



Order F23-82

## THOMPSON RIVERS UNIVERSITY

Celia Francis  
Adjudicator

October 4, 2023

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**Summary:** An applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to Thompson Rivers University (TRU) for records related to a submission he made to the Northwest Commission on Colleges and Universities. TRU disclosed some records and withheld what it called “draft letters” under s. 13(1) of FIPPA (advice or recommendations). The adjudicator found that most of the withheld information did not fall under s. 13(1) and ordered TRU to disclose it. The adjudicator also found that some information (editorial suggestions for changes to a draft letter) did fall under s. 13(1) and confirmed TRU’s decision to withhold this information.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 13(1).

### INTRODUCTION

[1] An applicant made the following request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to Thompson Rivers University (TRU):

In September 2017, I made a submission to the Northwest Commission on Colleges and Universities [NWCCU] with regard to TRU’s application for accreditation. In connection with that letter, I would like to request:

1. Any communications/emails/etc between TRU and NWCCU regarding my letter.
2. Any other documents in TRU’s possession related to that my [sic] letter (e.g. internal communications etc).

[2] TRU responded by telling the applicant that it had located 22 pages of responsive records. TRU disclosed approximately four pages and withheld the rest under s. 13(1) of FIPPA (advice or recommendations).

[3] The applicant requested a review of TRU's decision by the Office of the Information and Privacy Commissioner (OIPC). In March 2022, TRU disclosed more information and applied s. 22 (unreasonable invasion of third-party privacy) to some information.

[4] Mediation did not resolve the matter and it proceeded to inquiry. The applicant later agreed he no longer disputed TRU's decision to refuse access to some of the information under s. 22. Thus the only issue at inquiry was s. 13(1). The OIPC received submissions from TRU and the applicant.

### **PRELIMINARY MATTER**

[5] The applicant's request for review also questioned the adequacy of TRU's search for records. This issue was not mentioned in the Notice for this inquiry and the parties did not address it in their submissions. I take it, therefore, that the adequacy of TRU's search for responsive records is not at issue here.

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

[6] The issue I am to decide is whether TRU is authorized to refuse to disclose the information at issue under s. 13(1) of FIPPA.

[7] Under s. 57(1) of FIPPA, TRU has the burden of proving that the applicant has no right of access to the information under s. 13(1) of FIPPA.

### **DISCUSSION**

#### ***Background***

[8] TRU is a university based in Kamloops, British Columbia. It provides post-secondary educational services to approximately 25,000 students and employs approximately 2,000 faculty instructors and staff.<sup>1</sup>

[9] TRU said that the applicant is a former faculty member and that he made a submission to the NWCCU about TRU's application for accreditation with the NWCCU. TRU said that the NWCCU describes itself as a non-profit corporation that accredits institutions of higher education in British Columbia and the United States.<sup>2</sup>

[10] The parties did not provide me with a copy of the applicant's submission to the NWCCU. Thus, I do not know what he said about TRU's application for accreditation.

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<sup>1</sup> TRU's initial submission, para. 12.

<sup>2</sup> TRU's initial submission, para. 13.

**Information in dispute**

[11] TRU said the five pages of records in dispute “comprise early draft versions of a September 26, 2017 letter” it prepared in response to a communication the applicant sent the NWCCU regarding TRU’s application for accreditation.<sup>3</sup>

[12] TRU withheld all five pages of the records in dispute. The first three pages (pages 18-20 of the records) are a September 26, 2017 draft letter annotated as withheld in full under s. 13(1). The fourth and fifth pages are not numbered or annotated with any exceptions. However, I understand from TRU’s submission that it withheld these two pages under s. 13(1) as well.<sup>4</sup> I refer below to these pages as pages 21-22.

**Advice or recommendations – s. 13(1)**

[13] The s. 13 analysis involves two steps. First, I must determine if disclosure of the information in dispute would reveal advice or recommendations developed by or for the public body. Second, I must decide if the information that I find reveals advice or recommendations falls into any of the categories listed in s. 13(2) or s. 13(3). If it does, the public body cannot refuse to disclose it.<sup>5</sup>

[14] Section 13(2) lists categories of information that public bodies cannot withhold under s. 13(1). For example, s. 13(2)(a) says that public bodies cannot withhold factual material under s. 13(1).

[15] Section 13(3) says that public bodies cannot use s. 13(1) to withhold information in a record that has been in existence for 10 or more years.<sup>6</sup>

[16] The courts have said that the purpose of exempting advice or recommendations from disclosure is “to preserve an effective and neutral public service so as to permit public servants to provide free and frank advice,”<sup>7</sup> recognizing that some degree of deliberative secrecy fosters the decision-making process.<sup>8</sup>

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<sup>3</sup> TRU’s initial submission, para. 1.

<sup>4</sup> See para. 25, TRU’s initial submission.

<sup>5</sup> Order F21-16, 2021 BCIPC 21 (CanLII).

<sup>6</sup> Order F21-16 at paras. 14 and 15.

<sup>7</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36 [John Doe], at paras. 34, 43, 46, 47.

<sup>8</sup> *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College], para. 105.

[17] In arriving at my decision on s. 13(1), I have considered the principles for applying s. 13(1) as set out in past OIPC orders and court decisions. I also note, in particular, the following principles from some of those decisions:<sup>9</sup>

- A public body is authorized to refuse access to information under s. 13(1), not only when the information itself directly reveals advice or recommendations, but also when disclosure of the information would enable an individual to draw accurate inferences about any advice or recommendations.<sup>10</sup>
- Recommendations include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or implied.<sup>11</sup>
- “Advice” usually involves a communication, by an individual whose advice has been sought, to the recipient of the advice, as to which courses of action are preferred or desirable.<sup>12</sup>
- Advice includes policy options prepared in the course of the decision-making process.<sup>13</sup>
- “Advice” has a broader meaning than the term “recommendations.”<sup>14</sup> The Supreme Court of Canada in *John Doe* found that “advice” includes a public servant’s view of policy options to be considered by a decision maker, including the considerations to take into account by the decision maker in making the decision.<sup>15</sup>
- Advice also includes an opinion that involves exercising judgement 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>16</sup>
- Section 13(1) does not automatically apply to a document simply because it is a draft.<sup>17</sup> The fact that a record is a draft does not necessarily make the entire record advice or recommendations under s. 13(1). A public body can withhold only those parts of the draft that actually are advice or recommendations within the meaning of the section.<sup>18</sup>

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<sup>9</sup> I have taken these principles in large part from Order F19-28, 2019 BCIPC 30 (CanLII), at para. 14.

<sup>10</sup> Order 02-38, 2002 CanLII 42472 at para. 135. See also Order F17-19, 2017 BCIPC 20 at para. 19.

<sup>11</sup> *John Doe* at paras. 23-24.

<sup>12</sup> Order 01-15, 2001 CanLII 21569 at para. 22.

<sup>13</sup> *John Doe*, para. 35.

<sup>14</sup> *John Doe*, at para. 24.

<sup>15</sup> *Ibid* at paras. 26, 34 and 47.

<sup>16</sup> *College*, *supra* note 8 at para. 113.

<sup>17</sup> Order 00-27, 2000 CanLII 14392 at p. 6; Order F17-13, 2017 BCIPC 14 at para. 24; Order F17-39, 2017 BCIPC 43 at para. 37; Order 03-37, 2003 CanLII 49216 at paras. 59-60.

<sup>18</sup> Order 00-27, 2000 CanLII 14392 at p. 6 and Order 03-37, 2003 CanLII 49216 at para. 60.

- Section 13(1) extends to factual or background information that is a necessary and integrated part of the advice.<sup>19</sup> This includes factual information compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body.<sup>20</sup>

*Parties' submissions on s. 13(1)*

[18] TRU described the records in dispute as “draft versions of the letter to be finally sent to the NWCCU”. It said that the records “reflect careful internal deliberations amongst TRU employees as to what information to present to NWCCU, and the best way to present this information.” TRU said that the drafts were shared for comment amongst TRU employees with expertise in TRU’s processes, mandate and policies. TRU argued that “the ability for public body employees to share candid feedback on draft versions of letters is the exact type of ‘deliberative secrecy’” described by the BC Court of Appeal in *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner [College])*.<sup>21</sup> In TRU’s view, disclosure of the records would reveal advice and recommendations on the content of the letter and the most appropriate response to the applicant’s comments to the NWCCU.<sup>22</sup>

[19] The applicant argued that the records in dispute were not meant to provide advice to a public body or minister. He also pointed out that previous decisions have found that drafts do not necessarily fall under s. 13. He also suggested that TRU should at least provide those portions in the drafts that are “substantially identical” to the final letter.<sup>23</sup>

*Analysis and findings*

[20] I will now consider whether s. 13(1) applies to the records in dispute. TRU made no attempt to sever the records but rather withheld them in full. I also note that the records were four years old at the time of the request. TRU did not explain why it had retained these so-called drafts.

**Pages 18-20**

[21] TRU said that pages 18-20 are a draft version of the final letter and are marked to show edits made and comments that set out the rationale for these

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<sup>19</sup> *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53.

<sup>20</sup> *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.

<sup>21</sup> TRU’s initial submission, para. 28, with reference to *College*, *supra* note 8, at para. 105.

<sup>22</sup> TRU’s initial submission, paras. 22-24. The quotations I cite come from these paragraphs as well.

<sup>23</sup> Applicant’s response.

edits. TRU noted that it disclosed a subsequent draft of this letter at pages 2-4 of the March 2022 release package.<sup>24</sup>

[22] I am satisfied that pages 18-20 are a draft letter. They contain additions and changes using the Word track-changes feature. That is, some portions are underlined or struck out to suggest that they be added, deleted or moved. One paragraph is highlighted with a brief marginal comment.

[23] TRU said that the draft letter was prepared by employees in the TRU office of the Provost and VP Academic who have expertise in TRU's mandate, policies and processes.<sup>25</sup> TRU did not, however, explain who these specific employees were or how they had any such expertise.

[24] TRU also did not point to portions of the draft which it believes reflect any such expertise or which reveal any judgement these employees may have exercised. Nor did TRU point to portions of the draft letter disclosure of which, in its view, would reveal advice or recommendations as past orders have interpreted those terms.

[25] TRU's affidavit evidence also does not, in my view, assist it. The affiant was not employed by TRU at the time of the request. Nor did she assist in the preparation of the records. She appears to have no direct knowledge of any of the issues here.<sup>26</sup>

[26] In my view, the plain text and underlined portions of the draft letter contain no advice on how to respond to the applicant's submission, no options for responding, no expert opinion or analysis on matters of fact, no recommendations on possible future courses of action or any other information that past orders have found was advice or recommendations.

[27] Rather, these portions contain factual statements on, and explanations of, TRU's programs, standards and processes. They do not, in my view, reveal analytical expertise, nor do they enable the reader to draw inferences on how the employees applied any analytical expertise or what their conclusions might be. Moreover, setting aside the struck-out and highlighted portions, the draft letter is substantively the same as the final letter, which TRU has disclosed to the applicant.

[28] I find, therefore, that disclosure of the plain text and underlined portions of the draft letter would not reveal implied or explicit advice or recommendations within the meaning of s. 13(1). This finding is consistent with past orders which

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<sup>24</sup> TRU's initial submission, para. 27. Another copy of this letter appears at pages 10-12 and I understand that the applicant received this copy as well.

<sup>25</sup> TRU's initial submission, para. 11. a.

<sup>26</sup> TRU's affidavit.

have found that “a public body can withhold only those parts of the draft that actually are advice or recommendations within the meaning of the section.”<sup>27</sup>

[29] As for the struck-out and highlighted portions, including the marginal comment, I am satisfied that they are suggestions for editorial changes to the wording of the draft letter. While they are innocuous, I find that they are advice or recommendations within the meaning of s. 13(1). This finding is in keeping with past orders which have accepted that editorial suggestions or changes to wording are advice or recommendations on the content of a record.<sup>28</sup>

### **Pages 21-22**

[30] TRU said that these two pages are a Word document comprising an early rough draft of the letter. It said this document contains paragraphs of text with no date, title or “any other indication that it was meant to be disclosed.” TRU said that this record was prepared by the coordinator of Quality Assurance in the Office of the Provost and VP Academic.<sup>29</sup> In TRU’s view, it is “clear on the face of the record that it is an early draft intended solely for further development.”<sup>30</sup>

[31] I agree that this record contains no date or title. This record appears in isolation and there is no indication on its face of its purpose. Moreover, despite what TRU argued, it is not, in my view, clear that this record was “an early draft intended solely for further development.”<sup>31</sup> It does not take the form of a draft letter, although much of the information in it appears in the draft and final letters. Rather, this record contains four headings and several paragraphs of casually worded but factual comments on a series of seemingly unconnected topics.

[32] TRU did not explain how its employee had, or used, expertise or exercised judgement in preparing this record. TRU also did not point to portions in this record that it believes reflect or contain advice or recommendations, as past orders have interpreted these terms. TRU also did not explain how, in its view, the record contains options for responding to the applicant, expert opinion or analysis on matters of fact, recommendations on possible future courses of action or any other information that past orders have found was advice or recommendations. TRU has not, in my view, shown how this entire record consists of advice or recommendations within the meaning of s. 13(1). I find that there is no information in this record that reveals advice or recommendations.

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<sup>27</sup> For example, Order 00-27, p. 6.

<sup>28</sup> For example, Order F19-28, para 39, and the orders it cites.

<sup>29</sup> TRU’s initial submission, para. 11. b.

<sup>30</sup> TRU’s initial submission, para. 25.

<sup>31</sup> TRU’s initial submission, para. 25.

*Does s. 13(2) apply?*

[33] I will now consider whether s. 13(2) applies to the information I found above was advice or recommendations, that is, the struck-out and highlighted portions of pages 18-20.

[34] TRU argued that s. 13(2) does not apply here. It said that only s. 13(2)(a) is potentially applicable but that any factual information withheld under s. 13(1) is integrated with and forms part of the advice or recommendations. Thus, in its view, s. 13(2)(a) does not apply.<sup>32</sup> The applicant did not address this issue.

[35] The relevant provision reads as follows:

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

(a) any factual material

...

[36] **Factual material:** Past orders have discussed the difference between “factual material” (that is, “source materials” or “background facts in isolation”) which has an independent prior existence<sup>33</sup> and to which s. 13(2)(a) applies (and which may not be withheld under s. 13(1)) and factual information which may be captured by s. 13(1). For instance, in Order F16-43, the adjudicator said:

It is important to recognize that source materials accessed by the experts or background facts not necessary to the expert’s advice or the deliberative process at hand would constitute “factual material” under s. 13(2)(a) and accordingly would not be protected from disclosure. However, if the factual information is compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body, or if the expert’s advice can be inferred from the work product, it falls under s. 13(1) and not under s. 13(2)(a).<sup>34</sup>

[37] I do not consider the withheld information contains any background facts or source material, in isolation, or any other information to which s. 13(2)(a) would apply. The withheld information consists of advice on how to edit and change the letter which in my view falls squarely under the terms advice or recommendations. I find that s. 13(2)(a) does not apply to this information.

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<sup>32</sup> TRU’s initial submission, para. 31.

<sup>33</sup> Order F18-41, 2018 BCIPC 44 (CanLII), para. 34.

<sup>34</sup> Order F16-43, [2016] BCIPCD 47 (CanLII), at para. 25, with reference to *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 (CanLII), para 94.



*Does s. 13(3) apply?*

[38] None of the withheld information is older than 10 years, so s. 13(3) does not apply to it.

*Conclusion on s. 13(1)*

[39] I found above that disclosure of the plain text and underlined portions of pages 18-20 and all of pages 21-22 would not reveal advice or recommendations within the meaning of s. 13(1).

[40] However, I found that disclosure of the struck-out and highlighted portions of pages 18-20 would reveal advice or recommendations within the meaning of s. 13(1). I also found that ss. 13(2) and 13(3) do not apply to that information.

*Exercise of Discretion*

[41] Section 13 is discretionary. This means that the head of a public body must properly exercise its “discretion in deciding whether to refuse access to information, and upon proper considerations.”<sup>35</sup> If the head of the public body has failed to exercise discretion, the Commissioner can require the head to do so. The Commissioner can also order the head of the public body to reconsider the exercise of discretion where “the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations.”<sup>36</sup>

[42] TRU said it properly exercised its discretion to withhold information, having considered a number of factors, such as the purpose of s. 13(1), harms arising from disclosure, the importance of confidentiality to TRU’s deliberative processes, TRU’s past practice in maintaining confidentiality of its internal deliberative records, the impact of disclosure on the willingness of its employees to engage in “internal candid, open and robust internal [*sic*] debate,” the nature and sensitivity of the records in dispute and the passage of time.<sup>37</sup>

[43] I do not find these factors particularly compelling. The information in dispute in pages 18-20 is not sensitive in my view. It consists in part of straightforward editorial suggestions for re-wording the letter, which was four years old at the time of the applicant’s access request. Some of the suggestions are to move paragraphs around, without changing their wording. I have difficulty understanding how TRU’s employees would be deterred from providing such

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<sup>35</sup> Order 02-50, 2002 CanLII 43486 (BC IPC) at para. 144.

<sup>36</sup> *John Doe*, at para. 52; see also Order 02-50, 2002 CanLII 43486 (BC IPC) at para. 144 and Order 02-38, 2002 CanLII 42472 (BCIPC) at para. 147.

<sup>37</sup> TRU’s initial submission, para. 32.

editorial suggestions, knowing their suggestions might be disclosed some years later.

[44] As above, TRU's affidavit evidence on this point was not helpful. The affiant was not involved in processing the request but merely deposed to her "understanding" as to the factors TRU considered in exercising discretion. TRU also did not provide any direct evidence on the exercise of discretion from the individual who presumably made the decision to withhold the information.<sup>38</sup>

[45] However, I acknowledge that TRU disclosed more information during the OIPC's mediation of the request, although I do not know what this information was. I therefore accept that TRU turned its mind to whether it would apply s. 13(1) to the rest of the information. There is also no indication that TRU considered irrelevant factors or acted in bad faith. As a result, I find no reason to require that TRU reconsider its exercise of discretion in this case.

## CONCLUSION

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

1. Subject to item 2 below, I confirm in part, TRU's decision to refuse to disclose information under s. 13(1).
2. I find s. 13(1) does not authorize TRU to refuse to disclose the plain text and underlined portions TRU withheld under s. 13(1) on pages 18-20 or any of the information it withheld under s. 13(1) on pages 21-22.
3. I require TRU to give the applicant access to the information described in item 2 above.
4. Under s. 59(1), TRU is required to comply with this order by **November 17, 2023**.

October 4, 2023

## ORIGINAL SIGNED BY

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Celia Francis, Adjudicator

OIPC File No.: F21-87596

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<sup>38</sup> TRU affidavit, para. 8.