



Order F21-28

## UNIVERSITY OF BRITISH COLUMBIA

Ian C. Davis  
Adjudicator

June 30, 2021

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**Summary:** The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the University of British Columbia (UBC) for access to an investigation report. The report concerns allegations of sexual assault and sexual harassment that the applicant made against a former UBC employee. UBC decided to disclose some of the information in the report. The former UBC employee argued that the disputed information should be withheld under s. 22(1) of FIPPA because its disclosure would be an unreasonable invasion of his personal privacy. The adjudicator found the disclosure would not be an unreasonable invasion of third-party personal privacy and confirmed UBC's decision that it is not required under s. 22(1) to refuse to disclose the disputed information to the applicant.

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

### INTRODUCTION

[1] This inquiry concerns the applicant's second request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the University of British Columbia (UBC) for access to information contained in an investigation report.

[2] In late 2015, the applicant reported to UBC that an individual (third party), then employed by UBC, sexually assaulted and sexually harassed her. UBC retained an investigator (Investigator) to investigate the allegations and prepare an investigation report (Report). The Investigator submitted the Report to UBC in April 2016.

[3] In June 2016, the applicant made a request to UBC under FIPPA for access to the Report (2016 Request). After consulting with the third party, UBC decided to disclose a copy of the Report to the applicant with some information

redacted under s. 22(1) of FIPPA (unreasonable invasion of third-party personal privacy). The third party asked the Office of the Information and Privacy Commissioner (OIPC) to review UBC's decision. As a result of mediation, the third party agreed to UBC providing a redacted copy of the Report to the applicant, which UBC did in early 2017.<sup>1</sup>

[4] Subsequently, in 2018, the applicant made another FIPPA request to UBC for access to the Report (2018 Request). The 2018 Request is the access request at issue in this inquiry. In the request, the applicant took the position that s. 22(1) no longer applies to some of the previously redacted information because the third party had "widely discussed" that information.<sup>2</sup> After consulting with the third party, who objected to any further disclosure, UBC decided it was required to disclose some of the information it had previously withheld in response to the 2016 Request. That is the information now in dispute.

[5] The third party asked the OIPC to review UBC's 2018 decision to disclose previously redacted information in the Report. Mediation did not resolve the matter and it proceeded to inquiry. The applicant, UBC, and the third party all made inquiry submissions.<sup>3</sup> The applicant and UBC made submissions through counsel. The third party represented himself.

## PRELIMINARY MATTERS

### *Scope of this inquiry*

[6] The third party makes various allegations in his submissions. For example, he alleges that UBC is biased and has committed professional misconduct, "criminal financial fraud" and an abuse of process.<sup>4</sup> The third party says UBC has "an ulterior motive in revisiting its prior interpretation of facts" and has misrepresented certain case authorities.<sup>5</sup> He alleges that UBC's legal counsel swore an affidavit that includes statements the affiant knew to be false.<sup>6</sup> He also alleges that the applicant lied under oath multiple times.<sup>7</sup>

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<sup>1</sup> Mediation is confidential and this inquiry is not about the 2016 Request, so the record does not indicate exactly how the redacted report that was provided to the applicant ultimately differed from the redactions UBC originally proposed in response to the 2016 Request.

<sup>2</sup> Letter from the applicant's counsel to UBC dated October 15, 2018 at p. 1.

<sup>3</sup> On April 20, 2021, I invited the parties to make updated submissions, which all parties did.

<sup>4</sup> Third party's initial submissions at paras. 46, 171 and 175; third party's reply submissions at paras. 139-141; third party's further submissions dated May 12, 2021 at p. 3. In relation to the allegations of bias and misconduct, the third party takes issue with a letter UBC sent to him in response to the applicant's 2018 request. I accept UBC's sworn evidence in Affidavit #1 of CW that this letter was sent in error and corrected with a subsequent letter.

<sup>5</sup> Third party's initial submissions at para. 171.

<sup>6</sup> Third party's initial submissions at paras. 139-154.

<sup>7</sup> Third party's further submissions dated May 12, 2021 at p. 1.

[7] To the extent these allegations pertain to the assessment of the evidence and legal authorities for this inquiry, I have considered them in evaluating UBC's and the applicant's evidence and legal arguments. My views on those matters are reflected in the s. 22 analysis below.

[8] However, in my view, the third party's other allegations go beyond the scope of this inquiry. This inquiry arises from a factual history of contentious and high-profile disputes between the parties about serious matters, some of which are ongoing. The parties' submissions reflect that background. However, as the third party and the applicant acknowledge, the scope of this inquiry is limited to the FIPPA issue stated in the Investigator's Fact Report and the Notice of Inquiry.<sup>8</sup> To the extent the parties' submissions raise issues beyond s. 22, I decline to consider them. In general, the OIPC will only consider new issues at the inquiry stage when the OIPC grants permission.<sup>9</sup> The parties did not seek, and the OIPC did not grant, permission to add any new issues beyond s. 22.

### **ISSUE AND BURDEN OF PROOF**

[9] The only issue to be decided in this inquiry is whether UBC is required under s. 22(1) to refuse to disclose the information in dispute in the Report. The burden is on the applicant to prove that disclosure of the information in dispute would not be an unreasonable invasion of the third party's personal privacy.<sup>10</sup> However, the public body has the initial burden of proving that the information in dispute is personal information under s. 22(1).<sup>11</sup>

### **BACKGROUND**

[10] As noted above, in late 2015, the applicant reported to UBC that the third party sexually harassed and sexually assaulted her.<sup>12</sup> UBC suspended the third party's employment. UBC appointed the Investigator to investigate the allegations and prepare the Report. The Investigator submitted the Report to UBC in April 2016.

[11] UBC gave the third party a copy of the Report with all the information in dispute in this inquiry unredacted.<sup>13</sup>

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<sup>8</sup> Third party's initial submissions at para. 40; applicant's initial submissions at para. 8.

<sup>9</sup> See, e.g., Order F19-01, 2019 BCIPC 1 (CanLII) at para. 5.

<sup>10</sup> FIPPA, s. 57(3)(a).

<sup>11</sup> Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 9-11.

<sup>12</sup> Unless otherwise specified, the information in this background section is based on the following, all of which I accept: the Investigator's Fact Report; the third party's initial submissions at paras. 14 (the year appears to be a typo), 19-20, 24 and 30-31, and Appendices B, C, D and V; Affidavit #1 of AK at paras. 2, 5, 9 and 14, as well as Exhibits "A" and "C"; Affidavit #1 of PH at paras. 14-19; and the applicant's further submissions and evidence dated May 3, 2021.

<sup>13</sup> This is common ground between the parties and I infer this fact from the third party's submissions. However, it is not clear to me whether the third party has a copy of the Report with more information unredacted than is in issue in this inquiry.

[12] The applicant wrote to UBC in June 2016 requesting access to all parts of the Report relating to her (the 2016 Request).<sup>14</sup>

[13] Subsequently, UBC terminated the third party's employment. UBC advised the applicant about the steps it had taken in response to her allegations, noted that the third party "did not dispute any of the critical findings" in the Report, and stated that the third party was "no longer employed" at UBC.<sup>15</sup>

[14] In January 2017, with the assistance of the OIPC, the parties engaged in mediation regarding the 2016 Request. As a result of that process, UBC provided the applicant with a redacted copy of the Report in February 2017 (redacted Report).<sup>16</sup> I detail below the information that was and was not redacted in the redacted Report. Most notably, the open parts of the redacted Report state that the Investigator was "unable to find, on a balance of probabilities" that the alleged sexual assaults occurred.<sup>17</sup> The third party says he consented to UBC releasing the parts of the Report dealing with the sexual assault allegations so that he could "refute the widespread allegations that [he is] a rapist."<sup>18</sup>

[15] On August 29, 2018, the applicant made the 2018 Request at issue in this inquiry. The applicant also issued an open letter to UBC through her legal counsel demanding immediate release of the Investigator's findings.

[16] In late October 2018, the third party commenced a defamation action in the Supreme Court of British Columbia against the applicant and other defendants.

[17] On December 31, 2018, the third party asked the OIPC to review UBC's 2018 decision to disclose previously redacted portions of the Report.

[18] In May 2019, the applicant applied under the *Protection of Public Participation Act [PPPA]*<sup>19</sup> for an order dismissing the third party's defamation action. The *PPPA* permits defendants who allege that litigation stifles expression relating to matters of public interest to apply for an order summarily dismissing the action at any point in the proceedings. If a defendant brings a *PPPA* application, no party may take any further steps in the underlying proceeding until the *PPPA* application has been finally resolved. For the purposes of this inquiry,

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<sup>14</sup> Exhibit "A" to Affidavit #1 of AK. Although the applicant's counsel told UBC that the Report did not belong in the "FOI box", the parties proceeded with the 2016 Request as an access request under FIPPA. It is not clear to me what information, if any, about the Report and the investigation UBC had provided to the applicant at this point.

<sup>15</sup> Appendix K to the third party's initial submissions.

<sup>16</sup> See *supra* note 1.

<sup>17</sup> Record at pp. 22-24.

<sup>18</sup> Third party's initial submissions at para. 42.

<sup>19</sup> S.B.C. 2019, c. 3. The *PPPA* is colloquially referred to as "anti-SLAPP" legislation, where "SLAPP" stands for "Strategic Litigation Against Public Participation".

I will refer to the defamation action and the *PPPA* application together as the “defamation litigation”.

[19] The defamation litigation is ongoing. As part of the *PPPA* application, the parties filed affidavit evidence and cross-examined certain affiants. The applicant submitted transcripts of the cross-examinations as evidence in this inquiry.

[20] On August 7, 2019, following mediation with the OIPC, the third party requested that this FIPPA matter proceed to inquiry.

## **RECORD AND INFORMATION IN DISPUTE**

[21] The only record in dispute is the Report. It is a 47-page document (including the cover page and table of contents). As noted above, UBC already disclosed to the applicant a significant portion of the information in the Report in response to the 2016 Request, including:

- the Investigator’s name and the date on which the Report was submitted to UBC;
- most of the table of contents;
- the terms of reference for the investigation;
- the UBC policies considered in the investigation;
- the applicant’s allegations against the third party;
- background facts about how the applicant’s allegations arose;
- the process followed in the investigation;
- the entirety of the Investigator’s findings and discussion of the evidence relating to the allegations of sexual assault; and
- most of the Investigator’s discussion relating to the allegations of sexual harassment.

[22] The information in dispute in this inquiry is a subset of the information UBC previously withheld in the redacted Report.<sup>20</sup> In general terms, the information in dispute here is the third party’s name and job title, the Investigator’s conclusions about whether the third party committed sexual harassment and breached UBC policies, and several lines of text that I would describe as part of the Investigator’s evaluation of the evidence and factual findings regarding the allegations of sexual harassment (disputed information). The disputed information amounts to roughly a dozen lines of text, interspersed throughout the Report. The parties focused their arguments on the Investigator’s conclusions and findings regarding the sexual harassment allegations.

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<sup>20</sup> There is other information redacted in the Report, but it is not in dispute in this inquiry. UBC highlighted the information in dispute in this inquiry in green, and that is how the information appears in the record before me.

## HARM TO THIRD-PARTY PERSONAL PRIVACY – S. 22

[23] Section 22(1) provides that a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

### *Overview of the parties' positions*

[24] The parties provided detailed submissions about the various factors to consider under s. 22. I analyze those below. At this stage, the parties' overall positions can be summarized as follows.

[25] UBC submits that s. 22(1) does not apply to the disputed information because it is "already in the public domain."<sup>21</sup> UBC says that "significant commentary about what is in the Report has been released publicly by the Third Party and journalists he has spoken to or shown the Report to, or journalists that the Third Party has given interviews to."<sup>22</sup> UBC argues that a reasonable person would conclude from the published information that the Report made no findings against the third party, so the Investigator's sexual harassment findings should be disclosed.<sup>23</sup>

[26] The applicant takes a similar position. She says that, through media articles, the third party has "actively put the contents of the Report and his characterization of its findings into the public domain."<sup>24</sup> The applicant submits that the third party's public representations "directly and indirectly advanced the narrative that [her] complaint was entirely unfounded."<sup>25</sup> The applicant says she cannot test or counter the third party's representations because she does not have an unredacted copy of the Report and has never been formally advised of the Report's findings regarding her sexual harassment allegations.

[27] Further, the applicant submits that she has an interest as compelling as the third party's in being informed of the full findings of the Report. She claims that the third party is "weaponizing" s. 22—using it "as a sword"—to "exploit informational imbalances" and block the applicant's access to the Report in a manner that frustrates FIPPA and is harmful to her privacy and reputational interests.<sup>26</sup> The applicant argues that full disclosure of the Investigator's findings is required to maintain public confidence in sexual misconduct investigations and to encourage the reporting of sexual violence.

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<sup>21</sup> UBC's initial submissions at para. 14.

<sup>22</sup> UBC's reply submissions at para. 2; UBC's initial submissions at paras. 19-24.

<sup>23</sup> UBC's reply submissions at para. 3.

<sup>24</sup> Applicant's initial submissions at para. 2.

<sup>25</sup> Applicant's initial submissions at para. 2.

<sup>26</sup> Applicant's initial submissions at paras. 6 and 58.

[28] The third party submits that s. 22(1) requires UBC to refuse to disclose the disputed information. He acknowledges that he has publicly discussed the open parts of the redacted Report relating to the sexual assault allegations. He says he did so to defend himself and was entitled to do so. However, the third party denies publicly disclosing the redacted portions of the Report relating to the allegations of sexual harassment or misrepresenting the Report's findings.<sup>27</sup> He says he has at all times confined his comments to the "false allegation of rape and/or sexual assault", which is addressed in the open parts of the redacted Report.<sup>28</sup>

[29] The third party argues that UBC is not objectively applying FIPPA, but rather applying "its own view of fairness, one driven by misread media articles and by UBC's own wish to publicly excuse its mistreatment of [him]."<sup>29</sup> As for the applicant, the third party claims that she and her lawyer "have doggedly attempted to use the larger #metoo social movement as a weapon to destroy any possibility that [he] did not sexually assault anyone."<sup>30</sup> The third party resents what he considers to be the applicant's attempts to "ruin" him publicly and make him "stand-in for all terrible men in the world" and "stand on behalf of rapists."<sup>31</sup>

[30] With the parties' overall positions in mind, I turn now to the s. 22 analysis. The analytical approach to s. 22 is well-established.<sup>32</sup> I apply it below.

### ***Personal information***

[31] Since s. 22(1) only applies to personal information, the first step is to determine whether the disputed information is personal information. FIPPA defines personal information as "recorded information about an identifiable individual other than contact information".<sup>33</sup> Information is "about an identifiable individual" when it is "reasonably capable of identifying an individual, either alone or when combined with other available sources of information."<sup>34</sup>

[32] FIPPA defines contact information as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual".<sup>35</sup> None of the parties argued that any of the disputed information is contact information and I agree.

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<sup>27</sup> Third party's initial submissions at paras. 48-50 and 64.

<sup>28</sup> Third party's initial submissions at para. 66.

<sup>29</sup> Third party's initial submissions at para. 168.

<sup>30</sup> Third party's reply submissions at para. 6.

<sup>31</sup> Third party's reply submissions at paras. 10-12 and 20.

<sup>32</sup> See e.g. Order F15-03, 2015 BCIPC 3 (CanLII) at para. 58.

<sup>33</sup> Schedule 1 of FIPPA.

<sup>34</sup> Order F19-13, 2019 BCIPC 15 (CanLII) at para. 16 citing Order F18-11, 2018 BCIPC 14 (CanLII) at para. 32.

<sup>35</sup> Schedule 1 of FIPPA.

[33] UBC and the applicant submit that the disputed information is the personal information of both the applicant and the third party.<sup>36</sup>

[34] In his initial submissions, the third party agrees with UBC and the applicant that the disputed information is both his and the applicant's personal information.<sup>37</sup> However, in his reply submissions, he submits that the disputed information is only his personal information because it is the Investigator's comments and findings about whether he violated UBC policy.<sup>38</sup>

[35] In my view, the disputed information is the personal information of the applicant and the third party because it is about both of them. The information is clearly about the third party because it relates to his conduct and whether he breached UBC policies. The information is also about the applicant because it relates to allegations she made, which are about her interactions with the third party. I do not see how an investigator's discussion and findings about the interactions between two individuals could only be about one of them.

[36] I conclude that the disputed information is the personal information of both the applicant and the third party.<sup>39</sup>

***No unreasonable invasion – s. 22(4)***

[37] The next step is to analyze s. 22(4), which sets out various circumstances in which disclosure of personal information is not an unreasonable invasion of a third party's personal privacy.

[38] UBC submits that none of the circumstances in s. 22(4) apply.<sup>40</sup> The third party and the applicant did not explicitly address s. 22(4).

[39] The only subsection that even arguably applies is s. 22(4)(e). That subsection states that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information is "about the third party's position, functions or remuneration as an officer, employee or member of a public body". Past orders have held that s. 22(4)(e) applies to "objective, factual statements about what the third party did or said in the normal course of discharging her or his job duties, but not qualitative assessments or evaluations of such actions."<sup>41</sup>

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<sup>36</sup> UBC's initial submissions at para. 25; applicant's initial submissions at para. 53.

<sup>37</sup> Third party's initial submissions at para. 156.

<sup>38</sup> Third party's reply submissions at para. 56-59.

<sup>39</sup> For a similar finding, see Order F14-10, 2014 BCIPC 12 (CanLII) at paras. 1, 6-8, 14 and 19.

<sup>40</sup> UBC's initial submissions at para. 26.

<sup>41</sup> Order 01-53, 2001 CanLII 21607 (BC IPC) at para. 40. See also Order 02-57, 2002 CanLII 42494 (BC IPC) at para. 36; Order F10-21, 2010 BCIPC 32 (CanLII) at paras. 22-24.



[40] The third party used to be a UBC employee. However, the disputed information is not “objective, factual statements about what the third party did or said in the normal course of discharging” his duties as a UBC employee. Rather, it is the Investigator’s “qualitative assessments or evaluations” of the third party’s actions in relation to the applicant. Accordingly, in the circumstances of this case, s. 22(4)(e) does not apply.

[41] The parties did not argue that any other factors under s. 22(4) are relevant. I have considered them all and am satisfied that none apply.

***Presumptions of unreasonable invasion – s. 22(3)***

[42] The third step in the s. 22 analysis is to determine if any of the presumptions in s. 22(3) apply. Section 22(3) sets out various circumstances in which a disclosure of personal information is presumed to be an unreasonable invasion of a third party’s personal privacy.

[43] UBC submits that s. 22(3)(d) applies.<sup>42</sup> That subsection states that a disclosure of personal information is presumed to be an unreasonable invasion of a third party’s personal privacy if the personal information “relates to employment, occupational or educational history”.

[44] The third party also submits that the presumption in s. 22(3)(d) applies. He says the Report is a “workplace document relating to [his] employment.”<sup>43</sup> He notes, for example, that the investigation took place in the workplace, assessed his conduct against UBC policies, and “related to the termination of [his] employment”.<sup>44</sup>

[45] The applicant acknowledges that past OIPC orders have found that records arising from an investigation into sexual harassment by an employee fall within the scope of s. 22(3)(d).<sup>45</sup> However, she submits that the OIPC should reconsider these precedents “in a future case and/or internal or public consultation process”.<sup>46</sup> The applicant provides arguments in support of a narrower interpretation of employment history under s. 22(3)(d), but says she “does not request determination” of this issue in this inquiry.<sup>47</sup>

[46] In reply to the applicant, UBC submits that the s. 22(3)(d) jurisprudence relating to employment history “should not be disturbed”.<sup>48</sup>

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<sup>42</sup> UBC’s initial submissions at para. 27.

<sup>43</sup> Third party’s initial submissions at para. 162.

<sup>44</sup> Third party’s reply submissions at para. 128.

<sup>45</sup> Applicant’s initial submissions at para. 89.

<sup>46</sup> *Ibid* at paras. 89-92.

<sup>47</sup> *Ibid* at para. 90.

<sup>48</sup> UBC’s reply submissions at para. 46.

[47] The third party submits that re-interpreting employment history is “far outside the scope of this Inquiry.”<sup>49</sup>

[48] I decline to revisit the interpretation of “employment history” under s. 22(3)(d). The applicant is not asking me to do so in this case, and UBC and the third party are opposed.

[49] In my view, s. 22(3)(d) applies. It is well-established in past orders that s. 22(3)(d) applies to information about an individual’s behaviour or actions in the context of a workplace investigation.<sup>50</sup> Here, the disputed information is inextricably linked to the third party’s employment. The relationship between the applicant and the third party arose in the context of the third party’s capacity as a UBC employee. The Report evaluates the third party’s conduct against UBC policies, which applied to him because he was a UBC employee. Also, as the third party notes, the disputed information relates to the termination of his employment. For these reasons, I conclude that the disputed information clearly relates to the third party’s employment history with UBC. As a result, disclosure of the disputed information is presumed to be an unreasonable invasion of the third party’s personal privacy under s. 22(3)(d).

[50] The parties did not raise any other s. 22(3) factors, and I am satisfied that none apply.

***All relevant circumstances – s. 22(2)***

[51] The final step in the analysis is to determine whether disclosure of the disputed information would be an unreasonable invasion of the third party’s personal privacy, considering all relevant circumstances including those listed in s. 22(2). It is at this stage that the presumption under s. 22(3)(d) that I found applies may or may not be rebutted.

[52] The parties made submissions about ss. 22(2)(a), (c), and (e) to (h), as well as other factors that are not listed in s. 22(2).<sup>51</sup> I will first consider the factors raised by the parties that are not listed in s. 22(2) and then analyze each of the relevant factors that are listed in s. 22(2).

*Extent to which the disputed information is public*

[53] UBC and the applicant argue that the disputed information is already in the “public domain” and that this weighs in favour of disclosure under s. 22(2). This is their main argument, so I will address it first.

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<sup>49</sup> Third party’s reply submissions at para. 127.

<sup>50</sup> See, e.g., Order 02-57, *supra* note 41; Order F14-10, *supra* note 39 at para. 18.

<sup>51</sup> I am satisfied that the other factors listed in s. 22(2) are not relevant in this case.

[54] UBC and the applicant submit that the disputed information is in the public domain through media articles, including one written by the third party. UBC and the applicant argue that these articles, reasonably interpreted, state that the Investigator did not accept any of the applicant's allegations, including the allegations of sexual harassment. They argue that the disputed information is in the public domain and should be disclosed because, "as a result of the Third Party's own conduct, there exist numerous articles that purport to summarize the findings of the Report, which is the very information that the Applicant seeks access to."<sup>52</sup>

[55] UBC relies on Orders 43-1995 and F11-04.<sup>53</sup> In Order 43-1995, former Commissioner Flaherty stated that a record is in the public domain if it exists "in multiple copies with no controls on their re-dissemination".<sup>54</sup> In Order F11-04, former Commissioner Denham found that it weighed in favour of disclosure under s. 22(2) that a convicted teacher's personal information contained in a report was already in the public domain as a result of the teacher's "public trial and the accompanying publicity."<sup>55</sup>

[56] The applicant also claims that the third party allowed at least two individuals to read the unredacted Report, including the disputed information.<sup>56</sup> Further, the applicant says the third party admitted the Investigator's findings regarding the applicant's allegations of sexual harassment in cross-examination in the *PPPA* application.<sup>57</sup> In addition, the applicant says she applied to court in the defamation litigation for a copy of the unredacted Report and the court ordered the third party to disclose the Report with certain redactions removed.<sup>58</sup>

[57] The third party submits that he has never disclosed an unredacted copy of the Report, never commented publicly on the disputed information, and has at all times confined his public comments strictly to the open parts of the redacted Report relating to the sexual assault allegations.<sup>59</sup> He argues that UBC and the applicant are misinterpreting the published information about the Report. He says their argument is circular: "Were the information already in the public domain, the Applicant would not be seeking it."<sup>60</sup>

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<sup>52</sup> Applicant's initial submissions at para. 74.

<sup>53</sup> UBC's initial submissions at paras. 36 and 38. UBC also relies on Order F11-22, 2011 BCIPC 28 (CanLII) at para. 40 of its initial submissions. I agree with the third party that this case is clearly distinguishable. It was decided under s. 22(4), not s. 22(2). The adjudicator found that ss. 22(4)(c) and 22(4)(i) applied to information accessible online. Those subsections are not relevant here and no party raised them.

<sup>54</sup> Order No. 43-1995, see online: <https://www.oipc.bc.ca/rulings/orders/>.

<sup>55</sup> Order F11-04, 2011 BCIPC 4 (CanLII) at para. 21.

<sup>56</sup> Applicant's initial submissions at paras. 30-31.

<sup>57</sup> Applicant's further submissions dated May 3, 2021 at para. 7.

<sup>58</sup> Applicant's further submissions dated May 3, 2021 at paras. 14-16.

<sup>59</sup> Third party's initial submissions at paras. 37-39 and 47-106; third party's reply submissions at paras. 100-120.

<sup>60</sup> Third party's reply submissions at para. 92.

[58] I accept that past orders establish that a relevant consideration weighing in favour of disclosure under s. 22(2) is the extent to which the information in dispute under FIPPA is known to the applicant or to the public.<sup>61</sup> The weight to be placed on this factor depends on the “actual nature and extent” of the applicant’s or the public’s knowledge.<sup>62</sup> Where a party argues that the disputed information is publicly known through media statements, relevant considerations include whether the media statements reveal the disputed information directly or through inference and whether the media statements are based on a reliable source.<sup>63</sup>

[59] The parties submitted several media articles as evidence in this inquiry.<sup>64</sup> I have reviewed them all. I find that two of them state that the Investigator either found or did not find that the third party sexually harassed the applicant. I cannot identify the articles or detail what they say without creating a risk of revealing the disputed information through inference. The most I can say is that I am satisfied based on the evidence the parties submitted about recent developments in the defamation litigation that the statements in these articles support UBC’s and the applicant’s argument that the disputed information is no longer fully private.

[60] The other media articles are different. In an article written by the third party, he wrote that he did not “assault” the applicant and then noted (in the next sentence) that the Investigator was unable to find “that any of [the applicant’s] allegations happened”.<sup>65</sup> The following are some other examples of the media statements that UBC and the applicant rely upon:

- the Investigator concluded on a balance of probabilities that “the incidents likely didn’t happen”, but found that the third party “was wrong in having an affair with a student in his department”;
- the Report “effectively cleared [the third party] of wrongdoing”, and the Investigator “could substantiate none of the allegations against [the third party] – except, perhaps, that he’d erred in having a consensual affair with the woman”;

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<sup>61</sup> Order 02-36, 2002 CanLII 42470 (BC IPC) at para. 31; Order F08-20, 2008 CanLII 66914 (BC IPC) at para. 43; Order F11-04, 2011 BCIPC 4 (CanLII) at para. 21; Order F12-10, 2012 BCIPC 14 (CanLII) at para. 44; Order F16-52, 2016 BCIPC 58 (CanLII) at paras. 83-86; Order F17-02, 2017 BCIPC 2 (CanLII) at paras. 28-30.

<sup>62</sup> *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 at paras. 619-620.

<sup>63</sup> See, e.g., Alberta Order F2014-17, 2014 CanLII 23442 (AB OIPC) at paras. 35-39; Alberta Order F2016-20, 2016 CanLII 35713 (AB OIPC) at paras. 55-58.

<sup>64</sup> Exhibits to Affidavit #1 of PH and Affidavit #1 of AL, Exhibits “F” to “K” to Affidavit #1 of AK, and hyperlink on p. 2 of the third party’s further submissions dated May 12, 2021.

<sup>65</sup> Affidavit #1 of PH at Exhibit “F”, p. 55 (pages cited to numbers inserted).

- the Investigator “found the sexual assault allegation to be unfounded, but determined he engaged in a two-year affair with a student, which was against UBC policy”;
- the Investigator “could not substantiate reports of sexual assaults and noted that the two had a consensual extramarital affair”; and
- “[b]y any fair measure, the [third party] must be regarded as innocent” and the “only thing” the third party did wrong was to have a “consensual affair” with the applicant.<sup>66</sup>

[61] UBC and the applicant argue that a reasonable person reading these public statements would conclude that the Investigator did not accept any of the applicant’s allegations, including the allegations of sexual harassment.<sup>67</sup> Thus, the media articles make public statements about whether or not the Investigator found that the third party sexually harassed the applicant. According to UBC and the applicant, whether or not the Investigator found that the third party sexually harassed the applicant is the information in dispute in this inquiry; therefore, the media articles put the disputed information into the public domain.<sup>68</sup>

[62] I do not accept this argument. In my view, the disputed information is what the Investigator actually found, as that information appears in the Report. None of the media articles in question here directly state that the Investigator found, or did not find, that the third party sexually harassed the applicant. As a result, I do not see how those articles reveal the disputed information.

[63] I am also not persuaded by UBC’s and the applicant’s argument even if I were to accept that the media articles can be interpreted as stating that the Investigator did not find that the third party sexually harassed the applicant. Considering all the evidence before me, I find that none of the authors of the articles in question actually had access to the disputed information. I accept the third party’s sworn *PPPA* cross-examination evidence that he granted some authors access to the redacted Report only, that is, a copy of the Report with the disputed information redacted.<sup>69</sup> Since none of the authors actually had access to the disputed information, I do not see how the statements in the media can be considered reliable public representations about the disputed information. In my view, to the extent the media statements purport to summarize the Investigator’s sexual harassment findings, they are speculation and opinion, so they do not reveal the disputed information itself.

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<sup>66</sup> All quotes in the bulleted list come from Affidavit #1 of PH at Exhibit “A”, p. 3; Exhibit “B”, p. 8; Exhibit “C”, p. 14; Exhibit “D”, p. 18; Exhibit “E”, pp. 40 and 44.

<sup>67</sup> Applicant’s initial submissions at paras. 25-26 and 59-60; UBC’s reply submissions at paras. 3.

<sup>68</sup> Applicant’s initial submissions at paras. 51-60 and 74-79; UBC’s initial submissions at paras. 18 and 37; UBC’s reply submissions at paras. 3 and 32-44.

<sup>69</sup> Affidavit #1 of MS, Exhibit “B” at pp. 67-82 [Cross-Examination of Third Party].

[64] I do, however, accept that at least two specific individuals know the Investigator's sexual harassment findings. The applicant's counsel cross-examined one of these individuals under oath on his affidavit in the *PPPA* application. Based on my review of the transcript, I accept that this individual read an unredacted copy of the Report through his lawyer and was not given any explicit instructions about what he could or could not do with the information he learned.<sup>70</sup> As for the other individual, I find that the third party told this person whether the Investigator found that he sexually harassed the applicant.<sup>71</sup> The third party admitted that in cross-examination. He also admitted that he "never hid from anyone around [him] the findings of the report."<sup>72</sup>

[65] I also find that the applicant and the other defendants in the defamation litigation already know the Investigator's sexual harassment findings. The third party acknowledges this.<sup>73</sup> I accept, based on my review of the transcript of the third party's cross-examination evidence, that he revealed in cross-examination the Investigator's findings regarding the applicant's allegations of sexual harassment.<sup>74</sup> In addition, the applicant submitted evidence relating to the defamation litigation that satisfies me that the applicant and the other defendants now have an excerpt of the Report with all but part of one line of the disputed information unredacted.<sup>75</sup>

[66] The evidence before me indicates that the transcript of the third party's cross-examination evidence and the excerpt of the Report with almost all of the disputed information unredacted were filed with the Court as exhibits to affidavits.<sup>76</sup> There is a partial sealing order on the court file in the defamation litigation that applies to material, including affidavit exhibits, "which contains information that could identify the [applicant]."<sup>77</sup> The parties did not make submissions on the effect of the sealing order and whether the public has access to the disputed information. However, I do not see how the disputed information would reveal the applicant's identity, so it seems to me that the public could access the disputed information through the court file.

[67] Considering all of the above, I am not satisfied that the disputed information is in the public domain in the sense described in Order 43-1995. An unredacted copy of the report does not exist "in multiple copies with no controls on their re-dissemination".<sup>78</sup>

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<sup>70</sup> Affidavit #1 of MS, Exhibit "D" at pp. 10-19.

<sup>71</sup> Cross-Examination of Third Party, *supra* note 69 at pp. 72 (lines 12-25) and 73 (lines 1-4).

<sup>72</sup> Cross-Examination of Third Party, *ibid* at p. 73 (lines 4-6).

<sup>73</sup> Third party's further submissions dated May 12, 2021 at pp. 1-2.

<sup>74</sup> Cross-Examination of Third Party, *supra* note 69 at pp. 55 (lines 21-25), 56 (lines 1-2), 72 (lines 6-14) and 111 (lines 7-9).

<sup>75</sup> Affidavit #1 of AG, Exhibit "B".

<sup>76</sup> Affidavit #1 of AG, Exhibit "B"; Affidavit #1 of MS, Exhibit "B".

<sup>77</sup> Affidavit #1 of AK, Exhibit "M" at p. 2.

<sup>78</sup> *Supra* note 54.

[68] However, I am satisfied, based on my findings above, that the disputed information is no longer completely private. Certain media articles support the finding that the disputed information is publicly known. The parties to the defamation case already know the disputed information and that information is in the court file. At least two other specific individuals know the disputed information. I find that these circumstances significantly diminish the third party's claim to privacy over the disputed information. In my view, these factors weigh in favour of disclosure under s. 22(2) and I give them considerable weight.

[69] Finally, as noted above, the disputed information includes the third party's name and job title. That information appears on the cover page of the Report. On the evidence before me, I am satisfied that the connection between the Report and the third party's name and job title is notorious. Media articles and court judgments explicitly reveal this information and there is no question as to their accuracy. This consideration weighs heavily in favour of disclosure of the third party's name and job title.

*Inferences from information already disclosed*

[70] Past orders have considered it a relevant circumstance under s. 22(2) whether the applicant could "easily infer" the disputed personal information based on information that has already been disclosed.<sup>79</sup>

[71] In this case, the third party acknowledged in cross-examination that the applicant, or any other reasonable person, could infer the Investigator's conclusions regarding the applicant's allegations of sexual harassment from the parts of the Report that have already been disclosed.<sup>80</sup> The applicant makes this point as well.<sup>81</sup>

[72] The unredacted parts of the Report disclose a significant portion of the Investigator's discussion of the applicant's allegations of sexual harassment, including some key factual findings. I agree with the third party and the applicant that there is really only one reasonable inference to be made from those findings about the Investigator's conclusions. This is not a case, for example, where a decision-maker's factual findings are so complex and conflicting that significant explanation and analysis is required to bridge the logical gap to the legal conclusion. In my view, the Investigator's conclusions regarding the sexual harassment allegations are reasonably inferable from the information already disclosed in the Report.

[73] In my view, this factor weighs in favour of disclosure.

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<sup>79</sup> Order F18-19, 2018 BCIPC 22 (CanLII) at para. 76. See also Order F19-15, 2019 BCIPC 17 (CanLII) at para. 95.

<sup>80</sup> Cross-Examination of Third Party, *supra* note 69 at p. 72 (lines 6-14).

<sup>81</sup> Applicant's initial submissions at para. 33.

*Adequate degree of disclosure*

[74] The applicant submits that it is a relevant circumstance weighing in favour of disclosure that she has not been provided with an “adequate degree of disclosure” about the outcome of the investigation into her sexual harassment allegations.<sup>82</sup> She argues that the “informational asymmetry” between her and the third party is “unfair, and is contrary to the principles of natural justice, which at a minimum require parties to be informed of the decisions reached by a process which they, in good faith, submitted to and participated in.”<sup>83</sup>

[75] The applicant relies on Ontario OIPC orders to support her position. For example, in Order P-1014, the adjudicator stated that the concept of adequate degree of disclosure “relates to the fairness of administrative processes, and the need for a degree of disclosure to the parties which is consistent with the principles of natural justice.”<sup>84</sup> The adjudicator found that, in the context of a workplace investigation, “[b]oth the complainant and the respondent ... are entitled to a degree of disclosure which permits them to understand the finding that was made and the reasons for the decision.”<sup>85</sup>

[76] The applicant also notes that UBC’s current Sexual Misconduct Policy, adopted in April 2017, requires UBC to provide a copy of an investigation report to complainants and respondents, subject to certain exceptions for irrelevant personal information.

[77] UBC takes no position on the applicant’s arguments here.<sup>86</sup>

[78] The third party submits that the “adequate degree of disclosure” factor does not weigh in favour of disclosure because it arose under a different legislative framework in circumstances that are not analogous to the present case.<sup>87</sup> The third party says the applicant has known the Investigator’s findings since 2016.<sup>88</sup> Regarding UBC’s new Sexual Misconduct Policy, the third party submits that it is irrelevant because “FIPPA exists to govern the actions of Public Bodies such as UBC, not the other way around.”<sup>89</sup>

[79] I accept that the applicant clearly knows now what the Investigator found in relation to her allegations of sexual harassment. However, I am not satisfied she knew that information at the time of her access requests. The third party points to emails UBC sent to the applicant as evidence that the applicant knew all

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<sup>82</sup> Applicant’s initial submissions at paras. 80-84.

<sup>83</sup> Applicant’s initial submissions at para. 84.

<sup>84</sup> Order P-1014, 1995 CanLII 6545 (ON IPC) at pp. 18-19.

<sup>85</sup> Order P-1014, *ibid* at p. 19.

<sup>86</sup> UBC’s reply submissions at para. 53.

<sup>87</sup> Third party’s reply submissions at para. 99.

<sup>88</sup> Third party’s further submissions dated May 12, 2021 at p. 1.

<sup>89</sup> Third party’s reply submissions at para. 72.



of the Investigator's findings in 2016.<sup>90</sup> Based on my review, these communications do not actually specify what the Investigator found in relation to the sexual harassment allegations, nor do they provide the applicant access to the disputed information in the Report. I accept the applicant's sworn evidence that (but for recent developments) she was not fully advised of the Investigator's specific findings regarding her sexual harassment allegations.<sup>91</sup>

[80] In my view, whether the applicant received an adequate degree of disclosure is a relevant circumstance to consider and weighs in favour of disclosure in this case. I make this finding regardless of UBC's current Sexual Misconduct Policy. I accept that, as a complainant, the applicant has a significant interest in the outcome of the investigation, particularly since the allegations and investigation pertain to a deeply personal and sensitive aspect of her life. The Investigator's findings clearly affect the applicant. The disputed information is the applicant's personal information as well as the third party's. Following Ontario order P-1014, I find that investigative fairness requires, at a minimum, that the applicant be advised of the specific outcomes of each of her allegations. I am not satisfied that the applicant was so advised, so she did not receive an adequate degree of disclosure in the context of the investigation.

[81] I conclude that this factor weighs in favour of disclosure of the disputed information.

*Public confidence in the integrity of UBC*

[82] The applicant also submits that a separate relevant circumstance not listed in s. 22(2) is whether disclosure is necessary or desirable to maintain public confidence in the integrity of UBC.<sup>92</sup>

[83] The applicant relies on Order P-1014, a 1995 order of the Ontario Information and Privacy Commissioner. In that case, a complainant accused the access applicant of workplace harassment. The employer, a government ministry, investigated and the applicant requested records relating to the investigation. The adjudicator reasoned:

... it is my view that the degree of disclosure to the parties in [Workplace Discrimination and Harassment Prevention policy] investigations does have an influence on public confidence in institutions conducting such investigations.

If it appears that these investigations are secret trials which prejudice the rights of those accused, public confidence will be eroded. Failure to disclose the information which was considered by the investigator in

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<sup>90</sup> Third party's initial submissions, Appendices K and M.

<sup>91</sup> Affidavit #1 of AK at para. 6.

<sup>92</sup> Applicant's initial submissions at paras. 85-87.

arriving at his decision would clearly prejudice the rights of individuals accused of harassment. Accordingly, I find that this factor applies to information in the records which is directly related to the subject matter of the investigation, the investigator's findings and the Ministry's final disposition of the matter.<sup>93</sup>

[84] Drawing on Order P-1014, the applicant argues that public confidence in the integrity of UBC would be eroded if it did not disclose investigative findings to complainants.<sup>94</sup> The applicant argues that if "complainants are not afforded the same degree of disclosure as respondents, such that respondents are able to selectively rely on investigation findings to impugn the credibility and reputation of complainants, there will be little incentive for individuals to report incidents of sexual misconduct to public institutions."<sup>95</sup> The applicant says the public would lose confidence in public institutions as a result.

[85] UBC takes no position on the applicant's arguments regarding public confidence in its integrity.<sup>96</sup>

[86] The third party submits that disclosure of the disputed information is not necessary or desirable to maintain public confidence in the integrity of UBC.<sup>97</sup> He argues that the applicant's interest in the disputed information is a private one and does not engage the public's confidence in UBC. He also says that Order P-1014 is distinguishable and does not apply here.

[87] In my view, the exact reasoning in Order P-1014 does not apply here. In Order P-1014, the adjudicator found that the public would lose confidence in the integrity of the public body because withholding relevant documents *from an accused person* would violate their fundamental right to know the case against them and to not be subject to a "secret trial". That rationale does not apply to the applicant. She is the complainant, not the "accused". In this respect, Order P-1014 is clearly distinguishable.

[88] However, as I understand the applicant, she argues, building on Order P-1014, that she has a right as a complainant to know the investigative outcomes of her allegations that is as fundamental as an accused person's right to know the case against them and not be subject to a "secret trial". She argues that the public would lose confidence in UBC if it did not disclose the disputed information to the applicant because not doing so discourages complainants to report allegations of sexual misconduct.<sup>98</sup>

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<sup>93</sup> Order P-1014, *supra* note 84 at p. 18.

<sup>94</sup> Applicant's initial submissions at paras. 86-87.

<sup>95</sup> Applicant's initial submissions at para. 86.

<sup>96</sup> UBC's reply submissions at para. 53.

<sup>97</sup> Third party's reply submissions at paras. 94-99.

<sup>98</sup> Applicant's initial submissions at para. 86.

[89] I am not persuaded in this case that considerations of public confidence warrant additional and independent weight under s. 22(2). In my view, there is significant overlap between this factor and the “adequate degree of disclosure” factor discussed above. Providing the applicant an adequate degree of disclosure enhances investigative fairness and, as a result, avoids discouraging complainants to report. A consequence of adequate disclosure may be that it increases public confidence in UBC’s investigative process, but I see adequate disclosure as the more fundamental consideration. I have already given weight to the consideration that complainants are entitled to an adequate degree of disclosure as a matter of investigative fairness and that this did not occur in the applicant’s case.

*Labour arbitrator’s confidentiality order*

[90] The third party raises a factor relating to labour arbitration proceedings that the third party and UBC were engaged in from 2016 to 2018.

[91] In 2018, an arbitrator found that certain communications made by UBC contravened the third party’s privacy rights and harmed his reputation. The arbitrator awarded damages. Subsequently, the arbitrator issued a supplemental award in which he found that UBC made public statements that violated confidentiality terms previously agreed to by the parties and incorporated into the earlier award. The arbitrator awarded additional damages to the third party.

[92] The third party says the labour arbitrator made a confidentiality order that states “no party will comment on the proceeding or the reasons for the grievor’s dismissal.”<sup>99</sup> The third party submits that UBC would violate this order by disclosing the disputed information because the information “comments on the reasons advanced” for his dismissal.<sup>100</sup>

[93] UBC submits that the confidentiality order is not relevant in this inquiry because it “related to maintaining confidence over the arbitration proceedings.”<sup>101</sup> UBC argues that a response to an access request is not a comment on the reasons for dismissal and a labour arbitrator’s order “cannot preclude or influence a public body from applying the exceptions under FIPPA.”<sup>102</sup>

[94] In my view, the labour arbitrator’s confidentiality order is not relevant here. I do not understand how responding to an access request under FIPPA amounts to “commenting” on the third party’s reasons for dismissal or how the disputed information constitutes the “reasons” for the third party’s dismissal. As I understand the supplemental award, the arbitrator held that discussing the Report and its findings does not breach the confidentiality order, so long as any

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<sup>99</sup> Third party’s initial submissions at para. 147.

<sup>100</sup> Third party’s initial submissions at para. 148; also paras. 67-68.

<sup>101</sup> UBC’s initial submissions at para. 44.

<sup>102</sup> UBC reply submissions at paras. 26-27.

comments do not stray into UBC's decision-making process regarding the third party's dismissal.<sup>103</sup> I am not persuaded that the disputed information itself comments on UBC's decision-making process regarding the third party's dismissal.

[95] I turn now to the factors raised by the parties that are listed in s. 22(2).

*Public scrutiny – s. 22(2)(a)*

[96] Section 22(2)(a) states that a relevant consideration under s. 22(1) is whether “the disclosure is desirable for the purpose of subjecting the activities of ... a public body to public scrutiny”.

[97] The applicant submits that s. 22(2)(a) applies in this case because disclosure of the disputed information would allow the applicant “to fully scrutinize the investigative process, its findings, and the Public Body's subsequent actions.”<sup>104</sup> The applicant also argues that media attention relating to the investigation and the significance of the problem of sexualized violence at universities, including UBC, increases the public interest in scrutinizing UBC's response to complaints of sexual misconduct.<sup>105</sup>

[98] UBC does not specifically address s. 22(2)(a).

[99] The third party submits that s. 22(2)(a) does not weigh in favour of disclosure.<sup>106</sup> He argues that nothing in the disputed information “would meaningfully further any legitimate public purpose.”<sup>107</sup>

[100] In Order F14-18, the adjudicator held that s. 22(2)(a) generally applies to a public body's investigative “activities” in relation to complaints, but not to information about “the merits” of the complaints.<sup>108</sup>

[101] I find the Investigator's comments and findings pertain to the merits of the applicant's complaints—that is, the Investigator's view of the third party's conduct having regard to the evidence, the law and the applicable policies—and not about UBC's investigative activities. Information pertaining to the actions UBC took in response to the applicant's allegations, including the investigative process, has already been disclosed in the open parts of the redacted Report. In my view, the information already disclosed allows for public scrutiny of UBC's investigative activities.

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<sup>103</sup> Third party's initial submissions at Appendix C, pp. 16-18.

<sup>104</sup> Applicant's initial submissions at para. 66.

<sup>105</sup> Applicant's initial submissions at paras. 66-68.

<sup>106</sup> Third party's reply submissions at paras. 74-75.

<sup>107</sup> *Ibid* at para. 75.

<sup>108</sup> Order F14-18, 2014 BCIPC 21 (CanLII) at para. 36.

[102] I conclude that s. 22(2)(a) does not weigh in favour of disclosure.<sup>109</sup>

*Fair determination of applicant's rights – s. 22(2)(c)*

[103] Section 22(2)(c) states that a relevant consideration under s. 22(1) is whether the personal information is “relevant to a fair determination of the applicant's rights”.

[104] UBC and the applicant submit that s. 22(2)(c) applies because the applicant was the main complainant in the investigation and is currently being sued by the third party for defamation.<sup>110</sup> Specifically, the applicant argues that:

- she is entitled to the disputed information so that she can “adequately consider her own legal options arising from the incidents themselves, and the subsequent response of the Public Body and the Third Party to her disclosure and reporting of the incidents”;
- the disputed information is relevant to the defamation litigation, in particular to the applicant's credibility, possible defences, general litigation strategy, and her *PPPA* application; and
- the possibility of seeking disclosure of the disputed information through the BC Supreme Court Civil Rules does not preclude the applicant's access rights under FIPPA.<sup>111</sup>

[105] The third party submits that s. 22(2)(c) does not apply.<sup>112</sup> He says the defamation litigation is only about the applicant's allegations of sexual assault, not sexual harassment, so the applicant does not need the disputed information.<sup>113</sup> The third party also says s. 22(2)(c) does not apply because the applicant can seek production of the disputed information through court procedures.<sup>114</sup> The third party submits that the applicant has failed to meet the four-part s. 22(2)(c) test established and applied in past orders.<sup>115</sup>

[106] Past orders establish that the following four criteria must be met for s. 22(2)(c) to apply:

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<sup>109</sup> For a similar finding, see Order F05-02, 2005 CanLII 444 (BC IPC) at paras. 68-69.

<sup>110</sup> UBC's initial submissions at para. 29; applicant's initial submissions at paras. 61 and 69-73; UBC's further submissions dated May 7, 2021 at paras. 9-13; applicant's further submissions dated May 3, 2021 at paras. 20-24.

<sup>111</sup> Applicant's initial submissions at paras. 69-73.

<sup>112</sup> Third party's reply submissions at paras. 76-91; third party's further submissions dated May 12, 2021 at pp. 1-2.

<sup>113</sup> Third party's initial submissions at para. 157; third party's reply submissions at para. 76.

<sup>114</sup> Third party's initial submissions at para. 158.

<sup>115</sup> Third party's reply submissions at paras. 88-91.

1. the right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
2. the right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
3. the personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
4. the personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.<sup>116</sup>

[107] I accept that this test is satisfied in relation to the *PPPA* application. That application is underway and the applicant's legal rights are clearly at issue. Further, the Court ordered the third party to disclose all but one line of the disputed information to the applicant. It would not have done so if that information was not relevant to the *PPPA* application. I am satisfied that the disputed information is relevant to a fair determination of the applicant's rights in the *PPPA* application.

[108] However, I am not satisfied that the disputed information is otherwise relevant to a fair determination of the applicant's rights in the defamation litigation apart from the *PPPA* application. In my view, the evidence before me is not sufficient to make findings about that issue. The applicant did not even provide me with the pleadings in the defamation action. In my view, it is not sufficient for the applicant to simply assert that the disputed information generally relates to "credibility, possible defences, [and] general litigation strategy".

[109] The applicant also says she is entitled to the disputed information so that she can "adequately consider her own legal options arising from the incidents themselves" and the subsequent actions of UBC and the third party. Order F16-36 states that s. 22(2)(c) is met if the evidence establishes that the applicant is "contemplating (*i.e.* intently considering) commencing a proceeding."<sup>117</sup> On the evidence before me, I am not satisfied that the applicant is "intently considering" commencing a proceeding outside the defamation litigation. The applicant does not identify, even in general terms, what proceeding she might commence or how the disputed information relates to such a proceeding.

[110] I conclude that the disputed information is relevant to a fair determination of the applicant's rights in the *PPPA* application only and this weighs in favour of disclosure under s. 22(2)(c). However, since the applicant already has the

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<sup>116</sup> Order F20-37, 2020 BCIPC 43 (CanLII) at para. 116, citing Order 01-07, 2001 CanLII 21561 (BC IPC) at para. 31.

<sup>117</sup> Order F16-36, 2016 BCIPC 40 (CanLII) at para. 50.

disputed information through her document production application in that proceeding, I do not give this factor great weight.

*Supplied in confidence – s. 22(2)(f)*

[111] The third party made brief submissions on s. 22(2)(f), which states that a relevant circumstance under s. 22(2) is whether the personal information was “supplied in confidence”. The third party submits that everything he told the Investigator was supplied in confidence.<sup>118</sup>

[112] UBC did not address this factor. The applicant says it does not apply because the third party has “disregarded any confidentiality associated with the information contained in the Report.”<sup>119</sup>

[113] In my view, s. 22(2)(f) is not relevant here. The third party clearly did not supply the Investigator with the Investigator’s comments and findings as they appear in the Report. The Investigator considered the evidence and reached those conclusions on their own. The third party supplied his evidence, but that is not the disputed information. The third party also did not supply his name and job title in the context of the investigation because the Investigator already knew that information.

*Information likely inaccurate or unreliable – s. 22(2)(g)*

[114] The third party also raises s. 22(2)(g). That subsection states that a relevant circumstance under s. 22(2) is whether the personal information is “likely to be inaccurate or unreliable”.

[115] The third party submits that the Investigator’s findings regarding the sexual harassment allegations are likely inaccurate or unreliable because they were “based on false representations made by the Applicant, which [he] is ongoingly in a better position to refute with evidence that was not available to [him] at the time of the investigation.”<sup>120</sup>

[116] UBC did not address this factor. The applicant says it does not apply because the third party has “expounded on the significance and reliability of the Report”.<sup>121</sup>

[117] In my view, s. 22(2)(g) does not apply here. I understand that the third party intends to prove in the defamation litigation that the evidence the applicant provided to the Investigator regarding the allegations of sexual harassment was

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<sup>118</sup> Third party’s reply submissions at para. 147.

<sup>119</sup> Applicant’s initial submissions at para. 79.

<sup>120</sup> Third party’s initial submissions at para. 147.

<sup>121</sup> Applicant’s initial submissions at para. 79.

false. However, I am not satisfied that the evidence before me is sufficient to establish that here. The third party is effectively asking me to redecide the sexual harassment allegations based on new evidence and arguments. In my view, this is not the forum to do that and the record is not sufficient to do so. In the context of this inquiry, I am not persuaded that the disputed information is likely inaccurate or unreliable.

*Unfair harm or damage – ss. 22(2)(e) and 22(2)(h)*

[118] Section 22(2)(e) states that a relevant consideration under s. 22(1) is whether “the third party will be exposed unfairly to financial or other harm”.<sup>122</sup> Section 22(2)(h) states that a relevant consideration is whether “the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant”. Since these subsections both deal with the concept of unfair harm or damage, I will deal with them together.

[119] According to UBC, the third party has publicly stated that the Investigator did not make any findings against him, so if the Investigator did actually make findings against him, disclosure of that information could lead to harm. However, UBC argues that any harm would not be unfair because it would be the result of the third party misrepresenting the Report.<sup>123</sup>

[120] Similarly, the applicant argues that any harm to the third party resulting from disclosure of the disputed information would not be unfair because he put his own misleading characterization of the Report’s findings into the public domain.<sup>124</sup> The applicant also argues that s. 22(2)(h) weighs in favour of disclosure because her “lack of access to the full findings of the investigation in the unredacted Report” is causing “manifest harm to her reputation” in the form of being stigmatized as a “false accuser”.<sup>125</sup>

[121] The third party submits that s. 22(2)(e) weighs against disclosure.<sup>126</sup> He says the applicant’s allegations against him have been “international in scope”, “ruined” his life and caused “the complete loss” of his career.<sup>127</sup> He submits that any further disclosure of personal information would unfairly harm him and adversely affect his attempts to gain employment in any field. As I understand the third party’s submissions, he argues that the applicant may misrepresent or otherwise misuse the disputed information to unfairly harm him.<sup>128</sup>

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<sup>122</sup> The term “third party” is defined in Schedule 1 of FIPPA as any person other than “the person who made the request”, i.e. the applicant.

<sup>123</sup> UBC’s initial submissions at para. 30.

<sup>124</sup> Applicant’s initial submissions at para. 74-77.

<sup>125</sup> Applicant’s initial submissions at para. 88.

<sup>126</sup> Third party’s initial submissions at paras. 159-160.

<sup>127</sup> Third party’s initial submissions at para. 159; third party’s reply submissions at para. 2.

<sup>128</sup> Third party’s reply submissions at para. 71.



[122] As for s. 22(2)(h), the third party submits that the applicant has grossly mischaracterized what this subsection means.<sup>129</sup> He argues that s. 22(2)(h) is not about “balancing the reputational interests” of the parties, nor does it allow the applicant “to burnish [her] reputation at the expense of” the third party.<sup>130</sup>

[123] In my view, ss. 22(2)(e) and 22(2)(h) do not weigh for or against disclosure because, even if disclosure would cause harm, I am not persuaded that such harm would be “unfair”.

[124] Past orders have found that the harm caused by disclosing personal information is “unfair” where the information amounts to unproven allegations against the individual affected and that individual did not have an opportunity to rebut the allegations in the context of an investigative process.<sup>131</sup>

[125] That is not the case here. The third party and the applicant provided evidence to the Investigator, an experienced jurist, who then made findings based on the law, relevant policies and evidence. The allegations were scrutinized. The disputed information does not amount to unproven allegations. I recognize that the third party and the applicant both disagree with aspects of the Report and the investigative process. However, both parties also rely on certain aspects of the Report to support their positions. By doing so, they implicitly acknowledge that the Report carries some legitimate weight and authority. In the circumstances, I am not persuaded that any harm resulting from disclosure of the disputed information would be “unfair” to the third party or the applicant under ss. 22(2)(e) or 22(2)(h).

[126] The third party also argues that the applicant may misrepresent or otherwise misuse the disputed information to unfairly harm him. I understand the third party’s concern, given the clear conflict between the parties that endures particularly as a result of the defamation litigation. However, in my view, the third party’s claim is ultimately speculation and I do not give it any weight here.

[127] Finally, I understand the applicant to be arguing that disclosure of the disputed information, if it is favourable to her, could improve or repair her reputation and that this weighs in favour of disclosure. To the extent this is an argument under s. 22(2)(h), I do not accept it. In my view, if s. 22(2)(h) applies, it weighs *against* disclosure. The language of the section specifically refers to disclosure that would cause *damage*.

[128] However, I understand the applicant also to be arguing that, if disclosure of the disputed information would assist in improving or repairing her reputation,

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<sup>129</sup> Third party’s reply submissions at paras. 121-126.

<sup>130</sup> Third party’s reply submissions at paras. 123 and 126.

<sup>131</sup> See, e.g., Order F20-37, *supra* note 116 at paras. 131-132; Order F16-50, 2016 BCIPC 55 (CanLII) at paras. 52-54; Order 01-12, 2001 CanLII 21566 (BC IPC) at paras. 38-39.

that is a relevant unlisted factor weighing in favour of disclosure.<sup>132</sup> Past orders have considered this kind of argument,<sup>133</sup> so I will do so here as well. Although I dealt with unlisted factors above, the applicant's argument is closely related to s. 22(2)(h), so I will address it here.

[129] I accept that if the Investigator found that the third party sexually harassed the applicant, that would assist in improving or repairing her reputation because it would assist in undermining the claim that she is a "false accuser".<sup>134</sup>

[130] I cannot reveal what the Investigator actually found regarding the applicant's sexual harassment allegations. As a result, I cannot explicitly say whether this factor weighs in favour of disclosure. The most I can say is that, if the Investigator did accept the applicant's sexual harassment allegations, I have given that factor some weight in favour of disclosure under s. 22(2).

### ***Unreasonable invasion of personal privacy? – s. 22(1)***

[131] I found above that the disputed information is the personal information of both the applicant and the third party. I found that none of the circumstances in s. 22(4) apply. I also found that disclosure of the disputed information is presumed to be an unreasonable invasion of the third party's personal privacy under s. 22(3)(d) because the information relates to the third party's employment history with UBC.

[132] I then considered all relevant factors under s. 22(2), including factors listed in s. 22(2) and other factors not listed. I found that some of the relevant factors weigh neither for nor against disclosure. I found that none of the relevant considerations weigh against disclosure. However, I found that several factors weigh in favour of disclosure, including that:

- the disputed information is to a certain extent publicly known because one person has read the unredacted Report, the third party told at least one other person the Investigator's sexual harassment findings, the applicant and other defendants already know the disputed information as a result of recent developments in the defamation litigation, and certain media articles support the conclusion that the disputed information is no longer fully private;
- the Investigator's sexual harassment findings are reasonably inferable from information already disclosed in the open parts of the redacted Report;

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<sup>132</sup> Applicant's initial submissions at paras. 63 and 88.

<sup>133</sup> See, e.g., Order F12-06, 2012 BCIPC 9 (CanLII) at para. 19; Order Mo-4040, 2021 CanLII 37666 (ON IPC) at para. 57.

<sup>134</sup> Applicant's further submissions dated May 3, 2021 at para. 22.

- the applicant did not receive an adequate degree of disclosure in the UBC investigation into her allegations and disclosure of the disputed information would promote investigative fairness by ensuring the applicant receives an adequate degree of disclosure;
- the disputed information is relevant to a fair determination of the applicant's rights in the *PPPA* application (although I recognize that disclosure is not strictly necessary because she already has the information); and
- disclosure could assist in repairing or improving the applicant's reputation if the Investigator accepted the applicant's sexual harassment allegations.

[133] The question is whether the factors that I found weigh in favour of disclosure are sufficient to rebut the s. 22(3)(d) presumption against disclosure. In other words, the question is whether disclosure of the disputed information would be an unreasonable invasion of the third party's personal privacy, having regard to all the relevant circumstances.

[134] In my view, the s. 22(3)(d) presumption is rebutted in this case. The s. 22(3) presumptions are not easily overcome. I do not agree with the applicant that the relevant circumstances "overwhelmingly favour" disclosure.<sup>135</sup> This matter is more complicated than that. However, ultimately, in the unique circumstances of this case, I am satisfied that disclosure of the disputed information would not be an *unreasonable* invasion of the third party's personal privacy given the above factors weighing in favour of disclosure.<sup>136</sup>

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<sup>135</sup> Applicant's further submissions dated May 3, 2021 at para. 29.

<sup>136</sup> I recognize that, due to the passage of time and the evolving background to this case, my conclusion is based on different considerations than existed when UBC made its initial disclosure decision in 2018. However, in the interests of providing finality and an informed decision, and since the applicant could simply make a fresh access request now, my decision is based on more current circumstances and updated submissions from the parties.

**CONCLUSION**

[135] For the reasons given above, I confirm UBC's decision that it is not required under s. 22 to refuse to disclose the disputed information to the applicant.

June 30, 2021

**ORIGINAL SIGNED BY**

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Ian C. Davis, Adjudicator

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