



Order F23-45

## SIMON FRASER UNIVERSITY

D. Hans Hwang  
Adjudicator

June 9, 2023

CanLII Cite: 2023 BCIPC 53  
Quicklaw Cite: [2023] B.C.I.P.C.D. No. 53

**Summary:** An applicant requested records relating to the termination of her employment with Simon Fraser University (SFU). SFU disclosed the responsive records to the applicant but withheld some information in them under several exceptions to disclosure in the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator determined that SFU was authorized to withhold some, but not all, of the disputed information under s. 13(1) (advice or recommendations) and it was not required to withhold the disputed information under s. 22(1) (harm to personal privacy). The adjudicator ordered SFU to provide the applicant with access to the information it was not authorized or required to refuse to disclose.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, ss. 13(1), 13(2), 13(3), 22(1), 22(2)(a), 22(2)(g), 22(3)(d), 22(3)(g), 22(4).

### INTRODUCTION

[1] An individual (applicant) requested Simon Fraser University (SFU) provide access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records about the termination of her employment with SFU.

[2] SFU refused to disclose some information in the records to the applicant under ss. 13(1) (advice or recommendations), 15(1)(i) (harm to law enforcement), 17(1) (harm to financial or economic interest), 21(1) (harm to business interests) and 22(1) (harm to personal privacy) of FIPPA. The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review SFU's decision.

[3] The OIPC's mediation failed to resolve the matter and it proceeded to this inquiry. SFU subsequently confirmed that it is relying on only ss. 13 and 22(1)

and it ceased to rely on ss. 15(1)(i), 17(1) and 21(1), so those sections are no longer issues in this inquiry.<sup>1</sup>

### ***Preliminary Issues/Matters***

[4] The applicant raises an issue regarding the completeness of SFU's response to her request. She says that SFU's initial search for records responsive to her request was inadequate.<sup>2</sup>

[5] The OIPC has investigated the applicant's complaint of the inadequate search under s. 6(1) of FIPPA.<sup>3</sup> Based on the findings of that investigation, the OIPC investigator concluded that SFU has complied with its obligations under s. 6(1).<sup>4</sup>

[6] Section 6(1) was not listed as an issue in the investigator's fact report or notice of inquiry. Past OIPC Orders have consistently said parties must request and receive permission from the OIPC to introduce new issues at an inquiry.<sup>5</sup> The OIPC's notice of inquiry and its *Instructions for Written Inquiries*<sup>6</sup> clearly explain the process for adding new issues to an inquiry. Here, the applicant did not apply to the OIPC for permission to add s. 6(1) into the inquiry nor explain why she is only raising this issue at this late stage. In addition, nothing before me suggests that it would be fair to add this new issue or that there is any exceptional circumstance that warrants adding s. 6(1). Therefore, I decline to add, or consider, s. 6(1).

### **ISSUES**

[7] The issues I must decide in this inquiry are:

1. Is SFU authorized to refuse to disclose information to the applicant under s. 13(1)?
2. Is SFU required to refuse to disclose the information to the applicant under s. 22(1)?

[8] Under s. 57(1) of FIPPA, SFU, which is a public body in this case, has the

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<sup>1</sup> SFU's initial submission at paras 9, 12, 15, 19 and 20.

<sup>2</sup> Page 2 of the applicant's submission.

<sup>3</sup> Section 6(1) requires a public body to conduct an adequate search for records that respond to access requests.

<sup>4</sup> Affidavit #1 of PH dated December 19, 2022, Appendix A.

<sup>5</sup> For example, see Order F12-07, 2012 BCIPC 10 at para 6; Order F10-27, 2010 BCIPC 55 at para 10; Decision F07-03, 2007 CanLII 30393 (BC IPC) at paras 6-11; and Decision F08-02, 2008 CanLII 1647 (BC IPC).

<sup>6</sup> Available online: <https://www.oipc.bc.ca/guidance-documents/1744>.

burden of proving that the applicant has no right of access to the information it withheld under s. 13(1).

[9] Meanwhile, s. 57(2) places the burden on the applicant to prove disclosing the information at issue would not unreasonably invade a third party's personal privacy under s. 22(1). However, the public body has the initial burden of proving the information at issue is personal information.<sup>7</sup>

## **DISCUSSION**

### ***Background***<sup>8</sup>

[10] The applicant worked as an employee of SFU and her employment was terminated after SFU decided the applicant's position was redundant. The applicant filed a grievance against SFU about the termination of her employment.

### ***Records at issue***

[11] The records at issue are seven pages of emails between SFU employees relating to the applicant's termination and grievance. SFU has withheld some of the information in the emails.

### ***Advice and recommendations, s. 13***

[12] SFU applied s. 13(1) to withhold most of the information in dispute.<sup>9</sup>

[13] Section 13(1) states that the head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister. The purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.<sup>10</sup>

[14] Section 13(1) applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate inferences about the advice or recommendations.<sup>11</sup>

[15] The term "recommendations" includes material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being

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<sup>7</sup> Order 03-41, 2003 CanLII 49220 (BCIPC) at paras 9–11.

<sup>8</sup> The information in this background section is based SFU's initial submission at paras 5-7.

<sup>9</sup> SFU' initial submission at para 15.

<sup>10</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36 [*John Doe*] at paras 45-51.

<sup>11</sup> Order 02-38, 2002 CanLII 42472 at para 135. See also Order F17-19, 2017 BCIPC 20 (CanLII) at para 19.

advised and can be express or inferred.<sup>12</sup> Also, the courts have found that the term “advice” has a broader meaning than “recommendations”,<sup>13</sup> and includes “an opinion that involves exercising judgment and skill to weigh the significance of matters of fact,” including “expert opinion on matters of fact on which a public body must make a decision for future action”.<sup>14</sup>

[16] In addition, s. 13(1) extends to factual or background information that is a necessary and integrated part of the advice or recommendation.<sup>15</sup> This includes factual information compiled and selected by an expert, using their expertise, judgment and skill, for the purpose of providing explanations necessary to the deliberative process of a public body.<sup>16</sup>

[17] In the s. 13 analysis, the first step is to determine whether disclosing the information in dispute would reveal advice or recommendations developed by or for a public body. If it would, then I must decide if ss. 13(2) or (3) apply to the information. Section 13(2) lists types of information and records that a public body cannot withhold under s. 13(1), and s. 13(3) says that a public body cannot use s. 13(1) to withhold information in a record that has been in existence for 10 or more years.

#### *Parties’ submissions*

[18] SFU submits that the information it withheld under s. 13 qualifies as opinions, advice and recommendations.<sup>17</sup> While the applicant does not specifically address s. 13, I understand from the applicant’s submission that in general she disputes SFU’s application of s. 13(1) to the withheld information.<sup>18</sup>

#### *Analysis and findings*

[19] I find some of the information withheld from the responsive records is advice or recommendations developed by or for SFU under s. 13(1). It is information that reveals:

- A Human Resources Coordinator of SFU (HR Coordinator) providing an SFU employee with opinions on various issues about the termination of the applicant’s employment and recommendations on what steps to take

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<sup>12</sup> *John Doe* at paras 23-24.

<sup>13</sup> *John Doe* at para 24.

<sup>14</sup> *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para 113.

<sup>15</sup> *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras 52-53.

<sup>16</sup> *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para 94.

<sup>17</sup> SFU’s initial submission at para 33; Affidavit #1 of PH dated November 21, 2022 at para 3(a).

<sup>18</sup> Applicant’s submission on pages 2-3.

next.<sup>19</sup> In this email communication, the HR Coordinator forwarded her notes from a meeting concerning the termination. Some information in these notes is factual or background information related to the termination. I find that information was compiled and selected by the HR Coordinator and was a necessary and integrated part of the opinions and recommendations provided to SFU.<sup>20</sup>

- A Director, Administration and Real Estate Services of SFU (Director) providing the HR Coordinator and the SFU employee with recommendations and opinions on what changes to make to certain documents attached to an email.<sup>21</sup>

[20] However, I find the balance of the information withheld under s. 13(1) is not advice or recommendations developed by or for SFU. My reasons are as follows:

- The information reveals topics of discussion but would not reveal or allow a reader to accurately infer any opinions, advice or recommendations about the topics.<sup>22</sup>
- The information only reflects what steps had been taken and what step to take next.<sup>23</sup>
- The information is factual information that is not a necessary and integrated part of the opinions and recommendations.<sup>24</sup>
- The information is about personal matters that does not allow any inference about advice or recommendations actually received.<sup>25</sup>

### *Sections 13(2) and (3)*

[21] The next step in the s. 13 analysis is to consider whether any of the circumstances under ss. 13(2) and 13(3) apply to the information that I found would reveal advice or recommendations developed by or for a public body or minister.

[22] SFU says that none of the circumstances under s. 13(2) apply. Specifically, it submits that s. 13(2)(n) does not apply to the withheld

<sup>19</sup> Pages 3 and 4 (repeated 269 and 270) of the records in dispute.

<sup>20</sup> For similar reasoning, see Order 02-38, 2002 CanLII 42472 at para; Order F17-19, 2017 BCIPC 20 (CanLII) at para 19; *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.

<sup>21</sup> Page 74 of the records in dispute. For added clarity, the documents attached to the email are not part of the records in dispute.

<sup>22</sup> Pages 3 and 269 of the records in dispute.

<sup>23</sup> Pages 4 and 270 of the records in dispute.

<sup>24</sup> Pages 3 and 4 (repeated 269 and 270) of the records in dispute.

<sup>25</sup> Page 47 of the records in dispute. I will further consider if s. 22 applies to this information later on.

information.<sup>26</sup> The applicant does not specifically address s. 13(2) but she says “it doesn’t seem possible to make a fulsome argument without knowing the subject of the redactions.”<sup>27</sup>

[23] Section 13(2)(n) states that a public body must not refuse to disclose “a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.” Having considered the submission and records, I cannot see how s. 13(2)(n) applies here. I can see some of the withheld information contains advice, recommendations and opinion to consider in dealing with the termination of employment; but, none of that information contains a decision or reasons for a decision made in the exercise of a discretionary power or an adjudicative function of a public body.

[24] I have considered the other circumstances described in s. 13(2) and am satisfied that none apply.

[25] In addition, I find the records have not been in existence for 10 or more years. The oldest records at issue were created in 2020. Therefore, s. 13(3) does not apply.

[26] Given my findings respecting ss. 13(2) and (3), I conclude that s. 13(1) authorizes SFU to withhold some of the information in dispute.<sup>28</sup>

***Disclosure harmful to third-party personal privacy, s. 22<sup>29</sup>***

[27] Section 22(1) requires a public body to refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party’s personal privacy.<sup>30</sup>

*Personal information*

[28] Section 22(1) only applies to personal information; therefore, the first step in any s. 22 analysis is to determine whether the information in dispute is personal information.<sup>31</sup>

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<sup>26</sup> SFU’s initial submission at paras 31-34.

<sup>27</sup> Page 3 of the applicant’s submission.

<sup>28</sup> Pages 3, 4, 74, 269 and 270 of the records in dispute.

<sup>29</sup> SFU applied ss. 13 and 22 to information on pages 3, 4, 47, 74, 110, 269 and 270; I have already found s. 13 applies to some of the information withheld on pages 3, 4, 74, 269 and 270, so it is not necessary for me to consider whether s. 22 also applies to that information.

<sup>30</sup> Schedule 1 of FIPPA says: “third party” in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than (a) the person who made the request, or (b) a public body.

<sup>31</sup> See, for example, Order F15-03, 2015 BCIPC 3 (CanLII) at para 58.

[29] Schedule 1 of FIPPA defines personal information as “recorded information about an identifiable individual other than contact information” and 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>32</sup> Past OIPC orders have said that 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>33</sup>

[30] SFU argues that the information at issue is third parties’ personal information.<sup>34</sup> The applicant does not specifically address this.

[31] I find some of the information withheld in the emails are the names of two individuals who are not an author nor a recipient of these emails.<sup>35</sup> I am satisfied that this is information about these identifiable third parties other than contact information, so it is their personal information. Also, I find that some of the information reflects interactions a third party had, in their personal life, with others. I am satisfied that information qualifies as the third party’s personal information.<sup>36</sup>

[32] However, I am not satisfied that the remaining information withheld under s. 22 qualifies as personal information. There is an instance where SFU withheld a third party’s comment from an email.<sup>37</sup> While names of several individuals appear in the email, in my view, the withheld comment is about the third party’s general impression regarding a situation and it is not about an identifiable individual. Therefore, I conclude that SFU is not authorized to withhold it.<sup>38</sup>

*Disclosure not an unreasonable invasion of privacy, s. 22(4)*

[33] The second step in the s. 22 analysis is to determine whether the personal information falls into any of the types of information listed in s. 22(4). If so, its disclosure is not an unreasonable invasion of third-party personal privacy.

[34] SFU submits that none of s. 22(4) circumstances apply here. Specifically, it suggests that ss. 22(4)(a) and (b) do not apply to the information at issue.<sup>39</sup> The applicant makes no submission about s. 22(4).

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<sup>32</sup> Definition, Schedule 1 of FIPPA.

<sup>33</sup> Order F19-13, 2019 BCIPC 15 at para 16, citing Order F18-11, 2018 BCIPC 14 at para 32.

<sup>34</sup> SFU’s initial submission at paras 41-42.

<sup>35</sup> These two individuals are identified as “C” and “S” respectively on pages 4 and 270 of the records in dispute.

<sup>36</sup> Page 47 of the records in dispute.

<sup>37</sup> Page 110 of the records in dispute.

<sup>38</sup> For similar reasoning, Order F08-03, 2008 CanLII 13321 at para 82; Order F14-45, 2014 BCIPC 48 at para 41; Order F20-13, 2020 BCIPC 15 at para 42.

<sup>39</sup> SFU’s initial submission at para 45.

[35] Section 22(4)(a) says that if a third party consents to disclosure in writing, then disclosure is not an unreasonable invasion of the third party's personal privacy. I find that none of evidence demonstrates the third parties had consented to the release of their personal information to the applicant. Therefore, I find s. 22(4)(a) does not apply.

[36] Section 22(4)(b) provides that a disclosure of personal information is not an unreasonable invasion of a third party's privacy if there are compelling circumstances affecting anyone's health or safety and notice of disclosure is mailed to the last known address of the third party. Previous orders have held that s. 22(4)(b) is relevant and applicable when a public body has decided to *disclose* a third party's personal information<sup>40</sup> and that s. 22(4)(b) can only apply in cases where the public body has given notice to the third party.<sup>41</sup> It does not apply where a public body, SFU in this case, is refusing to disclose personal information to the applicant. Therefore, I find that s. 22(4)(b) does not apply.

[37] In addition, I have considered if any other provision of s. 22(4) applies and I find that none of them apply here. I conclude that none of the information falls within s. 22(4).

*Presumption of unreasonable invasion of privacy, s. 22(3)*

[38] The third step in the s. 22 analysis is to determine whether any provisions under s. 22(3) apply to the personal information. If one or more do, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy.

[39] SFU submits "none of the enumerated presumptive categories are applicable to the [disputed records]".<sup>42</sup> The applicant makes no submission about this.

[40] Having considered if any of the presumptions listed in s. 22(3) apply to the personal information, I find that none of them apply here. I cannot see, for example, that ss. 22(3)(d) or (g) apply. Section 22(3)(d) says disclosure of personal information is an unreasonable invasion of a third party's personal privacy if the personal information relates to employment, occupational or educational history. The personal information at issue does not relate to a third party's employment history, workplace conduct or complaint under s. 22(3)(d). Section 22(3)(g) says disclosure of personal information is an unreasonable invasion of a third party's personal privacy if the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party. I find that none of this information at issue

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<sup>40</sup> Order F19-02, 2019 BCIPC 2 (CanLII) at paras 21-24.

<sup>41</sup> Order F19-02, 2019 BCIPC 2 (CanLII) at paras 18-29; Order F20-36, 2020 BCIPC 42 (CanLII) at paras 63-64.

<sup>42</sup> SFU's initial submission at para 47.



refers to personal recommendations, assessments or evaluations about a third party under s. 22(3)(g).

[41] I conclude that none of the presumptions under s. 22(3) apply to the disputed information.

*Relevant circumstances, s. 22(2)*

[42] The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those listed in s. 22(2).

[43] It is at this stage that any applicable s. 22(3) presumption may be rebutted. I have found that the withheld personal information at issue does not fall under s. 22(3), so I do not need to consider whether any presumptions are rebutted. However, it is still necessary to consider the relevant circumstances in determining whether disclosure of the withheld information would be an unreasonable invasion of third-party personal privacy.

[44] The applicant does not make any submissions about s. 22(2). SFU asserts that “Where no s. 22 presumptions apply to the withheld personal information, and the relevant circumstances do not weigh in favour of disclosure, then s. 22(1) requires a public body to withhold the information.”<sup>43</sup>

[45] Having considered the circumstances listed in s. 22(2), I am not satisfied that any are relevant here. For example, I cannot see that disclosing the third-party personal information would be desirable for the purpose of subjecting SFU’s activities to public scrutiny under s. 22(2)(a) nor that any of the personal information is likely be inaccurate or unreliable under s. 22(2)(g). I conclude that none of the circumstances under s. 22(2) apply to the information in dispute.

[46] Previous OIPC orders have considered the sensitivity of the personal information at issue. Where the information is particularly sensitive, this will weigh against disclosure; where the information is not particularly sensitive, this will favour disclosure.<sup>44</sup> Some of the withheld information is a third party’s comments about interactions with others in their personal life.<sup>45</sup> In my view, nothing about the content or context of these comments indicates that they are particularly sensitive. Also, I find that the names of two individuals withheld in the records in dispute are likewise not particularly sensitive.<sup>46</sup> The email in which these names appear is about business-related matters and nothing about the

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<sup>43</sup> SFU’s initial submission at para 49.

<sup>44</sup> Order F16-52, 2016 BCIPC 58 (CanLII) at paras 87-91.

<sup>45</sup> Page 47 of the records in dispute.

<sup>46</sup> These two individuals are identified as “C” and “S” respectively on pages 4 and 270 of the records in dispute. Pages 4 and 270 of the records in dispute.

content or context of the email appears to be sensitive. The lack of sensitivity of this personal information favours disclosure.

*Summary and conclusion, s. 22(1)*

[47] I find some of the information SFU withheld under s. 22 is the personal information of third parties<sup>47</sup> and the balance of the information is not personal information because it is not about an identifiable individual.

[48] I find that ss. 22(4) and 22(3) do not apply here and that none of the circumstances listed in s. 22(2) apply to the information in dispute. Further, I find that the withheld personal information is not particularly sensitive.

[49] I conclude that it would not be an unreasonable invasion of third-party personal privacy to disclose the withheld information.

## **CONCLUSION**

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

1. I confirm, in part, SFU's decision to withhold information under s. 13(1), subject to item 2 below.
2. SFU is authorized to withhold only the information that I have highlighted on pages 3, 4, 74, 269 and 270. SFU is required to disclose the rest of the information it withheld under s. 13(1) to the applicant.
3. SFU is not required to withhold any of the information at issue under s. 22(1). SFU is required to disclose the information it withheld under s. 22(1) to the applicant.
4. SFU must concurrently copy the OIPC registrar of inquires on its cover letter to the applicant, together with a copy of the records described at items 2 and 3 above.

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<sup>47</sup> Pages 4, 47 and 270 of the records in dispute.

[51] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by July 24, 2023.

June 9, 2023

**ORIGINAL SIGNED BY**

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D. Hans Hwang, Adjudicator

OIPC File No.: F21-86366