



Order F23-71

THOMPSON RIVERS UNIVERSITY

Jay Fedorak
Adjudicator

September 12, 2023

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Summary: An instructor at Thompson Rivers University (TRU) requested a copy of a report into the investigation of a workplace complaint against him. TRU withheld the entire report under s. 13(1) (advice and recommendations), and s. 22(1) (unreasonable invasion of third-party personal privacy). The adjudicator found that ss. 13(1) and 22(1) applied to some of the information but ordered TRU to disclose the remainder.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 13(1), 13(2)(a), 13(2)(n), 13(3), 22(1), 22(2)(a), 22(2)(c), 22(2)(e), 22(2)(f), 22(2)(h), 22(3)(b), 22(3)(d), 22(4)(c), 22(4)(e); *Labour Relations Code*, RSBC 1996 c. 244, s. 49; *Workers Compensation Act*, RSBC 2019, c. 1, ss. 68, 75.

INTRODUCTION

[1] An instructor (applicant) at Thompson Rivers University (TRU) requested a copy of a report into the investigation of a workplace complaint against him (Report). TRU withheld the entire Report under s. 13(1) (advice and recommendations), and parts of the Report under s. 22(1) (unreasonable invasion of third-party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant requested a review by the Office of the Information and Privacy Commissioner (OIPC).

[3] Mediation did not resolve the outstanding issues and the applicant requested that the matter proceed to an inquiry.

[4] At the inquiry, an OIPC adjudicator permitted TRU to submit parts of its evidence *in camera* (that is, for the Commissioner only to see). I have considered this information but cannot reveal it in this order.

ISSUES

[5] The issues to be decided in this inquiry are:

1. Whether s. 13(1) authorizes TRU to withhold the information at issue.
2. Whether s. 22(1) requires TRU to withhold the information at issue.

[6] Under s. 57(1), TRU has the burden of proving that the applicant has no right of access to the information it withheld under s. 13(1). Section 57(2) stipulates that the applicants have the burden to prove that disclosure would not be an unreasonable invasion of the personal privacy of a third party under s. 22(1). However, the public body has the initial burden to show that the information it is withholding under s. 22(1) is personal information.¹

DISCUSSION

[7] **Background** – The applicant was the subject of a workplace complaint by another instructor (complainant) who had acted as a faculty association representative on his behalf. The complaint related to opinions the applicant had publicly expressed about the complainant’s performance as faculty representative. TRU hired an independent legal counsel (investigator) to investigate the complaint and issue the Report to assist it in resolving the complaint in accordance with the “Collective Agreement between Thompson Rivers University and the Thompson Rivers University Faculty Association” (Collective Agreement).

[8] **Records at issue** – The Report responsive to the request consists of the narrative and conclusions of the investigator of 21 pages, and 50 pages of attachments, for a total of 71 pages.

Section 13(1) – advice or recommendations

[9] Section 13(1) allows a public body to refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister to protect its deliberative processes.² The relevant provision reads as follows:

- 13 (1)** 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.
- (2) The head of a public body must not refuse to disclose under subsection (1)

¹ Order 03-41, 2003 BCIPC 49220 (CanLII), paras. 9-11.

² *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025, para 52.

- (a) any factual material,
 - ...
 - (n) 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.
- (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

[10] The first step in the analysis is to determine whether disclosing the information at issue would reveal advice or recommendations under s. 13(1). If it would, the next step is to decide whether the information falls into any of the provisions in s. 13(2) and whether it has been in existence for more than 10 years in accordance with s. 13(3). If ss. 13(2) or 13(3) apply to any of the information, it cannot be withheld under s. 13(1).

Advice or Recommendations

[11] The term “advice” is broader than “recommendations” and includes “an opinion that involves exercising judgment and skill to weigh the significance of matters of fact” and “expert opinion on matters of fact on which a public body must make a decision for future action”.³ “Recommendations” include suggested courses of action that will ultimately be accepted or rejected by the person being advised.⁴ Section 13(1) would also apply when disclosure would allow an individual to make accurate inferences about any advice or recommendations.

[12] TRU must go further than merely claiming that s. 13(1) applies. It must demonstrate how the exception applies to the specific information at issue. It must explain why the information at issue meets the definition of advice or recommendations.

[13] TRU characterizes the purpose of the Report as providing advice and recommendations to TRU about its compliance with the Collective Agreement and its other legal obligations. TRU argues as follows:

While an investigation report is not always explicitly framed as advice, it is fundamentally a recommendation and advice to an employer about questions including: whether or not they should accept an allegation as true, whether they should take action on it, and whether it amounts to violation of law, policy or other employment obligations.⁵

³ *John Doe v Ontario (Finance)* 2014 SCC 36 [John Doe], para 24. *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, para. 113.

⁴ *John Doe*, para 23.

⁵ TRU's initial submission, paras. 68-70.

[14] TRU describes the Report as an expert opinion regarding the reliability and significance of the evidence and whether the complaint was substantiated. According to TRU, this includes all of the background assessments and weighing of the evidence and conclusions. After the closure of submissions, TRU clarified that it was ceasing to rely on s. 13(1) to withhold the attachments but was continuing to rely on s. 13(1) to refuse access to 21 pages of the narrative and conclusions of the investigator.

[15] The applicant asserts that the Terms of Reference for the investigation do not include the investigator making any recommendations. He also submits that provisions in s. 13(2) apply. I will deal with those separately below.⁶

Analysis

[16] I find that TRU has established that the purpose of the Report was to inform TRU's decision about the complaint of workplace harassment it received. It needed to determine whether the complaint was substantiated. If the complaint was substantiated, it needed to determine whether to impose discipline. TRU subsequently found the complaint to be substantiated and disciplined the respondent (applicant). It is clear from the Terms of Reference that the investigator was to provide information necessary to inform those decisions. The Terms of Reference stipulate the following:

The report will include a summary of the allegations; evidence considered; any assessment of credibility that is required to render a determination; the findings of fact; and a determination of whether there has been a breach of applicable TRU policies, Article 9 of the TRU Faculty Association Collective Agreement and/or the law ("Confidential Investigation Report").

Although the Investigator will make findings of fact based on the investigation, the final determination with respect to the appropriate response to the Complaint rests solely within the discretion of TRU.⁷

[17] Therefore, I find that some of the information in the Report constitutes "advice" in accordance with s. 13(1). This includes the evaluation of the evidence, the assessment of credibility, the opinions of the investigator on the application of the precedents of law and policy, the findings of fact, the analysis of the evidence and the conclusion.

[18] Nevertheless, I do not accept TRU's submission that the entire narrative and conclusions of the investigator constitute advice and recommendations. While the courts have found that expert opinions on matters of fact, including the weighing of the evidence, constitutes advice, the narrative and conclusions of the investigator are more than that. They also includes the following:

⁶ Applicant's response submission, pp. 4-6.

⁷ Applicant's response submission, Appendix A.

- the purpose of the Report;
- who the Report is by and for;
- description of the complaint process;
- a summary of the complaint;
- a factual description of some of the evidence; and direct quotes from the social media posts.

[19] I have analyzed the passages containing this information carefully. In my view, the investigator has drafted these passages in an impartial and objective manner. These passages do not reveal analytical expertise, nor do they enable the reader to make inferences on how the investigator applied her analytical expertise or what her conclusions might be. I find that these passages do not constitute advice or recommendations.

[20] Therefore, I find that the information noted above in paragraph 17 reveals advice, but the information noted in paragraph 18 reveals neither advice nor recommendations.

Section 13(2)

The next step in the s. 13 analysis is to consider if s. 13(2) applies to the information that I found above would reveal advice. The parties' submissions raise ss. 13(2)(a) and (n).

[21] **Section 13(2)(a)** – Section 13(2)(a) provides that the head of a public body must not refuse to disclose any “factual material” under s. 13(1). The applicant submits that descriptions in the Terms of Reference regarding the contents of the Report indicates that much of it, in his opinion, must be factual. He notes the number of times the term “fact” appears in the Terms of Reference and the Collective Agreement.⁸

[22] TRU replies that previous court decisions have distinguished between factual material and other types of information that form an integral part of the advice. This is particularly the case where discussion of facts is intertwined with the advice to the point where disclosure of those facts would enable a reader to infer the advice. TRU submits further that receiving, sorting, and assessing evidence is an essential component of giving advice.⁹

[23] The term “factual material” in s. 13(2)(a) has a distinct meaning. Factual material means “source materials” or “background facts in isolation” that are not necessary to the advice provided. If the factual information is compiled and selected by the person providing the advice and is an integral component of their advice, then it is not “factual material” under s. 13(2)(a). Thus, for s. 13(2)(a) to

⁸ Applicant's response submission, p. 5.

⁹ TRU's reply submission, paras. 8-10.

apply, the information must be purely factual material that is not intertwined with the advice or recommendations.¹⁰

[24] I conclude the information which I found would reveal advice is not factual material. To the extent that information contains facts, the facts are intermingled with and an integral part of the analysis, opinion and advice and cannot be separated from the advice. Therefore, I find that s. 13(2)(a) does not apply.

[25] **Section 13(2)(n)** – 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. The applicant submits that s. 13(2)(n) applies, but he provides no reason other than that he received a warning letter and was anticipating a grievance hearing. He asserts that “This letter clearly affects my rights, and the reasons would be contained in the report.”¹¹

[26] TRU replies that the Report is not a decision, and the investigator was not exercising a discretionary power. It says TRU made the decision and exercised all powers, after considering the advice the investigator provided in the Report.¹²

[27] It is clear on its face that the Report is not a decision, and the investigator was not exercising a discretionary power. Therefore, I find that s. 13(2)(n) does not apply to the information in the Report that I found above would reveal advice.

[28] The applicant did not raise any of the other provisions in s. 13(2). It is not evident from face of the record that any of these provisions apply. Therefore, I find that s. 13(2) does not apply to any of the information which I found would reveal advice.

Section 13(3) *Information in existence for more than 10 years*

[29] Finally, it is clear from the face of the records that none of the information has been in existence for more than 10 years, so I find that s. 13(3) does not apply.

Exercise of Discretion

[30] Section 13(1) is a discretionary exception. My jurisdiction with respect to its exercise of discretion is limited. I can order the public body to exercise its discretion, if I find it has failed to do so. I can also order it to reconsider the exercise of discretion, if I find the decision was made in bad faith or for an

¹⁰ *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322, paras. 91-94.

¹¹ Applicant’s response submission, p. 6.

¹² TRU’s reply submission, paras. 12-16.

improper purpose or the decision considered irrelevant considerations or failed to consider relevant considerations.¹³ I may not substitute my discretion for that of TRU or require it to disclose the Report on these grounds.

[31] The applicant submits that TRU did not exercise its discretion properly when it decided to withhold the Report under s. 13. He argues that one relevant consideration is its past practice with respect to disclosure of similar types of records. Referring to information he has obtained from other access requests, he asserts that TRU has always provided copies of reports of harassment investigations to the parties, except in cases involving him. He also submits that there are compelling and sympathetic grounds for TRU to release the Report to him and that this is a relevant consideration in its exercise of discretion. He believes that, as he requires a copy of the Report for a fair determination of his rights, this is also a compelling reason for TRU to disclose the Report to him.¹⁴

[32] TRU responds with affidavit evidence from its privacy advisor describing how it exercised its discretion in this case. TRU submits that there is a clear distinction between this case and how it has dealt with the disclosure of reports of other investigations. In the other cases, all the parties agreed to keep the reports confidential, while the applicant alone in this case did not. TRU also considered whether there were compassionate circumstances that would warrant disclosure to the applicant. It decided that the risk of harm to the third parties outweighed the benefits to the applicant of disclosing the Report. It argues that the applicant has a history of criticizing and disparaging his coworkers in public forums. On balance, it concluded that there were insufficient grounds to exercise its discretion in favour of disclosing the Report.¹⁵

Analysis

[33] Having reviewed TRU's evidence regarding its exercise of discretion, I am satisfied that it has properly exercised its discretion. TRU has provided a reasonable explanation for the difference of approach in this case and how it weighed the interests of all of the affected parties. There are no grounds for me to require TRU to reconsider its exercise of discretion in this case.

Conclusion on s. 13

[34] In conclusion, I confirm the decision of TRU to withhold under s. 13(1) the information I noted above in paragraph 17. It is not authorized by s. 13(1), however, to refuse to disclose the information noted above in paragraph 18.

¹³ Order 02-50, 2002 BCIPC 43486 (CanLII), para. 144 and Order 02-38, 2002 BCIPC 42472 (CanLII), para. 147.

¹⁴ Applicant's response submission, pp. 7-8.

¹⁵ TRU's reply submission, paras. 20-27; Affidavit 1 of Privacy Assistant.

Section 22(1) – unreasonable invasion of third-party privacy

[35] TRU has applied s. 22(1) to portions of the Report, in both the narrative and conclusions of the investigator and the attachments. I will only consider whether s. 22(1) applies to the information that I have not already found can be withheld under s. 13(1).

Section 22(1) requires public bodies to withhold the personal information where disclosure of that personal information would be an unreasonable invasion of a third party's personal privacy. The proper approach to the application of s. 22(1) of FIPPA is described in Order F15-03, where the adjudicator stated the following:

This section only applies to “personal information” as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.¹⁶

[36] I have taken the same approach in considering the application of s. 22(1) here.

Step 1: Is the information “personal information”?

[37] Under FIPPA, “personal information” is recorded information about an identifiable individual, other than contact information. “Contact information” is “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.”¹⁷

[38] TRU submits that the parties are all well known to each other and there is sufficient contextual information in the Report to enable them to be identified, even if their names are not used.¹⁸

[39] The applicant argues that the Report does not in fact contain any personal information. First, he cites the requirement in Article 9 of the Collective Agreement that investigation reports must not identify the parties and must be provided to the parties. Therefore, he says this Report must not contain any

¹⁶ Order F15-03, 2015 BCIPC 3 (CanLII), para. 58.

¹⁷ FIPPA provides definitions of key terms in Schedule 1.

¹⁸ TRU's initial submission, para. 26.

personal information. Second, he submits that if, in the alternative, the Report does contain personal information of the parties, by disclosing the Report to one party, TRU would be violating the privacy of the other party. He concludes that, as TRU would not intentionally violate the privacy of any of the parties in this way, the Report must not contain any personal information.¹⁹

[40] I can see that the narrative and conclusions of the investigator do not identify any of the parties by name. However, it is evident from the face of the record that, although they are not identified by name or other personal identifier in the Report, all the employees mentioned are identifiable. The information that they provide in their statements is specific to them and would identify them. The fact that they are not identified by name, does not prevent them from being identifiable in the context of the Report.

[41] The attachments include correspondence between the investigator and the applicant that contain the names of third parties. They also contain records including passages, similar to those in the narrative and conclusions of the investigator, where unnamed individuals are identifiable.

[42] Therefore, I find that the Report contains identifiable information about third parties. I find that none of this information is contact information.

[41] For these reasons, I find that all of the information I am considering under s. 22(1) is personal information.

Step 2: Does s. 22(4) apply?

[42] The relevant provision is s. 22(4)(e) which reads as follows:

22 (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

(c) an enactment of British Columbia or Canada authorizes the disclosure,

...

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

[43] **Section 22(4)(c) (disclosure authorized by an enactment)** – The applicant submits that s. 22(4)(c) applies to the Report. He cites s. 49 of the *Labour Relations Code*, which requires persons to comply with any requirements of a collective agreement. He also cites s. 9.2.3.3(b) of the Collective Agreement, which, he argues, requires TRU to provide him with a copy of the Report. This

¹⁹ Applicant's response submission, pp. 8-9.

provision reads as follows: “The Investigator’s Report will be given, in confidence, to the parties.”²⁰

[44] TRU replies that the Collective Agreement requires it to provide a copy of the Report to the applicant in confidence. As the applicant has repeatedly refused to agree to keep the Report confidential, TRU argues that the applicant has voluntarily disqualified himself from receiving a copy of the Report under the Collective Agreement. TRU submits further that previous orders have established that for s. 22(4)(c) to apply, the relevant enactment must require disclosure generally, not just to certain individuals under certain conditions. It submits that for these reasons, s. 22(4)(c) does not apply.²¹

[45] Section 22(4)(c) stipulates that a disclosure of personal information is not an unreasonable invasion of privacy where an enactment makes that personal information available publicly. For example, previous orders have found that where a statute authorizes or requires professional regulatory bodies to publicize information about identifiable members, those bodies may not apply s. 22(1) to that information in response to requests under FIPPA.²² In this case, the Collective Agreement is not an enactment. Nevertheless, the *Labour Relations Code* is an enactment, and s. 49(1) requires all individuals bound by a collective agreement to do everything that individual is required to do under the agreement.

[46] Notwithstanding, I find that s. 22(4)(c) does not apply in this case. The relevant provision in the Collective Agreement (s. 9.2.3.3(b)) requires that TRU provide copies solely to the parties and in confidence. It does not authorize the disclosure of personal information in the Report to everyone. I accept what TRU says about the applicant repeatedly refusing to agree to keep the Report confidential. He does not dispute that this is what he has said. Disclosure of the Report to the applicant through a FIPPA request would enable the applicant to make the Report public. This would defeat the purpose of the confidentiality provision in the Collective Agreement. The circumstances of this case do not conform with the requirements of s. 22(4)(c).

[47] Therefore, I find that s. 22(4)(c) does not apply.

[48] **Section 22(4)(e) (position, functions and remuneration)** – This provision applies to factual information about the actions of employees in the normal course of business, but not to qualitative information about how they performed their job duties. In the context of a workplace investigation, it would

²⁰ Applicant’s response submission, p. 9; *Labour Relations Code* RSBC 1996, c. 244; Collective Agreement appended to TRU’s reply submission.

²¹ TRU’s reply submission, paras. 31-35; Order 174-1997, 1997 BCIPC 459 (CanLII); Order F22-38, 2022 BCIPC 43 (CanLII), paras 39-42.

²² Order F11-22, 2011 BCIPC 28 (CanLII); Order F12-10, 2012 BCIPC 14 (CanLII).

not apply to information about the actions and statements that are under investigation.

[49] TRU submits that s. 22(4)(e) does not apply to any of the personal information in the Report. It argues that personal information contained in workplace investigation records does not constitute information about an employee's position, functions or remuneration because it was collected as part of a workplace investigation. It cites several orders in support of its position.²³

[50] The applicant makes no submissions on the application of s. 22(4)(e).

[51] TRU is incorrect to assert that s. 22(4)(e) never applies to any personal information in the context of a workplace investigation. On the contrary, it can apply to factual information about individuals performing their duties in the normal course of business. It is necessary to separate qualitative information relating to the complaint and evaluations of the statements and actions of individuals that is at the heart of the investigation from any incidental factual information about the performance of duties that are not being investigated. As former Commissioner Loukidelis found in Order 01-53:

any third-party identifying information that in some way relates to the third party's job duties in the normal course of work-related activities falls into s. 22(4)(e). I refer here 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.²⁴

[52] I have reviewed the personal information in the Report. It includes only one passage that relates to incidental factual information about an employee performing their duties that is not under investigation. This passage is part of the first sentence of the first new paragraph on page 4 of the Report. I find that s. 22(4)(e) applies to that personal information. I find that s. 22(4)(e) does not apply to any other personal information.

Step 3: Does s. 22(3) apply?

[53] TRU submits that s. 22(3)(b) and (d) apply. Those provisions read as follows:

22 (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if:

...

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the

²³ TRU's initial submission, para. 32; Order F05-32, 2005 BCIPC 44 (CanLII), paras. 7-10; Order F14-18, 2014 BCIPC 21 (CanLII), para. 22.

²⁴ Order 01-53, 2001 BCIPC 56 (CanLII) (Order 01-53), para. 40.

extent that disclosure is necessary to prosecute the violation or to continue the investigation,

...

- (d) the personal information relates to employment, occupational or educational history.

[54] **Section 22(3)(b) (investigation into a violation of law)** – TRU submits that, while previous orders have not found workplace investigations to constitute investigations into possible violations of law, subsequent amendments to occupational health and safety laws should alter the interpretation of s. 22(3)(b). It cites changes to the *Workers Compensation Act* (WCA) as requiring employers to prevent the presence of bullying and harassment in the workplace. TRU notes that a previous order has found that s. 22(3)(b) applies to investigations into possible contraventions of the WCA.²⁵

[55] The applicant does not make submissions with respect to the application of s. 22(3)(b).

[56] While investigations pursuant to the WCA may fall within the provision of s. 22(3)(b), nothing before me indicates that the Report at issue was the result of an investigation under the WCA. The text of the Report does not mention the WCA in any respect. I also note that the terms of reference do not include any mention of the WCA.

[57] Therefore, I find that the investigation that led to the Report was not an investigation into a possible violation of law and s. 22(3)(b) does not apply.

[58] **Section 22(3)(d) (employment history)** – TRU submits that the personal information of employees to which it applied s. 22(1) constitutes their employment history.²⁶ TRU cites Order 01-53, where former Commissioner Loukidelis determined that “evidence or statements by witnesses or a complainant about an individual’s workplace behaviour or actions” constitutes their employment history.²⁷

[59] TRU describes the information in the Report that the employees provided to the investigator as a description of their interactions relating to the complaint under investigation. TRU argues that the identities of these employees constitute part of their employment history in the context of a workplace investigation. Although there are no personal identifiers in the Report, TRU submits that a knowledgeable reader would be able to identify the employees from the contextual information that they provided in the Report. TRU argues the

²⁵ TRU’s initial submission, paras. 37-39; *Workers Compensation Act* RSBC 2019 c. 1. Order 01-19, 2001 BCIPC 2 (CanLII), paras. 29-30.

²⁶ TRU’s initial submission, paras. 24-47.

²⁷ TRU’s initial submission, para. 43; Order 01-53, para. 32.

disclosure of any information about their statements would reveal their identities and, consequently, their employment history.²⁸

[60] The applicant did not make submissions regarding the application of s. 22(3)(d).

[61] The Report is solely concerned with a workplace investigation. While the events at issue did not occur at TRU facilities and did not involve any direct interaction between the employees, they relate to behaviours subject to investigation in accordance with the Collective Agreement. Therefore, I find it constitutes a workplace investigation.

[62] With the exception of the passage I mention above to which s. 22(4)(e) applies, the third-party personal information at issue in the Report is contained in statements about interactions between employees that are under investigation. This information is employment history that falls clearly within the provision of s. 22(3)(d).

[63] Therefore, I find that this personal information about the employees constitutes their employment history in accordance with s. 22(3)(d) and disclosure is presumed to be an unreasonable invasion of privacy.

Step 4: do the relevant circumstances in s. 22(2) rebut the presumption of unreasonable invasion of privacy?

[64] The relevant provisions read as follows:

22 (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

...

(h) the disclosure may unfairly damage the reputation of any person

²⁸ TRU's initial submission, paras. 45-47.

referred to in the record requested by the applicant

[65] **Section 22(2)(a)(public scrutiny)** – The applicant asserts that disclosure is desirable for the purpose of subjecting TRU to public scrutiny. He submits:

TRU has repeatedly attempted to use confidentiality requirements to prevent public scrutiny of their activities. This has become a modus operandi for them. Repeatedly, using confidentiality excuses to prevent public criticism is clearly an issue for which public scrutiny is desirable.²⁹

[66] TRU denies that this provision applies.³⁰

[67] I find that the applicant has not established why disclosure of the Report would be desirable for subjecting TRU to public scrutiny. He provided no evidence to substantiate his allegations. I have reviewed the Report, and I cannot see how this provision would apply to it. There is nothing in the Report that relates to the applicant's allegations.

[68] I find that s. 22(2)(a) does not apply in this case.

[69] **Section 22(2)(c) (fair determination of an applicant's rights)** – This provision applies to personal information that is relevant to a fair determination of the applicant's rights. Previous OIPC orders have established the following test for s. 22(2)(c) to apply:

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, the 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.³¹

[70] The applicant submits that disclosure of the information at issue is necessary for a fair determination of his rights. He asserts that he has attempted to obtain the Record through the process stipulated in the Collective Agreement

²⁹ Applicant's response submission, p.12.

³⁰ TRU's reply submission, para. 43.

³¹ Order F23-13, 2022 BCIPC 15 (CanLII), para. 120; Order 01-07, 2001 BCIPC 21561 (CanLII), para. 31.

but has been unsuccessful. He has an active grievance, and he submits that he requires access to the Report to prepare properly for the hearing.³²

[71] TRU submits the applicant has failed to demonstrate that all four parts of the test apply. TRU submits further that, as part of the complaint process, it has previously provided the applicant with all of the allegations and evidence he requires to prepare for the hearing. TRU adds that it has provided a copy of the Report to his union representatives who will participate in the hearing on his behalf. Finally, TRU notes that it has offered a copy of the Report to the applicant on conditions of confidentiality, which he has refused to accept. Therefore, it concludes that providing the applicant with the Report is not necessary for him to prepare for the hearing.³³

[72] I will address the four elements of the test below.

Legal right

[73] The first part of the test relates to whether the right in question is a legal right drawn from the common law or a statute, as opposed to a non-legal right based on moral or ethical grounds. TRU does not dispute that the hearing with respect to the applicant grieving his discipline involves legal rights in accordance with this test.

[74] I find that the applicant's claims involve legal rights, such as the right to grieve the employment-related decision that affects him.

Proceeding under way or contemplated

[75] The second part of the test relates to whether a proceeding is either under way or contemplated. Previous OIPC orders have established that an applicant only needs to establish that they are intently considering the commencement of a proceeding.³⁴ This provision does not apply, however, to a proceeding that has already been completed.

[76] TRU does not contest the applicant's assertion that a hearing respecting the grievance of his discipline is contemplated. I find that, the applicant's claims meet the test for being in contemplation.

Information has a bearing on the legal right

[77] The third part of the test involves whether the personal information at issue has some bearing on, or significance for, a determination of the legal right in question.

³² Applicant's response submission, para. 26.

³³ TRU's reply submission, paras. 37-42.

³⁴ For example, Order F23-13, para. 126; Order F16-36, 2016 BCIPC 40 (CanLII), para. 50.

[78] I find the legal right engaged here is to present a case at a future hearing respecting the grievance of his discipline. TRU contends that previous cases regarding arbitration awards have refused to admit investigation reports as evidence.³⁵ It argues that, as the Report is not admissible at the hearing, it has no bearing on any legal rights relating to the hearing. It submits the onus is on TRU to prove its case at the hearing and the applicant will be able to respond to the evidence it submits in that forum.

[79] Nevertheless, I note that TRU argues elsewhere that the purpose of the Report was to assist in its deliberations with respect to the complaint against the applicant. It follows that the evaluation of information upon which a decision was based may have a bearing on the determination as to the soundness of that decision.

[80] Therefore, I find that information in the Report may have a bearing on the exercise of the applicant's legal rights.

Information necessary to prepare for the hearing

[81] Ultimately the issue is whether disclosure of the personal information of the employees contained in the Report is necessary for the applicant to prepare for the hearing.

[82] I have reviewed the Report and the information that TRU has already disclosed to the applicant. It appears to me that the applicant is already privy to the information that is essential for him to grieve his discipline. I see nothing of significance in the Report of which he is not already aware.

[83] Therefore, I find that access to the personal information of employees contained in the Report is not necessary for the applicant to prepare for the hearing respecting the grievance of his discipline.

[84] In summary, I find that s. 22(2)(c) does not apply in this case.

[85] **Section 22(2)(e) (unfair harm)** – TRU submits that disclosure of some of the information could cause harm to the employees by contributing to stress and anxiety. It submits that the applicant has a history of criticizing co-workers publicly and retaliating against the complainant in this case. It argues that it is reasonable to conclude that disclosure of the personal information to the applicant would lead him to retaliate further against the employees.³⁶ In support of these submissions, TRU provided evidence from a witness, *in camera*.

³⁵ TRU's reply submission, para. 38; *British Columbia Institute of Technology and British Columbia Governors and Services Employees' Union*, 1995 CanLII 18000 (BC LA).

³⁶ TRU's initial submission, para. 60.

[86] The applicant does not make submissions to refute the arguments of TRU with respect to the application of s. 22(2)(e).

[87] I find it relevant that the matter at issue that gave rise to the Report was the applicant having publicly criticized the complainant and subsequently having disclosed information about the complainant. The fact that the applicant has refused to receive a copy of the Report in confidence suggests that he wishes to preserve the option of making further public disclosures of the personal information of the employees in the Report. The witness has provided evidence *in camera* that has persuaded me about the harm that the previous public disclosures by the applicant has caused.

[88] Therefore, I find that s. 22(2)(e) is a relevant circumstance favouring withholding the personal information.

[89] **Section 22(2)(f) (supplied in confidence)** – TRU submits that the investigator received all statements in confidence. It also provided evidence from a witness that the investigator provided assurances of confidentiality. TRU also points to the Collective Agreement, which requires the process to be confidential.³⁷

[90] The applicant does not make submissions in response to TRU arguments respecting whether the statements were supplied in confidence.

[91] In my assessment, the witness's evidence, the Report and the Collective Agreement support TRU's argument that the statements were supplied in confidence. Therefore, I find the statements to be supplied in confidence in accordance with s. 22(2)(f) and that this is a relevant circumstance favouring withholding the information.

[92] **Section 22(2)(h)** – TRU submits that disclosure of some of the information about the employees could damage their reputations. It argues that it is reasonable to conclude that disclosure of the personal information to the applicant would lead him to criticize the employees publicly in a way that could unfairly damage their reputations.³⁸

[93] The applicant does not contest the arguments of TRU with respect to the application of s. 22(2)(h).

[94] As with respect to the application of s. 22(2)(e) I find the applicant's previous public disclosures to be relevant. The fact that the applicant has refused to receive a copy of the Report in confidence supports that conclusion that he will make further public disclosures of the personal information of the employees in

³⁷ TRU's initial submission, para. 62; Witness (in camera) affidavit, para. 5.

³⁸ TRU's initial submission, para. 60.

the Report. His previous public statements have been critical of employees and may have unfairly damaged their reputations.

[95] Therefore, I find that s. 22(2)(h) is a relevant consideration favouring withholding the personal information.

[96] **Other considerations** – In addition to the circumstances listed in s.22(2) , I may consider others that the parties have raised. I may also identify other relevant considerations.

[97] It is a relevant consideration that much of the information about the substance of the complaint and the actions of the applicant has already been disclosed to him. He was a party to the investigation and his actions are the primary focus of the Report. The Report also contains his statements and copies of his correspondence.

[98] The narrative and conclusions of the investigator also includes the applicant's statements that he provided to the investigator. The disclosure of information about the substance of the complaint with respect to his own actions would only duplicate information that he has already received and made public. The attachments include complete copies of some correspondence between the applicant and the investigator. This correspondence contains the names of third parties. I find it reasonable to assume that the applicant retains the original copies of the correspondence. As a result, the withholding of the names in this correspondence would not protect the privacy of the third parties. I find this to be a relevant consideration favouring the re-disclosure of this personal information.

Conclusion on s. 22(1)

[99] I found above that the information in dispute is personal information of employees. I have found that, with the exceptions of one passage subject to s. 22(4)(e), none of the provisions of s. 22(4) applies to this information.

[100] I have found that some of the personal information relates to the employment history of the employees under s. 22(3)(d) and disclosure of this personal information is presumed to be an unreasonable invasion of privacy.

[101] It is significant that the Report is largely about the actions of the applicant and that he has already received the substance of the complaint. I find this to be a relevant circumstance that supports, in effect, re-disclosing the personal information it contains. This does not apply, however, to those passages where it would enable the applicant to infer additional information about the other employees.

[102] I have found that the employees supplied their statements in confidence in accordance with s. 22(2)(f). I have also found that disclosure of the statements may cause the employees to suffer unfair harm in accordance with s. 22(2)(e) and may damage their reputations in accordance with s. 22(2)(h). Similarly, I find that, given his previous actions, it is likely the intent of the applicant to publicize this personal information of the employees. These are relevant circumstances favouring withholding this information.

[105] In conclusion, I find that s. 22(1) applies to the personal information of the employees. The only exceptions are: one passage subject to s. 22(4)(e); others where disclosure would only constitute re-disclosure of the substance of the allegations and information about the applicant's actions alone; and copies of correspondence to which the applicant was the sender or recipient.

CONCLUSION

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

1. Subject to item 3 below, I confirm, in part, the decision of TRU to withhold information under s. 13(1).
2. Subject to item 3 below, I require TRU to refuse access, under s. 22(1), part of the personal information it withheld under s. 22(1).
3. In a copy of the records that is provided to TRU along with this order, I have highlighted in yellow the only information that TRU is authorized or required to refuse to disclose to the applicant under ss. 13(1) and 22(1). The highlighted information is on pages on pages 2-21, 29, 52, 54-55, 57-58, 62-65 of the records. I require TRU to disclose to the applicant all of the information that is not highlighted.
4. TRU must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicants, together with a copy of the pages containing the information that it must disclose.

[107] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by October 25, 2023.

September 12, 2023

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

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