meaning of s. 13(1). The Records therefore fall under both elements of s. 13(1)(1) disclosing them would reveal advice, and (2) this advice was developed by or for a public body.³⁰

[39] The applicant disputes that the rubrics are advice or recommendations, and he submits that they constitute a “manual” similar to what is described in Order F14-34. He also points out that UBC’s Associate Registrar acknowledges that “the majority of the readers are selected and trained to follow the rubrics, and do not have any significant latitude in how to apply them.”³¹

Analysis – s. 13

[40] I have examined what *3430901 Canada Inc. v. Canada (Minister of Industry)*³² (“Telezone”) and Order F14-52 say about what constitutes advice and recommendations as UBC points to these decisions as support for its view the rubrics are advice. However, as I will explain below, for reasons related to their factual differences, I disagree that these two decisions support UBC’s position that the rubrics are advice or recommendations under s. 13.

[41] In *Telezone*, the unsuccessful applicant for one of four available communications licences, applied to the Minister of Industry for records relating to the awarding of the licences. The Ministry withheld the information under the federal *Access to Information Act*’s equivalent of s. 13. The evaluation of the licence applications commenced with a working group evaluating the applications against a system of evaluation criteria and percentage weightings. The working group communicated their recommendations to a selection panel that in turn discussed, assessed and ranked the applications in accordance with the evaluation criteria and percentage weightings. The selection panel prepared materials for the Minister, including a spreadsheet showing the scores for the top four applicants. On the instructions of the Minister, the percentage weightings were changed. The applications were reassessed on the basis of the revised percentage weightings and the final assessments were communicated to the Minister. The Minister then made the decision. Evans, J.A. said:

... The reason for the group’s informing the selection panel, and ultimately the Minister, of the bases of their evaluations was to suggest to the Minister the appropriate rankings of the applications, and not just to give an account of how they had gone about their work. The percentages represented the working group’s view, approved by the Assistant Deputy Minister, of the relative importance of the various government objectives being pursued through the allocation of the licences.

³⁰ UBC’s initial submissions, paras. 64-66.

³¹ Applicant’s submissions, para. 32.

³² 2001 FCA 254 (CanLII).

In my opinion, the content of the documents is predominantly normative, rather than merely factual, and thus brings them within the rationales underlying paragraph 21(1)(a) for exempting records from disclosure. This conclusion is not affected by the fact that the working group was implicitly, rather than expressly, advising the Minister of the relative importance that should be attached to the various evaluative factors in making the ultimate decision.

Accordingly, the Minister was correct to treat as falling within paragraph 21(1)(a) any records or parts of records emanating from the working group and selection panel that contain the percentages ascribed by the working group to the various evaluative criteria, the descriptions of the criteria that have not been disclosed by the Minister, and the numerical scoring of Telezone's application.³³

[42] In *Telezone* the information at issue revealed the working group's advice and recommendations to the decision maker (i.e., the Minister) about the scoring of applications and how various criteria in those applications should be weighted.

[43] In the present case, however, there is no evidence to establish that the rubrics provide advice or recommendations to the readers, who are making the decisions about what score to award personal profiles. Rather, the rubrics are directions to the readers. UBC's evidence indicates that the rubrics are prescriptive and provide the readers with the predetermined criteria and scoring protocol along with instructions on how to use them properly. It is clear from UBC's submissions and evidence that the rubrics are designed to ensure consistency in scoring, and the readers have no latitude or discretion not to follow them. In my view, the rubrics cannot accurately be characterized as advice and recommendations because the readers are obliged to follow them. For something to be advice and recommendations the decision maker must be free (as was the case with the Minister in *Telezone*) to *not* follow the advice and recommendations that were created to inform his or her decision-making. That is clearly not the case with the rubrics, which are presented to the readers as the mandatory criteria they must employ to assess profiles.

[44] I also find that Order F14-52 does not support UBC's submission that the rubrics are advice because the facts in that case were different. Order F14-52 dealt with records related to a Thompson Rivers University professor's unsuccessful request for promotion. The process for granting the promotion in that case involved several levels of recommendations before a decision was made by the University's Board of Governors. The deliberation process began with a Departmental Promotion and Tenure Committee ("DPT") assessing the candidate and forwarding its recommendation to the Senate Promotion and Tenure Committee, which provided its recommendation to the University's President, who provided a recommendation to the University's Board of

³³ *Telezone*, at paras. 56-58.

Governors, which then made and communicated the decision about the candidate's application for promotion. The professor requested access to the DPT's records. Adjudicator Francis found that all of the information in dispute, including emails about appropriate ways of assessing candidates, was advice or recommendations for the purposes of s. 13(1). She concluded that the records were an integral part of DPT's decision-making process of formulating the advice and recommendations that they gave to the final decision-maker.

[45] In my view, the rubrics in the present case are more akin to the information in the policy manuals in Order F14-34, which Adjudicator Flanagan found was not advice or recommendations. Remarking that the purpose of s. 13 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, he said:

Consistent with its purpose, s. 13 does not typically capture a manual because a manual is a record of a public body's settled policy or position about how to approach an issue, not advice or recommendations. This is the case even though a manual may be the culmination of considering several records that themselves contain advice or recommendations. Manuals provided to staff, contractors or others who are bound to follow them are directions to the recipient of the manual from the public body. A manual does not generally give the user of the manual (typically an employee) the latitude to accept or reject its contents required to fall within s. 13. While a manual generally must provide a degree of discretion to the intended user of the manual, it represents a settled position on the policy, approach, methodology or philosophy that a public body intends to take when faced with particular decisions. The utility of a manual is typically the uniformity, predictability and conformance to the manual that it commands of users.³⁴

[46] Although UBC submits that the rubrics serve as tools to assist the readers to formulate advice or recommendations, it supplied no evidence that the readers are formulating advice or recommendations as opposed to making decisions - or that they provide advice and recommendations to someone else. Based on the information UBC provides about how the personal profiles are assessed, it is clear that the readers make the scoring decisions, and the rubrics provide direction on how to do that. In conclusion, I find that s. 13 does not apply to the rubrics and they may not be withheld on that basis.

Harm to Financial or Economic Interests - s. 17

[47] UBC is also withholding the rubrics under s. 17(1),³⁵ which states, in part:

³⁴ Order F14-34, 2014 BCIPC 37, para. 18.

³⁵ UBC says it relies exclusively on the opening words of s. 17(1) - not to any of the more specific harms listed in the subsections (a) through (f).

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

[48] The standard of proof for s. 17 is whether disclosure could reasonably be expected to result in the specified harm. The Supreme Court of Canada has described this standard as requiring a reasonable expectation of probable harm from disclosure of the information.³⁶ It is a middle ground between what is probable and that which is merely possible. A public body must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach this standard. The determination of whether the standard of proof has been met is contextual, and the quantity and quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and the "inherent probabilities or improbabilities or the seriousness of the allegations or consequences".³⁷

[49] UBC submits that it will stop using the BBA process if the rubrics are disclosed and this will result in a loss of the financial investment made to develop the BBA process. UBC submits as follows:

UBC has provided evidence that the disclosure of the Records in this Inquiry would lead to the abandonment of the BBA process in its current form. This is because applicants with access to the rubrics would be able to tailor their answers to meet UBC's requirements, which would deal a fatal blow to the predictive value of the "personal profile" questions in selecting suitable students. There would be little point in continuing to fund a process that no longer had significant predictive value.

What is relevant here is that UBC believes that disclosure of the rubrics would harm the predictive value of the process, and that it would abandon the process on the basis of this belief. For the purposes of applying section 17(1), it is not necessary to decide whether this belief is reasonable (although UBC submits that it is).³⁸

[50] UBC submits that abandoning the BBA process would result in a loss of the substantial financial investment that it made in developing the BBA process. The Associate Registrar's evidence is that UBC spent \$200,000 in staff time and \$1.76 million on IT systems to develop the BBA process. He adds that UBC spends at least \$75,000 annually to select, train and compensate readers.

³⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.

³⁷ *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 94 citing: *F.H. v. McDougall*, 2008 SCC 53, at para. 40.

³⁸ UBC's initial submissions, paras.72-73.

[51] The applicant submits that UBC's belief that disclosure of the rubrics would fatally undermine its BBA process does not meet the standard of a reasonable expectation of harm under s. 17(1). He says, "the fact that its policy was expensive to implement does not mean that making it public would make the money already spent a waste, and there is no real contention of how it would affect the economic interests going forward."³⁹ The applicant adds that UBC's threat to abandon the BBA process altogether if the rubrics are disclosed is a "scare tactic and nothing more."⁴⁰

Analysis – s. 17(1)

[52] UBC submits that disclosure of the rubrics would harm the predictive value of the BBA process, so UBC would stop using it. It is this cessation of the process, UBC submits, which would result in the harm to its financial or economic interests. Abandoning the BBA process, UBC says, will cause the loss of the substantial financial investment made to develop it.

[53] UBC also submits that for the purposes of applying s. 17(1), it is not necessary to decide whether UBC's belief that disclosure would harm the predictive value of the BBA process is reasonable (although UBC submits that it is). I do not agree with this submission because UBC's entire s. 17(1) argument about harm to its financial or economic interests is predicated on this assertion. Therefore, I believe it is necessary to consider whether UBC's belief that the BBA process will become ineffective is reasonable.

[54] Based on the inquiry materials and the rubrics themselves, it is clear that the BBA process is not like an exam where a student must demonstrate their knowledge of the concepts taught by an educational institution, and where maintaining the secrecy of the questions and answers is essential to the fairness and integrity of the testing. There are no right or wrong answers to a personal profile question. Although UBC did not provide any examples of personal profile questions, I understand they are not secret because UBC's evidence is that it reuses the personal profile questions and approximately 62,000 personal profiles were received in 2014.⁴¹

[55] UBC believes that if candidates knew how their profiles were to be scored, they would "tailor" what they say and "game the system". By this, I understand UBC to mean that candidates will exaggerate and/or misrepresent themselves. In my view, the possibility already exists that at least some of the candidates might misrepresent themselves in their personal profiles. Every personal profile answer, by its very nature, will be highly individual and pertain to the candidate's unique set of experiences and reflections. UBC did not explain how it currently

³⁹ Applicant's submissions, para. 43.

⁴⁰ Applicant's submissions, paras. 39.

⁴¹ Associate Registrar's affidavit, paras. 7 and 8.

screens personal profiles to detect misrepresentations. The applicant says that he has been advised by UBC that it uses random reference checks to address the issue of misrepresentation in the BBA process, but UBC did not respond to his submission on this point.

[56] I have carefully reviewed all three rubrics, and they contain nothing that reveals the questions or anything that could be considered to be a “correct” answer. They contain the generic high-level information one would expect to find in instructions to UBC’s readers on how to fairly and objectively score a personal profile answer about leadership experience, for example, or commitment and contributions to community. I accept that if candidates had access to the rubrics it might take some of the guesswork out of trying to understand what it is that UBC’s readers are looking for when they evaluate personal profiles. That is because the rubrics reveal what information is relevant or important to include and what are the elements of a strong personal profile answer. Such information would allow candidates to more clearly articulate how their personal experiences make them the type of student UBC is seeking. However, the candidates would still need to provide a personal profile answer that relates back to their own individual experiences and reflections. Given the nature of the information in these rubrics, I am not convinced that disclosure would make exaggeration, misrepresentation or false information any more prevalent or harder to detect than they currently are. Therefore, I do not accept that it is reasonable to believe, as UBC does, that disclosure of the rubrics would significantly diminish the predictive value of the BBA process, and that the only alternative is to abandon the BBA process.

[57] However, even if it were reasonable to conclude that disclosure of the rubrics necessitates abandoning the BBA process, UBC did not provide information that satisfies me that this could reasonably be expected to harm its financial or economic interests. There was no information provided about anticipated future financial costs or economic impact, if UBC determines that a replacement screening tool needs to be developed. UBC’s evidence and submissions on this issue all relate to money it has already spent to develop and maintain the BBA process. Further, the Associate Registrar explained that the BBA process was piloted by UBC’s Sauder School of Business in 2003 and has gradually been introduced into other academic programs, which suggests that UBC has had several years of value from the money spent developing the process. This past voluntary expenditure cannot be accurately characterized as an impending “harm” to UBC’s financial or economic interests, under s. 17. Therefore, I find that UBC has not established that disclosure of the rubrics could reasonably be expected to harm its financial or economic interests, pursuant to s. 17(1).

CONCLUSION

[58] In conclusion, I find that ss. 3(1)(d) and (e) do not apply to the rubrics, so the rubrics fall within the scope of FIPPA. Further, I find that the information in the rubrics is not advice or recommendations under s. 13, and its disclosure could not reasonably be expected to harm UBC's financial or economic interests under s. 17.

ORDER

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

1. UBC is not authorized under ss. 3(1)(d), 3(1)(e), 13, or 17 to refuse to disclose the information in dispute.
2. I require UBC to give the applicant access to this information by October 22, 2015 and to provide the OIPC's Registrar of Inquiries with a copy of its cover letter and the records sent to the applicant.

September 9, 2015

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

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