ISSN 1198-6182

Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 131-1996
November 19, 1996

INQUIRY RE: An applicant's request for access to records held by the University of British Columbia

Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: http://www.cafe.net/gvc/foi

1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on August 20, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose from an applicant's request for access to records held by the University of British Columbia (UBC). The applicant is a student at the University.

2. Documentation of the inquiry process

The applicant made a request on November 28, 1995 to the University of British Columbia for "any and all files at the University of British Columbia that relate in any way to me ..." On February 14, 1996 UBC notified the applicant that it was denying access to portions of the records under sections 19 and 22 of the Act.

In a letter dated March 11, 1996 the applicant requested the Office of the Information and Privacy Commissioner to review the decision to deny him access to portions of the records. I then granted various extensions at the request of the parties.

3. Issues under review at the inquiry and the burden of proof

The issues under review in this inquiry are the application of sections 19(1)(a), 22(1), 22(2)(e), (f), and (g), and 22(3)(d) and (g.1) of the Act to the records in dispute . The relevant sections read as follows:

Disclosure harmful to individual or public safety

19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or

....

Disclosure harmful to personal privacy

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

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

...

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

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

(g) the personal information is likely to be inaccurate or unreliable, and

....

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

...

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

...

(g.1) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation,

....

Section 57 of the Act establishes the burden of proof. Under that section where access to information in the records has been refused, it is up to the public body to prove that the applicant has no right of access to the record or part of the record that is withheld under section 19 of the Act. In the present case, the burden under this section is on UBC.

Under section 57 of the Act, if the record or part that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure would not be an unreasonable invasion of third party's personal privacy under section 22 of the Act. In the present case, the burden under this section is on the applicant.

4. The records in dispute

The pages of records that remain in dispute are telephone conversation notes, memoranda, and letters concerning the applicant, written by or to staff of a Department at the University of British Columbia. The contents are discussed further below.

5. The applicant's case

The applicant claims that he has been unjustly forced to withdraw from a Master's degree program at UBC. He wants access to his complete personal records held by the University in order to assist in his appeal against that expulsion. He has suspicions about the roles of various university instructors, whom he now accuses of hiding behind the cloak of third-party personal privacy, which he claims is not at issue, since they prepared information "as part of their government-paid professional duties."

The applicant accuses UBC, and one instructor in particular, of engaging in a "kind of secret adjudication process, a sort of Star Chamber tribunal that can expel a student and then refuse to provide reasons or any justification for the decision ...."

I have presented below the applicant's detailed submissions on various sections of the Act.

6. The University of British Columbia's case

UBC limited its initial written submission to section 19(1)(a) of the Act, which I have discussed further below:

> The sole concern of the University in disclosing these records to the Applicant is the safety and health of other persons. There are very serious concerns from those who have had contact with the Applicant of the real potential for harm should the records in dispute be released.

UBC states that the applicant "has a history of intimidating behaviour towards Faculty members, students and staff. Disclosure of the records in question could reasonably be expected to threaten the safety or mental or physical health of individuals." UBC is of the view that it has provided clear and convincing evidence of potential harm to third parties should the records in dispute be released to the applicant.

UBC's reply submission also advanced arguments under section 22 of the Act as to why the records in dispute should not be released to the applicant. I have reviewed them below.

7. Discussion

The context for this case is a situation in which a graduate student was required to withdraw from a graduate program, exhausted his appeal processes, and now wishes complete access to the records in dispute, which he is persuaded will support his cause. This is a not uncommon situation in inquiries before me, yet it does not, by itself, constitute grounds for granting access to information, which must be done in compliance with the Act.

As I have noted in other decisions involving universities in this province, I wish to state that I remain a Professor on leave from the University of Western Ontario.

UBC appeal processes

UBC has informed me that the applicant appealed his expulsion by the Dean of Graduate Studies to the Senate Committee on Academic Standing, which upheld the decision. Thus the applicant has exhausted the internal appeal procedures available to him, and there are no pending determinations of his standing in the Graduate Program at which the information sought by him could be used. On the basis of documentation submitted to me, I accept the statement by UBC that the applicant "was provided a full opportunity to participate in the open determination of his academic appeals and was also provided with written reasons for these decisions." (Affidavit of Libby Nason, Vice Provost, UBC, paragraphs 3, 10) This statement is also a full response to the applicant's argument that UBC must release to him the records on which it based its decision to expel him. He has in fact received such materials. (Reply Submission of UBC, paragraphs 22, 23) Thus I find that UBC has, as it argues, met its obligations under section 6(1) of the Act.

In camera submissions

The applicant generally is opposed to UBC making *in camera* submissions in this inquiry on the grounds that a person like himself should have some knowledge of what he is being charged with and judged by, especially in light of what he calls "dirty dealings." He is especially concerned if there is a class of third parties that the University has concealed from him: "This is very unfair, since being entirely ignorant of their position, I can prepare no response."

UBC in fact made an initial five-page *in camera* submission to me along with five *in camera* affidavits about the application of section 19(1) of the Act in this inquiry. Its public submission contains a four-line synopsis of the essence of its case, which I have quoted above.

It should be noted that the applicant made a reply submission on an *in camera* basis with respect to UBC's reliance on section 19 of the Act. The University then objected to his *in camera* submission, since "it does not protect the content of the Records in Dispute, nor can it protect the identities of the third parties or their personal information."

The contents of the various *in camera* submissions are relatively similar in terms of argument. They all contain information that would be subject to an exception under the Act. I accept all of the *in camera* submissions on that basis and deny UBC's request to review the applicant's reply.

Section 19(1): The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

> ***(a) threaten anyone else's safety or mental or physical health,***

Drawing on my previous Orders, UBC argues that the standard of proof that it has to meet under this section is a balance of probabilities with respect to a public body or a third party having legitimate grounds for fearing a hostile response from an applicant. (See Order No. 28-1994, November 8, 1994, p. 8) The University also correctly argues that the basic thrust of my previous decisions is that a public body must act prudently where the health and safety of others are at issue in connection with the possible release of records. (See Order No. 108-1996, May 30, 1996, p. 3) In its view, its *in camera* affidavits meet this burden.

The applicant's opinion is that the charge against him of engaging in intimidating behaviour towards others "is completely false and untrue .... There is no truth whatsoever in their [UBC's] contention that anyone's safety or mental or physical health might be threatened by the disclosure of the documents in question."

In Order No. 39-1995, April 24, 1995, p. 8, I determined on the basis of affidavit evidence that the complainants "have presented detailed and convincing evidence which demonstrates that they have sufficient reason from their past experiences with Jane Doe to have legitimate reasons to fear for their safety or mental or physical health, if their identities are disclosed to the applicant in this case." That is the test that I apply below in accepting UBC's position on the application of section 19(1).

Section 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,***

The applicant states that this section of the Act favours disclosure of the information in dispute to him. In his view:

> The ... Department at UBC has acted in a secretive and high-handed manner in this case, and is showing contempt for the principles of natural justice and any sort of fairplay -- I still have no idea about what sort of lies, and innuendoes and character assassinations might be being spread around about me under this cloak of official and officious secrecy.

As noted above, UBC has documented for me the exhaustive processes that were used to deal with the academic fate of the applicant. (Affidavit of Libby Nason) UBC argues that "there is no utility in disclosing the Records in Dispute for [the applicant's] professed purpose of scrutinizing the activities of the University." (Reply Submission of UBC, paragraph 5)

I am of the view that the relevant circumstance in section 22(2)(a) does not apply, since the applicant has already received the basic documentation upon which UBC relied in making its decision concerning him. I have reviewed the records in dispute. The information that was not disclosed to the applicant does not reveal a need for subjecting the public body to public scrutiny.

Section 22(2)(c): the personal information is relevant to a fair determination of the applicant's rights,.

The applicant asserts that this relevant circumstance is a factor militating in favour of disclosure of his personal information to him in this case. I agree with the submission of UBC that the applicant's rights have been carefully considered during three internal appeals of a judgment made on his academic performance. UBC's description of what transpired has been shared with the applicant. (Reply Submission of UBC, paragraphs 6-13)

Section 22(2)(e): the third party will be exposed unfairly to financial or other harm,

UBC submits that disclosure of the records in dispute will reveal information supplied by third parties in confidence and expose them unfairly to harm. I agree with the University that this is a relevant circumstance militating against disclosure, especially with respect to third parties who are students. (See Order No. 99-1996, April 22, 1996, p. 5, and Reply Submission of UBC, paragraph 14)

Section 22(2)(f): the personal information has been supplied in confidence,

UBC is of the view that the records in dispute contain information supplied in strict confidence. (Reply Submission of UBC, paragraph 15) I will address this circumstance further below.

Section 22(2)(g): the personal information is likely to be inaccurate or unreliable,

The applicant states that he was an excellent student up to the time of his expulsion. Thus he thinks that any information that was used for the decision against him is likely to be inaccurate or unreliable and should be disclosed to him. UBC's response is that the Government of British Columbia's *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual, Section C.4.13, p. 22, states that information that is likely to be inaccurate or unreliable should not in fact be disclosed. Based on my own review of the records in dispute, I find that issues of accuracy and reliability are not relevant circumstances militating against disclosure in the context of this inquiry.

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

> ***(d)*** ***the personal information relates to employment, occupational or educational history,***

UBC submits "that insofar as the Records in Dispute relate to course work of those other than [the applicant], disclosure of that information relates to the educational history of those individuals. As such, the Act deems its disclosure to be an unreasonable invasion of a Third Party's privacy." (Reply Submission of UBC, paragraph 18) It relies on the definition of "educational history" in the Manual, Section C.4.13, p. 28. To the extent that the records in dispute indeed concern the educational history of third parties, UBC's argument is correct.

22(3)(g.1) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation,

UBC submits that insofar "as the Records in Dispute contain personal evaluations of the Applicant that were supplied in confidence by Third Parties," this section prohibits the disclosure of their identities. This section presumes that disclosure of the information would be an invasion of privacy of the third party. I agree with UBC that such personal evaluations as occurred in the present case are not restricted to the employment context but can be applied in a university or college setting. (Reply Submission of UBC, paragraphs 19, 20) In principle, I accept that a teacher's formal "personal evaluation," where supplied in confidence, of a student in any educational setting is covered by this section. In this present inquiry, most of the information withheld is specifically covered by this section, which means that its disclosure would be a presumed invasion of the privacy of the third parties, because to reveal it would disclose identities.

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

> ***(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,

The applicant is of the view that the personal information prepared about him by university instructors falls under this category of information and should thus be released. In his view, this subsection trumps sections 22(2)(f) and 22(3)(d) and (g.1), because the records in dispute were prepared by instructors acting in a professional capacity. I agree with UBC that since the records in dispute contain assessments provided by others, this section does not apply, and the applicant has misinterpreted it. (Reply Submission of UBC, paragraphs 15, 21) The applicant is also not a third party in this inquiry. In addition, this section is intended to refer to a description of a professional's activities, not to the product of their professional activities.

Review of the records in dispute

A number of UBC personnel have argued that most of the remaining records in dispute were supplied or collected in confidence. Although I am sympathetic to such arguments, there is inadequate direct evidence in this inquiry that the records in dispute were submitted in confidence. I reiterate that any public body undertaking an investigation of a human resources matter should establish in advance the kinds of conditions of confidentiality that it can offer to respondents. (See Order No. 97-1996, April 18, 1996, p. 8) Those requesting and preparing evaluations should be clear that they are being supplied in confidence if that is indeed the case.

The applicant has received about 130 pages of records from UBC; parts of 13 pages have not been disclosed. In reviewing this material, I have benefitted greatly by UBC's *in camera* detailed description of each of the records in dispute, accompanied by specific references to affidavit evidence.

On the basis of my detailed review of the submissions and affidavits, I find that UBC is justified in withholding the records in dispute under both sections 19 and 22 of the Act. In particular, I find that the relevant third parties are legitimately concerned about the disclosure of their identities and comments to the applicant on the basis of their past experience with him. In addition, the applicant has not met his burden of proving that disclosure would not be an unreasonable invasion of the privacy of the third parties.

8. Order

I find that the University of British Columbia is authorized to refuse access to the records in dispute under section 19(1)(a) of the Act. Under section 58(2)(b), I confirm the decision of the University to refuse access to the records in dispute to the applicant.

I also find that the University of British Columbia is required to refuse access to the records in dispute under section 22 of the Act. Under section 58(2)(c), I require the University to refuse access to the records in dispute by the applicant.

David H. Flaherty November 19, 1996
Commissioner