



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

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Order F19-27

## UNIVERSITY OF BRITISH COLUMBIA

Laylí Antinuk  
Adjudicator

July 16, 2019

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**Summary:** An applicant requested information about himself from his former university. The university withheld information under several *Freedom of Information and Protection of Privacy Act* exceptions. The adjudicator considered ss. 13 (advice or recommendations), 14 (solicitor client privilege) and 22 (harm to personal privacy) and found that they applied to some of the disputed information. The adjudicator ordered the university to disclose the balance of the information in dispute.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2), 14, 22(1), 22(2)(a), 22(2)(e), 22(2)(f), 22(2)(h), 22(3)(a), 22(3)(d), 22(4)(e).

### INTRODUCTION

[1] An applicant requested information about himself from the University of British Columbia (UBC) in two separate access to information requests. UBC responded by providing the applicant with records that had some information withheld under ss. 13 (advice or recommendations); 14 (solicitor client privilege); 15 (harm to law enforcement); and 22 (harm to personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review UBC's decisions in respect of both access requests. Mediation did not resolve either matter. The applicant requested that both matters proceed to inquiry. I will deal with both in this inquiry.

[3] UBC provided written submissions for the inquiry but the applicant did not. When providing its initial submission, UBC decided to release all information previously withheld under s. 15. Therefore, I do not need to consider s. 15 in this inquiry. During the inquiry, UBC also reconsidered its application of s. 14 to some of the information at issue and decided that s. 14 did not apply to some of the information previously withheld under that section. UBC still claims that s. 14 applies to other information at issue so I will consider s. 14 in my analysis.

## ISSUES

[4] This inquiry involves the following issues:

- 1) Is UBC authorized by ss. 13 and 14 to refuse to disclose the information?
- 2) Is UBC required by s. 22 to refuse to disclose the information?

[5] UBC bears the burden of proving that the applicant has no right to access the information withheld under ss. 13 and 14.<sup>1</sup> The applicant bears the burden of proving that disclosing the information withheld under s. 22 would not be an unreasonable invasion of third party personal privacy.<sup>2</sup>

## DISCUSSION

### *Background*

[6] The applicant attended UBC's Bachelor of Science in Nursing Program (the Program).<sup>3</sup> During this time, he failed a course. He appealed this failure through UBC's formal processes. He eventually met the requirements for his previously failed course but then failed to complete his final clinical placement. As a result, he could not graduate from the Program.

[7] As noted, the applicant appealed his course failure formally through UBC's processes. He also made other complaints related to his academic issues during his time as a student at UBC.<sup>4</sup> According to UBC, students who have academic issues can go to the School of Nursing's Undergraduate Programs Progression Committee (the Committee) to discuss those issues and receive advice from the Committee. The Committee then supports the students as they attempt to rectify their respective issues. From my review of the records, I understand that the Committee monitored and made decisions about the applicant because of his academic issues.

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<sup>1</sup> Section 57(1).

<sup>2</sup> Section 57(2).

<sup>3</sup> Senior Instructor's affidavit at para. 5. All information summarized in the remainder of the background section comes from this affidavit at paras. 4-7 unless otherwise specified.

<sup>4</sup> Associate Professor's affidavit #1 at para. 7.

## **Records**

[8] The records consist of 4,457 pages of:

- emails (some with attachments);
- text messages;
- letters;
- course, clinical placement, and examination lists;
- Committee meeting materials;
- student progress reports;
- draft materials related to the academic standing and formal appeals of various students, including the applicant;
- draft course materials;
- flow charts;
- an information sheet about the use of social media; and
- screenshots of the UBC online learning platform.

## **Solicitor client privilege – section 14**

[9] Section 14 allows public bodies to refuse to disclose information protected by solicitor client privilege. Section 14 encompasses two kinds of solicitor client privilege recognized at common law: legal advice privilege and litigation privilege.<sup>5</sup> UBC claims that legal advice privilege applies to the information it withheld under s. 14.

[10] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking and giving legal advice. In order for this form of privilege to shield a communication and records related to it, the communication must meet the following four conditions:<sup>6</sup>

- 1) There must be an oral or written communication;
- 2) The communication must be confidential in character;
- 3) The communication must be between a client (or agent) and a legal advisor; and
- 4) The communication must be directly related to the seeking, formulating, or giving of legal advice.

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<sup>5</sup> *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, [College of Physicians], 2002 BCCA 665 at para. 26.

<sup>6</sup> *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22; *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 837. For examples of OIPC orders that have applied this test, see Order F18-33, 2018 BCIPC 36 at paras. 15-16; Order F17-43, 2017 BCIPC 47 at para. 38; Order F15-52, 2015 BCIPC 55 at para. 10; and Order F15-15, 2015 BCIPC 16 at para. 15.

[11] Legal advice privilege extends beyond the explicit request for and provision of legal advice to include communications that make up “part of the continuum of information exchanged”<sup>7</sup> within the framework of the solicitor-client relationship.<sup>8</sup> This continuum of communications can include information the client provides to counsel that relates to the legal advice sought as well as internal client communications about the legal advice received and its implications.<sup>9</sup> As stated by the British Columbia Supreme Court:

The privilege will extend to documents between [a client’s] employees which transmit or comment on privileged communications with lawyers. The privilege will also extend to include communications between [a client’s] employees advising of communications from lawyer to client.<sup>10</sup>

[12] UBC claims legal advice privilege over information in some of the email communications at issue and, in one instance, in the Committee meeting minutes.

[13] UBC chose not to provide me with copies of the information it claims legal advice privilege over. However, following my request for further submissions and evidence regarding its s. 14 claims, UBC provided supplementary submissions and two affidavits respecting that information.<sup>11</sup> After carefully reviewing these materials, I decided that I have sufficient evidence to make my findings regarding s. 14 without seeing the contents of the records themselves.

#### *UBC’s position*

[14] UBC submits that the information it withheld under s. 14 meets the test for legal advice privilege. Specifically, UBC says that the information at issue consists of confidential communications between solicitor and client that involve the seeking or giving of legal advice.<sup>12</sup> UBC also submits that legal advice privilege applies to several emails that do not specifically include a solicitor but instead consist of internal communications between UBC employees sharing and discussing the legal advice they received from UBC’s lawyers.<sup>13</sup>

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<sup>7</sup> *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 83, citing *Canada (Information Commissioner) v. Canada (Minister of Safety and Emergency Preparedness)*, 2013 FCA 10 at para. 28.

<sup>8</sup> *Descôteaux et al. v. Mierzwinski*, 1982 CanLII 22 (SCC) at p. 893; *Maranda v. Richer*, 2003 SCC 67 at para. 22; and *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at paras. 32-44.

<sup>9</sup> *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 at paras. 22-24; *Bank of Montreal v. Tortora*, 2010 BCSC 1430 at para. 12.

<sup>10</sup> *Bank of Montreal v. Tortora*, *ibid.*

<sup>11</sup> I offered the applicant the opportunity to provide submissions in response to these supplemental materials provided by UBC. He chose not to provide response submissions.

<sup>12</sup> UBC’s supplemental submissions, at paras. 7 and 11.

<sup>13</sup> Associate Professor’s affidavit #2 at paras. 6, 7, 9, and 11.

*Analysis and findings*

[15] For the reasons that follow, I find that the information withheld under s. 14 meets all four conditions for legal advice privilege to apply.

[16] UBC has provided the names of the lawyers it interacted with in relation to the applicant. UBC's evidence shows that these lawyers work as UBC's in-house counsel or with external firms retained by UBC to provide legal advice.<sup>14</sup> The affidavit evidence paired with the context of the records and the nature of the applicant's interactions with the School leads me to conclude that the communications between UBC's lawyers and employees directly relate to the seeking and giving of legal advice in relation to the applicant.<sup>15</sup> In short, I find that the information in dispute reveals UBC employees' oral and written communications with UBC's internal and external legal counsel in which those employees requested and received legal advice.

[17] The final condition for legal advice privilege requires confidentiality. UBC's two affiants from the School both say that all discussions about students were confidential. The School's former Director specifically states that all discussions with internal and external counsel respecting the applicant were treated as confidential and only shared internally on a confidential basis.<sup>16</sup> I also note that the subject lines of some of the internal emails discussing previously received legal advice specifically reference the confidentiality of the information contained within them.<sup>17</sup> In my view, this demonstrates that UBC's employees treated the legal advice they received from UBC's lawyers as confidential. This evidence, paired with the sensitive nature of the applicant's academic issues, convinces me that the communications between UBC's lawyers and employees were confidential.

[18] Other information withheld under s. 14 consists of internal discussions between UBC employees relating to legal advice previously received. I find that disclosing these discussions would reveal information protected by legal advice privilege.

[19] In conclusion, UBC has established that legal advice privilege applies to the information it withheld under s. 14.

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<sup>14</sup> Associate Professor's affidavit #1 at paras. 11-13; Associate Professor's affidavit #2 at para. 15.

<sup>15</sup> UBC has revealed that it sought legal advice in relation to the applicant (Associate Professor's affidavit #2, at paras. 6, 8, 10-12, and 14-15).

<sup>16</sup> Senior Instructor's affidavit at para. 11; Associate Professor's affidavit #1 at para. 9 and affidavit #2 at para. 18.

<sup>17</sup> Page 1248 and 1588 of F17-71262.

**Advice or recommendations – section 13**

[20] Section 13(1) allows public bodies to refuse to disclose information that would reveal advice or recommendations developed by or for a public body subject to certain exceptions in s. 13(2). Section 13 protects a public body's internal decision and policy making processes by encouraging the free and frank flow of advice and recommendations.<sup>18</sup> In doing so, s. 13 preserves an effective and neutral public service.<sup>19</sup>

[21] Section 13 applies to information that explicitly contains advice and recommendations and to information that would enable an individual to make accurate inferences about underlying advice or recommendations.<sup>20</sup> Advice under s. 13 includes expert opinion on matters of fact on which a public body must make a decision for future action.<sup>21</sup> The Supreme Court of Canada states that advice sets forth considerations for a decision maker to take into account when making any given decision and notes that advice serves as the basis for making a decision among presented options.<sup>22</sup> In short, advice or recommendations precede and inform decisions.

[22] The s. 13 analysis involves two steps.<sup>23</sup>

- 1) First, I must determine if disclosure of the information at issue would reveal advice or recommendations developed by or for a public body such that s. 13(1) applies to it.
- 2) If so, I must determine whether the information falls into any of the categories listed in s. 13(2). If it does, the public body must not refuse to disclose it under s. 13(1).

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<sup>18</sup> *Insurance Corporation of British Columbia v. Automotive Retailers Association*, [Automotive Retailers], 2013 BCSC 2025 at para. 65; *College of Physicians*, *supra* note 5 at paras. 104-105; Order 01-15, [2001] B.C.I.P.C.D. No. 16 at para. 22.

<sup>19</sup> *John Doe v. Ontario (Finance)*, [John Doe], 2014 SCC 36 at para. 43. In *John Doe*, the Court considered s. 13(1) of Ontario's freedom of information legislation which resembles s. 13(1) of FIPPA.

<sup>20</sup> *Automotive Retailers*, *supra* note 18 at para. 42; Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 135; Order 01-17, 2001 CanLII 21571 (BC IPC) at para. 21; Order F15-12, 2015 BCIPC 12 at para. 42; Order F16-28, 2016 BCIPC 30 at para. 22; and Order F17-01, 2017 BCIPC 01 at para. 13.

<sup>21</sup> *College of Physicians*, *supra* note 5 at para. 113.

<sup>22</sup> *John Doe*, *supra* note 19 at para. 47.

<sup>23</sup> Order F07-17, 2007 CanLII 35478 (BC IPC), para. 18; Order F17-01, *supra* note 20 at para. 14; Order F18-43, 2018 BCIPC 46 at para. 50.

*UBC's position*

[23] UBC applied s. 13 to information in a variety of records, including Committee meeting materials, emails (and attachments), and draft materials. In several instances, UBC withheld records in their entirety under s. 13.

[24] UBC submits that all the information it withheld under s. 13 would reveal advice or recommendations related to the Program in general or the applicant specifically.<sup>24</sup> UBC also says that the information withheld under s. 13 includes draft materials and questions seeking advice in relation to the draft materials. UBC submits that the drafts were “part of the deliberative process.”<sup>25</sup>

*Analysis and findings – section 13(1)*

[25] Prior to delving into my analysis, I note that in one instance, UBC withheld information in one place under s. 13 but disclosed it elsewhere in a duplicate record.<sup>26</sup> I will not consider whether s. 13 applies to this specific information because the applicant has already received this information and UBC has not explained why it severed the records inconsistently.<sup>27</sup>

[26] For clarity and simplicity, I have organized the records relevant to my s. 13 analysis into the following categories:

- Committee meeting materials;
- Emails and attachments;
- Draft materials; and
- Other records.

I will discuss each category in turn.

*Committee meeting materials*

[27] The records contain Committee meeting agendas and minutes from three years. UBC describes the Committee meeting minutes as the “primary source” of advice and recommendations related to the Program.<sup>28</sup>

[28] I find that some of the information withheld from the Committee meeting materials under s. 13 reveals advice or recommendations. This information consists of suggestions and recommendations from various Committee members or guests about what the Committee or the School should do in relation to

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<sup>24</sup> UBC's initial submissions at para. 40.

<sup>25</sup> *Ibid* at para. 42.

<sup>26</sup> Specifically, p. 2236 of F17-72586 contains information released elsewhere in a duplicate record.

<sup>27</sup> For similar reasoning, see Order F18-41, 2018 BCIPC 44 at para. 26; and Order F07-11, 2007 CanLII 30396 (BC IPC) at para. 41.

<sup>28</sup> UBC's initial submissions at para. 41.

specific issues, such as plagiarism, or specific students, including the applicant. This type of information falls within the meaning of s. 13(1).

[29] However, I find that the following types of information in the Committee meeting materials do not reveal advice or recommendations and cannot be withheld under s. 13(1).

- *Topics, headings and lists of future discussion items for meetings:* This type of information simply states general discussion topics in broad language. I do not see – and UBC does not explain – how this type of information reveals advice or recommendations. I find that the topics, headings and lists of future discussion items do not qualify as advice or recommendations. This finding accords with previous orders.<sup>29</sup>
- *Facts:* The types of facts that I find UBC cannot withhold from the meeting materials, such as the number of students enrolled in the Program or the number with academic issues, would not reveal advice or recommendations. Previous orders have made similar findings.<sup>30</sup>
- *Administrative information:* UBC has withheld corrections to previous meeting minutes and details about committee membership and the attendance of guests under s. 13(1). In my view, none of this administrative information reveals advice or recommendations.<sup>31</sup>
- *Action items:* UBC withheld action items which list specific tasks that specific individuals will complete. In my view, this type of information logs the Committee's decisions as to next steps in relation to specific topics. In other words, the action items do not relate to decisions that UBC must make but rather reflect the decisions the Committee has already made. Information that communicates a decision that has already been made does not qualify as advice or recommendations.<sup>32</sup>

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<sup>29</sup> For example, in Order F18-41, *supra* note 27 at para. 15, Adjudicator Lott found that the general topics for an upcoming meeting did not qualify as advice or recommendations. See also Order F17-42, 2017 BCIPC 46 at paras. 75-76 in which Senior Adjudicator Barker found that the topics for a conference call did not qualify as advice or recommendations. Similarly, in Order F18-43, *supra* note 23 at paras. 65 and 70, Adjudicator Siew found that information that identified the topics addressed in a report, Cabinet submissions and presentations did not qualify as advice or recommendations.

<sup>30</sup> Order F17-08, 2017 BCIPC 9 at para. 23; Order F17-03, 2017 BCIPC 3 at para. 29; Order F15-60, 2015 BCIPC 64 at para. 16; and Order F15-59, 2015 BCIPC 62 at para. 32.

<sup>31</sup> For similar reasoning, see Order F14-44, 2014 BCIPC 47 at para. 31; and Order F19-15, 2019 BCIPC 17 at para. 30, first bullet.

<sup>32</sup> Order F15-33, 2015 BCIPC 36 at para. 25. For similar reasoning, see also Order F18-04, 2018 BCIPC 04 at para. 83. In that Order, Adjudicator Lott found that an insurance adjuster's assessment and decision about an individual's injuries did not qualify as advice or recommendations. See also Order F15-37, 2015 BCIPC 40 at para. 22 in which Adjudicator



- *General updates:* UBC withheld updates related to action items, academic issues, and the Program in general. However, UBC has not explained how these updates reveal advice or recommendations related to any decision UBC was considering. I am not satisfied that these updates reveal advice or recommendations. Previous orders have come to similar conclusions.<sup>33</sup>

### *Emails*

[30] UBC describes the emails as the “primary source” of advice and recommendations about the applicant’s academic issues.<sup>34</sup> UBC says that the emails contain internal discussions among UBC employees seeking or giving advice or recommendations in relation to the applicant’s academic standing and progress.

[31] In my view, some of the information in the emails qualifies as advice or recommendations. For example, suggestions about potential courses of action in relation to the applicant’s academic issues, the rationale behind such suggestions, editorial advice respecting draft documents (discussed further below), and expert opinions on matters of fact and how they relate to the applicant’s academic standing are all advice or recommendations.

[32] However, I find that the following types of information in the emails do not reveal advice or recommendations so UBC cannot withhold them under s. 13(1).

- *Instructions to staff:*<sup>35</sup> Staff typically must follow the instructions and satisfy the requests of superiors. Conversely, recipients of advice or recommendations have no obligation to follow the advice or accept the recommendations they receive.<sup>36</sup> Therefore, directions, instructions or requests to staff do not qualify as advice or recommendations under s. 13(1).<sup>37</sup>
- *Questions and requests for advice:* UBC has withheld several questions and requests for advice including requests for feedback on draft

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Alexander found that information related to decisions already made by a public body’s staff did not qualify as advice provided by those staff members.

<sup>33</sup> *Ibid.* See also Order F18-41, *supra* note 27 at para. 21; Order F17-42, *supra* note 29 at para. 75, last bullet; and Order F15-25, 2015 BCIPC 27 at para. 22.

<sup>34</sup> Associate Professor’s affidavit #1 at para. 10; Senior Instructor’s affidavit at para. 20.

<sup>35</sup> Examples at p. 447 and 1431 of F17-71262; and p. 28, 574, and 875 of F17-72586.

<sup>36</sup> For similar reasoning, see Order F14-34, 2014 BCIPC 37 at para. 19.

<sup>37</sup> See Order F15-52, *supra* note 6 at para. 25; Order F18-41, *supra* note 27 at para. 16; Order F18-04, *supra* note 32 at para. 78; Order F17-30, 2017 BCIPC 32 at para. 31, item (e); and Order F19-15, *supra* note 31. As stated in Order F10-20, 2010 BCIPC 31 at para. 34: “Advice or recommendation... implies that the receiver of the information has latitude to accept or reject it after giving it consideration.”

materials.<sup>38</sup> However, I do not see – and UBC has not explained – how this type of information would reveal advice or recommendations. A question or request for advice certainly may *lead* to advice or recommendations, but the question or request itself does not amount to advice unless it would allow for accurate inferences as to advice actually received.<sup>39</sup> The requests for advice and questions that UBC cannot withhold under s. 13(1) would not allow for such inferences.

- *Explanations as to why, or information about what, the email author thinks, said, did, or will do:* In my view, descriptions and explanations in the records about what was or will be done or said, and why, do not qualify as advice or recommendations.<sup>40</sup> For example, one UBC employee emailing another about what she plans to communicate to the applicant and why is not advice.<sup>41</sup> This communication simply alerts the email recipient of something that will occur. Past orders have found that this type of information does not qualify as advice or recommendations.<sup>42</sup> In addition, I note that past orders have found that information explaining why someone did something does not qualify as advice or recommendations under s. 13(1).<sup>43</sup>
- *Descriptions of what the applicant said or did:* UBC has withheld information about what the applicant said or did under s. 13(1).<sup>44</sup> In my view, factual information about the applicant's actions does not reveal advice or recommendations. I note that past orders have also found that descriptions of what individuals said or did do not qualify as advice or recommendations.<sup>45</sup>

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<sup>38</sup> Examples of withheld requests at p. 418, 484, 488 and 1009 of F17-71262; and p. 574 and 2540-2542 of F17-72586. Examples of withheld questions at p. 315, 391, 438, 440, 479, 861, 919, 1084, 1115 of F17-71262; and p. 409, 1209 and 2463 of F17-72586.

<sup>39</sup> For orders dealing with questions, see Order F14-19, 2014 BCIPC 22 at para. 35; Order F12-01, 2012 BCIPC 1 at para. 32, portions related to records 29, 37, 40, 66, 69, 127, and 225. For orders related to requests for advice, see Order F18-41 *supra* note 27 at paras. 16 and 20; and Order F17-39, 2017 BCIPC 43 at para. 37. For similar reasoning, see Order F17-23, 2017 BCIPC 24 at para. 19 in which Adjudicator Whittome found that information that refers to the intention to seek advice or recommendations does not fit within the meaning of s. 13(1).

<sup>40</sup> Examples at p. 352, 434, 451, 457, 974, 1008 and 1009 of F17-71262; and p. 186-187, 643, 737, 815 and 2279 of F17-72586.

<sup>41</sup> Example at p. 352 of F17-71262.

<sup>42</sup> Order F15-52, *supra* note 6 at para. 28. See also Order F12-15, 2012 BCIPC 21 at para. 18 in which Adjudicator Flanagan found that statements about future actions by a staff member did not reveal any recommendations, advice, options or expert opinions on matters of fact on which the public body must make a decision.

<sup>43</sup> Order F17-13, 2017 BCIPC 14 at para. 23.

<sup>44</sup> Examples at p. 861 and 1025 of F17-71262; and p. 2570 of F17-72586.

<sup>45</sup> Order F17-22, 2017 BCIPC 23 at para. 29; Order F14-44, *supra* note 31 at para. 31; and Order F17-13, *supra* note 43 at para. 22.

- *The email author's views about, or reactions to, the applicant:* Several emails contain information about what various UBC employees think about what the applicant said or did.<sup>46</sup> None of this information qualifies as advice or recommendations under s. 13(1). This finding accords with previous orders.<sup>47</sup>
- *Email subject lines and titles of attached documents:* The subject lines and titles of email attachments withheld by UBC contain nothing more than a few generic words that do not reveal anything substantive about the subjects discussed in the emails or attachments themselves.<sup>48</sup> I do not understand how these subject lines and document titles reveal advice or recommendations and UBC has not explained this. I find that the email subject lines and document titles do not qualify as advice or recommendations under s. 13(1). Past orders have made similar findings.<sup>49</sup>
- *Information sharing:* UBC withheld some portions of emails that simply communicate information about specific subjects.<sup>50</sup> In my view, sharing information does not equate to giving advice. To use an example from the records before me, if person A tells person B about the existence of a particular process but does not in any way suggest or recommend engagement in that process, this communication amounts to information sharing only, not advice. To give another example from the records, if a person identifies the next steps in a process without giving any advice in relation to how those steps could or should be completed, that person has not provided advice but instead has simply shared information. I find that this type of information sharing does not qualify as advice or recommendations under s. 13(1).<sup>51</sup>
- *Pleasantries:* UBC withheld words of encouragement, appreciation, and farewell from some emails under s. 13(1).<sup>52</sup> In my view, these types of pleasantries do not qualify as advice or recommendations. UBC has not explained how these social niceties reveal advice or recommendations developed by or for UBC.

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<sup>46</sup> Examples at p. 306, 350 and 1249 of F17-71262; and p. 432, first bullet of F17-72586.

<sup>47</sup> Order 01-15, 2001 CanLII 21569 (BC IPC) at para. 27.

<sup>48</sup> Example of email subject lines at p. 461 of F17-71262. Examples of attached document titles at p. 237, 1696, 1794, 1878 and 1920 of F17-72586.

<sup>49</sup> For similar reasoning, see Order F18-43, *supra* note 23 at para. 68. In that Order, Adjudicator Siew found that a document's title page did not qualify as advice or recommendations. See also Order F14-44, *supra* note 31 at para. 31 in which Adjudicator Barker found that email subject lines did not reveal advice or recommendations.

<sup>50</sup> Examples at p. 418-419, 974 and 1431 of F17-71262.

<sup>51</sup> For a similar finding, see Order F17-42, *supra* note 29 at para. 75, first bullet.

<sup>52</sup> Examples at p. 295 and 355 of F17-71262; and p. 2518 of F17-72586.

- *Facts*: The types of facts that I find UBC cannot withhold from the emails, like the time a specific meeting occurred or information about who someone spoke with, would not reveal advice or recommendations.<sup>53</sup>

#### *Draft materials*

[33] The records contain draft materials prepared by various individuals. Several of the drafts relate specifically to the applicant. Other drafts relate to specific UBC courses and include a draft course learning plan, syllabus, and calendar description.<sup>54</sup> UBC says that the drafts were “part of the deliberative process”<sup>55</sup> and withheld all draft materials in their entirety.

[34] Previous orders establish that a document does not automatically contain advice simply because it is a draft.<sup>56</sup> If information in a document reveals advice, it fits within the meaning of s. 13(1) regardless of whether the document is finalized or still in the drafting stage.

[35] With this in mind and following a review of the records in dispute, I find that the majority of the draft materials do not reveal advice or recommendations. None of the draft materials contain policy options, implications of options, expert opinions, or pros and cons for a decision maker to consider. Rather, the drafts related to the applicant contain information about what the applicant said or did during his time at UBC; summaries of instructor feedback written to the applicant; information as to instructor, Committee, or School decisions related to the applicant; reasons for such decisions; and information about next steps. The draft course materials describe course objectives, requirements, and evaluation methods. In my view, this type of information does not reveal advice or recommendations.

[36] UBC says that all drafts were “part of the deliberative process” but this does not automatically make the information in them advice or recommendations under s. 13(1). In order for s. 13(1) to apply, the specific information at issue must reveal advice or recommendations developed by or for UBC. Subject to the following paragraph, I find that the draft materials do not reveal advice or recommendations.

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<sup>53</sup> Examples at p. 296, 376, 395, 456, 462, 483, and 1259 of F17-71262; and p. 1179 and 1186 of F17-72586.

<sup>54</sup> Examples at p. 1576-1577, 1800-1803 and 1884-1891 of F17-72586.

<sup>55</sup> UBC’s initial submissions at para. 42.

<sup>56</sup> Order 00-27, 2000 CanLII 14392 (BC IPC) at p. 6. See also Order F14-44, *supra* note 31 at para. 32; Order 03-37, 2003 CanLII 49216 (BC IPC) at paras. 59-61; Order F18-38, 2018 BCIPC 41 at para. 17; Order F17-39, *supra* note 39 at para. 37; and Order F17-13, *supra* note 43 at para. 24.

[37] In some instances, UBC has withheld editorial advice and suggestions made in relation to the draft materials. Some of this type of commentary appears directly in the draft documents in comment boxes or via tracked changes in Microsoft Word; other times, these comments appear in emails sent by those reviewing the draft materials (as discussed above). Previous orders have found that public bodies can withhold editorial advice and recommendations regarding the content and wording of draft documents under s. 13(1).<sup>57</sup> Therefore, I find that these types of comments and suggestions qualify as advice or recommendations.<sup>58</sup>

#### *Other records*

[38] UBC also withheld two one-page flowcharts about School processes and a two-page information sheet about the use of social media under s. 13(1).<sup>59</sup> UBC withheld all three of these records in their entirety but has not explained how the information in them reveals advice or recommendations.

[39] Each flow chart contains a visual depiction of what happens when certain issues occur at the School. The first flow chart shows what happens when a student requests a review of an academic decision made about him or herself; the second shows what happens when a student fails an academic or clinical course. These flow charts do not contain policy options, implications of options, expert opinions, or pros and cons for a decision maker to consider. Rather, each describes the specific steps taken when dealing with student failures or requests for reviews of academic decisions. In short, these records contain information about various School processes. Previous orders have found that information about steps in a process does not amount to advice or recommendations.<sup>60</sup> With all this in mind, I find that the flowcharts do not reveal advice or recommendations.

[40] I also find that the information sheet about the use of social media does not fit within the meaning of s. 13(1). This information sheet contains basic information about online professionalism and includes internet links to various policies about ethics and professional conduct. From the context provided in the Committee meeting minutes, I understand that the Committee required a student

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<sup>57</sup> Order 03-37, *ibid*; Order F14-44, *supra* note 31; Order 04-15, 2004 CanLII 7271 (BC IPC) at para. 15; Order F18-38, *ibid* at para. 18; and Order F15-26, 2015 BCIPC 28 at para. 29.

<sup>58</sup> Some draft documents contain a myriad of comments, recommendations and suggestions in track changes or comment boxes (e.g. p. 190-195 and 2530-2535 of F17-72586). UBC can withhold these drafts in their entirety because the information that reveals advice or recommendations cannot be reasonably severed from the information that does not.

<sup>59</sup> Use of social media information sheet at p. 1714-1715 of F17-72586; flowcharts at p. 1928-1929 of F17-72586.

<sup>60</sup> Order F13-07, 2013 BCIPC 8 at paras. 15 and 17. For similar reasoning, see also Order F14-34, *supra* note 36 at para. 30 where Adjudicator Flanagan found that instructions and guidance to staff about steps to follow in preparing certain documents did not qualify as advice or recommendations.

to prepare this document because of something the student had done. In effect, it appears that the Committee gave a student a disciplinary assignment to ensure the student learned about a specific topic. I do not understand – and UBC does not explain – how a document written by a UBC student as a form of discipline reveals advice or recommendations under s. 13(1).

*Exceptions – section 13(2)*

[41] UBC did not make submissions specifically related to the exceptions contained in s. 13(2). I have considered whether the information that qualifies as advice or recommendations falls within any of the circumstances described in s. 13(2). In my view, s. 13(2) does not apply.

*Summary – section 13*

[42] To summarize, UBC can withhold some of the information in dispute under s. 13 because it reveals advice or recommendations developed by or for UBC and none of the exceptions in s. 13(2) apply. However, some of the information UBC withheld under s. 13 would not reveal advice or recommendations. UBC has also applied s. 22 to some of this information, so I will consider it again below.

***Unreasonable invasion of personal privacy – section 22***

[43] Section 22 requires public bodies to refuse to disclose personal information if disclosure would be an unreasonable invasion of a third party's personal privacy.

[44] UBC has withheld information from a variety of records under s. 22, including emails; Committee meeting materials; course, clinical placement, and examination lists; student progress reports; and charts with student marks.

[45] The analysis under s. 22 involves four steps:<sup>61</sup>

- 1) Determine whether the information in dispute is personal information.
- 2) Determine whether any of the circumstances described in s. 22(4) apply. If they do, then disclosure is *not* an unreasonable invasion of personal privacy.
- 3) Determine whether any of the presumptions listed in s. 22(3) apply. If they do, disclosure is *presumed* to be an unreasonable invasion of personal privacy. Presumptions may be rebutted by considering all relevant circumstances (the next step in the analysis).

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<sup>61</sup> For example, see Order 01-53, 2001 CanLII 21607 (BC IPC) at paras. 22-24.

- 4) Consider the impact that disclosure would have in light of all the relevant circumstances. Do the relevant circumstances weigh in favour or against disclosure?

*Personal Information*

[46] FIPPA defines personal information as recorded information about an identifiable individual other than contact information.<sup>62</sup> Previous orders have held that information is about an identifiable individual when it is reasonably capable of identifying an individual alone or when combined with information from other available sources.<sup>63</sup>

[47] As noted, FIPPA excludes contact information from the definition of personal information. FIPPA defines contact information as information to enable an individual at a place of business to be contacted. Contact information includes an individual's name, position or title, business telephone number, address, email or fax number.

[48] Much of the information withheld under s. 22 qualifies as personal information. It includes the following types of information:

- Student names;<sup>64</sup>
- Student and nursing license numbers;<sup>65</sup>
- Student course, clinical and exam schedules, and marks;<sup>66</sup>
- Details about the personal and academic or professional lives of identifiable individuals, such as information about family, health or academic issues, and information about vacations and hobbies;<sup>67</sup>
- Information about the personal feelings or concerns of identifiable individuals;<sup>68</sup>
- Information about what identifiable individuals said or did;<sup>69</sup> and
- Personal email addresses or personal phone numbers of students and instructors.<sup>70</sup>

[49] However, the following types of information do not qualify as personal information because they do not relate to an identifiable individual:

<sup>62</sup> Schedule 1 of FIPPA contains its definitions.

<sup>63</sup> For examples, see Order F16-38, 2016 BCIPC 42 at para. 112; and Order F13-04, 2013 BCIPC 4 at para. 23.

<sup>64</sup> Examples at p. 15-24 of F17-71262; and p. 22 of F17-72586.

<sup>65</sup> Examples at p. 1060 of F17-71262; and p. 19-21 of F17-72586.

<sup>66</sup> Examples at p. 23-25 and 183-185 of F17-72586.

<sup>67</sup> Examples at p. 352 and 737 of F17-71262; and p. 43-44, 53-54, and 226-227 of F17-72586.

<sup>68</sup> Examples at p. 306, 919, 959, and 1136 of F17-71262.

<sup>69</sup> Examples at p. 866, 959, 977, and 1138 of F17-71262.

<sup>70</sup> Examples at p. 42-43, 62, 186, and 228 of F17-72586.

- Administrative information such as meeting times or corrections to meeting minutes respecting administrative matters;<sup>71</sup>
- Factual information that does not relate to any identifiable individuals, such as the number (but not the names) of students with academic issues;<sup>72</sup> and
- Topic headings, titles and action items (but not the people's names associated with action items).<sup>73</sup>

I will not consider these types of information any further in my s. 22 analysis because they do not qualify as personal information.

*Not an unreasonable invasion of privacy – section 22(4)*

[50] The next step in the s. 22 analysis requires that I consider whether s. 22(4) applies to the information at issue. Section 22(4) lists situations in which disclosure of personal information is not an unreasonable invasion of personal privacy.

[51] I find s. 22(4)(e) applicable here. Section 22(4)(e) says that when personal information is about a third party's position, functions, or remuneration as an employee of a public body, the disclosure of that information will not be an unreasonable invasion of personal privacy. Previous orders have held that the names of a public body's employees fall under s. 22(4)(e).<sup>74</sup> Similarly, information that relates to an employee's job duties in the normal course of work-related activities also falls under s. 22(4)(e).<sup>75</sup>

[52] UBC has withheld the names and factual information about the work-related actions of UBC employees in two emails and many times in the Committee meeting minutes, including the action items.<sup>76</sup> Section 22(4)(e) applies to this type of personal information. Disclosing the names and objective, factual statements about what various UBC employees did in the normal course of discharging their job duties does not constitute an unreasonable invasion of the personal privacy of those individuals under s. 22(1). I will not consider this type of personal information any further.

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<sup>71</sup> Examples at p. 286 of F17-71262; and p. 28 of F17-72586.

<sup>72</sup> Examples at p. 253, 288, and 1659 of F17-71262; and p. 33, 223, 244, 249-250, 252, and 254 of F17-72586.

<sup>73</sup> For similar reasoning, see Order F19-19, 2019 BCIPC 21 at para. 40.

<sup>74</sup> Order 01-15, *supra* note 47 at para. 35; and Order 04-20, 2004 CanLII 45530 (BC IPC) at para. 18.

<sup>75</sup> Order 01-53, *supra* note 61 at para 40.

<sup>76</sup> Emails at p. 27 and 2485 of F17-72586. Examples of UBC employee names in meeting minutes at p. 29-33, 212-213, 222-225, 249-250 of F17-72586. Example of a UBC employee name in a meeting agenda at p. 1799 of F17-72586.



*Presumed unreasonable invasion of privacy – section 22(3)*

[53] The third step in the s. 22 analysis requires that I consider whether any of the presumptions in s. 22(3) apply to the personal information at issue. Section 22(3) lists circumstances in which disclosure of personal information is presumed to be an unreasonable invasion of personal privacy.

[54] UBC submits that s. 22(3)(d) applies to personal information respecting the occupational or educational history of students and instructors. I agree. I find that disclosure of the student names; student numbers; students' course schedules and clinical placements; and information related to students' academic performance is presumed to be an unreasonable invasion of personal privacy because this information relates to the educational history of those students. I also find that s. 22(3)(d) applies to the nursing license numbers of clinical instructors because nursing license numbers relate to the occupational history of those instructors.

[55] Additionally, while UBC did not make submissions in relation to s. 22(3)(a), I find that it applies to some of the information at issue. Section 22(3)(a) creates a presumption against releasing a third party's medical information. Some of the information withheld under s. 22 relates to the medical condition or treatment of identifiable individuals.<sup>77</sup> The disclosure of this personal information is presumed to be an unreasonable invasion of personal privacy.

*Relevant circumstances – section 22(2)*

[56] The last step in the s. 22 analysis requires a consideration of all relevant circumstances to determine whether disclosure of personal information constitutes an unreasonable invasion of personal privacy. The relevant circumstances might rebut the presumptions discussed immediately above.

[57] Section 22(2) lists some relevant circumstances to consider at this stage. In its submissions, UBC discusses the potential applicability of ss. 22(2)(a), (e), (f) and (h) in relation to the information at issue. As mentioned previously, the applicant makes no submission about this (or any of the other issues involved in this inquiry).

*Disclosure desirable for public scrutiny – section 22(2)(a)*

[58] Section 22(2)(a) asks whether disclosure of personal information is desirable for the purpose of subjecting the activities of a public body to public scrutiny. In doing so, this section highlights the importance of fostering the accountability of public bodies.<sup>78</sup>

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<sup>77</sup> Pages 838 and 2272 of F17-72586.

<sup>78</sup> Order F05-18, 2005 CanLII 24734 (BC IPC) at para. 49.

[59] UBC takes the position that the disclosure of some of the information withheld under s. 22 – specifically, the expression of the personal feelings and/or concerns of identifiable third parties – would not be desirable for the purpose of subjecting UBC to public scrutiny under s. 22(2)(a). UBC submits that this type of information “is not relevant to improving or fostering accountability on the part of the public body.”<sup>79</sup> I agree. I see no connection between disclosing the specific type of personal information UBC references and fostering the public accountability of UBC.

[60] Additionally, while UBC focusses its s. 22(2)(a) submissions exclusively on only one type of personal information in the records (the expression of the personal feelings/concerns of third parties), I also find that the disclosure of the other students’ personal information in the records before me would not add to the public’s ability to scrutinize UBC in any meaningful way. For all these reasons, I find that s. 22(2)(a) does not weigh in favour of disclosure in this case.

*Unfair harm and unfair damage to reputation – sections 22(2)(e) and (h)*

[61] Section 22(2)(e) asks whether disclosure would unfairly expose a third party to “financial or other harm.” Past orders have interpreted “other harm” as serious mental distress, anguish, or harassment.<sup>80</sup> For mental harm to fit within the meaning of “other harm,” it must go beyond embarrassment, upset, or a negative reaction.<sup>81</sup> Section 22(2)(h) relates to circumstances where disclosure may unfairly damage the reputation of a person referred to in the records.

[62] UBC submits that disclosure of what it characterizes as “sensitive comments in relation to personal feelings and/or concerns” would unfairly expose the individuals named in the records to harm and unfairly damage their reputations.<sup>82</sup> UBC has withheld some of its employee’s views about the actions of an identifiable third party. UBC says that disclosure of this information would unfairly damage that individual’s reputation and cause “professional harm” to that individual.<sup>83</sup> I am not persuaded by this argument for the reasons that follow.

[63] First, as described above, past orders have defined “other harm” under s. 22(2)(e) as serious mental distress, anguish or harassment – not “professional harm.” UBC did not provide any persuasive evidence to show that disclosure of the information at issue would expose anyone to serious mental distress, anguish, or harassment.

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<sup>79</sup> UBC’s initial submissions at para. 26.

<sup>80</sup> Order 01-37, 2001 CanLII 21591 (BC IPC) at para. 42.

<sup>81</sup> Order 01-15, *supra* note 47 at paras. 49-50.

<sup>82</sup> UBC’s initial submissions at para. 29.

<sup>83</sup> *Ibid.*

[64] With regards to s. 22(2)(h), UBC also did not provide persuasive evidence to establish that disclosure might damage anyone's reputation or any specifics as to how the alleged damage to anyone's reputation would be unfair. Furthermore, the context of the records leads me to conclude that any negative impact to an identifiable third party's reputation has already occurred. In other words, the disclosure of this information would not do anything that has not already been done.

[65] For all these reasons, I am not satisfied that ss. 22(2)(e) and (h) weigh against disclosure in this case.

*Supplied in confidence – section 22(2)(f)*

[66] Under s. 22(2)(f), I must consider whether the personal information at issue was supplied in confidence. UBC submits that the personal information withheld under s. 22 was supplied in confidence, making s. 22(2)(f) a relevant factor weighing against disclosure in this case.

[67] UBC provides affidavit evidence from two professors respecting the confidential nature of:

- student information, such as schedules, grades and progress;
- discussions between School employees about students or instructors; and
- the personal phone numbers and email addresses of instructors and students.

[68] One of UBC's affiants says "[i]n all our internal discussions regarding either student progress or faculty responsibilities, all faculty members, instructors, and staff are constantly aware of the importance of confidentiality."<sup>84</sup>

[69] UBC's evidence, paired with the sensitive nature of much of the information about other students, persuades me that much of the personal information at issue was supplied in confidence. I find that this factor weighs against disclosure in relation to some of the personal information in dispute.

*Other relevant circumstances*

[70] I have also considered the fact that the applicant already knows some of the third party personal information at issue. For example, in several instances, UBC has withheld the personal cell phone number of one of its instructors. However, this instructor clearly and intentionally gave the applicant her cell

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<sup>84</sup> Senior Instructor's affidavit at para. 11.

phone number in two different emails that she wrote to him.<sup>85</sup> Similarly, UBC withheld information relating to the whereabouts of an instructor who had travelled internationally.<sup>86</sup> However, this instructor told all the students in her course (which included the applicant) about this international travel.<sup>87</sup> UBC also withheld the names of students that attended a course with the applicant from a communication the instructor sent to all attendees (including the applicant).<sup>88</sup> Similarly, UBC withheld the email addresses of other UBC students from an email that included the applicant.<sup>89</sup> Additionally, in a few instances, UBC withheld information in one place under s. 22 but disclosed it elsewhere in a duplicate record in its response to the applicant's access request.<sup>90</sup> The applicant already received all this personal information in one way or another, therefore I find that its disclosure would not be an unreasonable invasion of third party personal privacy under s. 22(1).<sup>91</sup>

[71] Past orders have also treated the sensitivity of the personal information at issue as a relevant circumstance. For example, where personal information is innocuous and not sensitive in nature, past orders have found that its disclosure would not constitute an unreasonable invasion of personal privacy.<sup>92</sup> In my view, information relating to an individual's vacation, travel, or family plans or hobbies is entirely innocuous.<sup>93</sup> As stated by Senior Adjudicator Barker:

[This type of information] is the type of information most people share openly with others when explaining where they are going or where they have been, and it is part of the niceties of greetings and workplace etiquette. In my view, this is innocuous information that is devoid of any detail, sensitivity or apparent significance. Further, it is over two years old. I find that disclosing it would not be an unreasonable invasion of third party personal privacy under s. 22(1).<sup>94</sup>

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<sup>85</sup> Email sent Oct 21, 2014 1:29 PM on p. 1996 of F17-72586; and email sent Jan 30, 2015 at 1:12 PM on p. 2193 of F17-72586.

<sup>86</sup> Examples at p. 2037 and 2052 of F17-72586.

<sup>87</sup> Page 2368 of F17-72586.

<sup>88</sup> Page 2369-2370 and the email at p. 2372 of F17-72586.

<sup>89</sup> Page 25 of F17-71262.

<sup>90</sup> Specifically, p. 1587, 2253, 2487 and 2489 of F17-72586 contain information released elsewhere in duplicate records.

<sup>91</sup> For examples of similar reasoning, see Order F19-02, 2019 BCIPC 02 at para. 73; Order F17-02, 2017 BCIPC 2 at paras. 28-30; Order F18-19, 2018 BCIPC 22 at paras. 74-77; and Order 04-33, 2004 CanLII 43765 (BC IPC) at para. 54.

<sup>92</sup> For examples, see Order F08-20, 2008 CanLII 66914 (BC IPC) at para. 44; Order F17-13, *supra* note 43 at para. 62; Order F16-06, 2016 BCIPC 7 at para. 38; Order F14-45, 2014 BCIPC 48 at para. 58; Order F16-38, *supra* note 63 at paras. 114 and 149; and Order F14-39, 2014 BCIPC 42 at paras. 54 and 59.

<sup>93</sup> Examples at p. 43, 276, 714, 801, 855, 891, 909, 1831, and 2298 of F17-72586; and p. 352 of F17-71262.

<sup>94</sup> Order F17-13, *supra* note 43.

In this case, most of the innocuous information at issue relates to vacations, travel and family activities that occurred between two to four years ago. I find that disclosing it would not unreasonably invade personal privacy under s. 22(1).

[72] Conversely, if information is particularly sensitive or private in nature, this factor may weigh against disclosure.<sup>95</sup> I find some of the personal opinions, feelings and concerns expressed by various UBC instructors quite sensitive.<sup>96</sup> The disclosure of this sensitive information would, in my view, constitute an unreasonable invasion of personal privacy.

#### *Conclusion – section 22*

[73] I find that much of the information withheld under s. 22(1) is personal information. However, administrative and factual information that does not relate to identifiable individuals, including topics, headings and action items is not personal information.

[74] Additionally, I find that disclosing the names and objective, factual statements about what various UBC employees did in the normal course of discharging their job duties does not constitute an unreasonable invasion of personal privacy. UBC cannot withhold this type of personal information under s. 22(1).

[75] The presumptions against releasing medical information and information about educational, occupational or employment history apply to much of the personal information in this case. I find that this type of information was supplied in confidence, a circumstance that weighs against disclosure. None of the relevant circumstances rebut the applicable presumptions.

[76] However, two relevant circumstances – the applicant's knowledge and the innocuous nature of some of the personal information – weigh in favour of releasing some information. Specifically, I find that releasing innocuous information about vacations and family plans and releasing information that the applicant already knows would not constitute an unreasonable invasion of personal privacy under s. 22(1). None of the presumptions in s. 22(3) apply to this information.

[77] In short, UBC must withhold some but not all of the information under s. 22(1).

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<sup>95</sup> For examples, see Order F17-39, *supra* note 39 at paras. 120-121; and Order F15-52, *supra* note 6 at para. 46.

<sup>96</sup> Examples at p. 713 of F17-72586; and p. 921, p. 959, and p. 1136 of F17-71262.

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## CONCLUSION

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

- 1) I confirm UBC's decision to refuse to disclose information to the applicant under s. 14.
- 2) Subject to item 3 below, I confirm in part UBC's decision to refuse to disclose information to the applicant under ss. 13(1) and 22(1).
- 3) UBC is not authorized or required under ss. 13(1) or 22(1) to refuse to disclose the information highlighted in the copy of the records it receives with this order.
- 4) UBC must concurrently provide the OIPC registrar of inquiries with a copy of its cover letter and the records identified at item 3 immediately above when it sends those records to the applicant.

[79] Pursuant to s. 59(1), UBC must give the applicant access to the information described above in paragraph 78, item 3 by August 28, 2019.

July 16, 2019

## ORIGINAL SIGNED BY

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Laylí Antinuk, Adjudicator

OIPC Files: F17-71262 & F17-72586