OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F24-12

THOMPSON RIVERS UNIVERSITY

Alexander Corley
Adjudicator

February 20, 2024

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Summary: An applicant requested from a past employer (University) all records related to an external investigation of the University's treatment of the applicant. The University disclosed some information but withheld the rest under ss. 13(1) (advice or recommendations), 14 (solicitor-client privilege), and 22(1) (unreasonable invasion of privacy) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator determined that the University was authorized to withhold all the information withheld under s. 14 but was not authorized or required to withhold some information withheld under ss. 13(1) or 22(1) and ordered the University to disclose that information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act* [RSBC 1996, c. 165], ss. 13(1), 13(2)(a), 13(2)(k), 13(2)(n), 13(3), 14, 22(1), 22(2)(a), 22(2)(c), 22(2)(e), 22(2)(f), 22(2)(h), 22(3)(d), 22(4)(e), and Schedule "1".

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), the applicant requested from Thompson Rivers University (University) all records related to an external report examining the University's treatment of the applicant. The University provided some records to the applicant but withheld others under ss. 12(3)(b) (local public body confidences), 13(1) (advice or recommendations), 14 (solicitor-client privilege), and 22(1) (unreasonable invasion of privacy) of FIPPA.

[2] The applicant was not satisfied and requested that the Office of the Information and Privacy Commissioner (OIPC) review the severing. Mediation by the OIPC did not resolve the matter and the applicant requested that it proceed to an inquiry.

[3] The University indicates that it is no longer relying on s. 12(3)(b) to withhold any of the information in dispute and therefore s. 12(3)(b) is no longer in issue.[1]

Preliminary Matters

Information no longer in dispute

[4] During the submissions phase of the inquiry, the University reconsidered its severing decisions and indicated that it would release additional information.[2] I find that this information is no longer in dispute, and I will not consider it during this inquiry.

[5] Further, the University submits that some of the information in dispute in this inquiry was also in dispute regarding a different request for review the applicant submitted to the OIPC.[3] I find that the parties' dispute over that information was decided by Order F23-65 and I decline to re-adjudicate the conclusions reached in that order.[4] Therefore, I will not consider that information in this inquiry.[5]

Information severed with no explanation

[6] The University has severed some information from the records without explaining which section(s) of FIPPA authorize or require the severing.[6] This information is the e-mail headers generated when the requested records were forwarded within the University while the University prepared its response to the access request.

[7] A public body cannot pick and choose which information is responsive to an access request when the record containing the information is itself responsive. Rather, a public body must release all information in responsive records unless FIPPA specifically authorizes or requires the public body to withhold it.[7] I find that the withheld header information forms part of the responsive records that were provided to the applicant. As the University does not rely on any sections of FIPPA to withhold this information, I find that the University must release it to the applicant.[8]

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[1] Public Body's initial submission at paras. 3-4.
[2] Public Body's reply submission at paras. 1, 12-13, and 22.
[3] Public Body's reply submission at para. 2, referencing OIPC file F21-86387.
[4] 2023 BCIPC 75.
[5] Records package at pp. 226-229, 231-232, 234 (except the top two e-mails on that page), 235-242, 244-246, 248 (except the top e-mail on that page), and 250-259.
[6] Records package at pp. 268, 279, 285, 288, 369, and 374.
[7] See, for example, Order F14-27, 2014 BCIPC 30 at paras. 10-13.
[8] I have considered whether s. 22(1) applies to any of the header information as that section is a mandatory disclosure exception under FIPPA. However, I find that while some of the information

ISSUES

[8] In this inquiry I must decide:

1. Whether ss. 13(1) or 14 authorize the University to withhold the information in dispute under those sections; and
2. Whether s. 22(1) requires the University to withhold the information in dispute under that section.

[9] Section 57(1) of FIPPA says the University has the burden of proving that it is authorized to withhold the information severed under ss. 13(1) and 14. Meanwhile, s. 57(2) of FIPPA says the applicant has the burden of proving that release of the information the University has withheld under s. 22(1) would not be an unreasonable invasion of third-party personal privacy.[9]

DISCUSSION

Background

[10] The applicant was formerly employed by the University as a professor. The end of the parties' relationship was acrimonious and has led to several matters before the Labour Relations Board (LRB) and numerous FIPPA access requests by the applicant for information in the custody and control of the University.[10]

[11] In 2018, the Canadian Association of University Teachers (CAUT), which represents and organizes on behalf of academic staff across Canada, launched an investigation into whether the University had infringed the applicant's academic freedom (the Investigation). The University did not participate in the Investigation but was aware of it and took steps to prepare for its outcome. In November 2019, CAUT issued a report detailing the Investigation's findings (the CAUT Report).[11] The information in dispute concerns the University's response to the Investigation and CAUT Report.

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contained in the e-mail headers is personal information, it must be released to the applicant because s. 22(4)(e) applies to it and disclosure is therefore not an unreasonable invasion of third-party personal privacy.

[9] However, the University bears the burden of demonstrating that the information withheld under s. 22(1) meets the definition of "personal information" under FIPPA: Order F23-49, 2023 BCIPC 57 at para. 5 and note 1, citing Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 9-11.

[10] Public Body's initial submission at para. 14 and Affidavit of the University's Legal Counsel and Access and Privacy Officer (Legal Counsel) at para. 6.

[11] Public Body's initial submission at paras. 12-13.

Records in dispute

[12] As I explain below, the University did not provide the information it withheld under s. 14 for my review. Therefore, I can see some of the responsive records (visible records) but not others (s. 14 records).

Visible records

[13] The visible records contain 378 pages with information in dispute severed from 95 of those pages.[12] From my review of the visible records and the associated table provided by the University (visible records table), I find that these records are primarily e-mails or other correspondence, some with attachments, related to the University's internal and external discussion and action regarding the Investigation and the CAUT Report.[13] Much of the correspondence relates to the University's public relations strategy, including versions of the University's communications strategy regarding the Investigation and CAUT Report (Comms Strategy) and versions of a distinct communications strategy for the University's school of business and economics (SOBE Strategy).

S. 14 records

[14] The University withheld 470 pages of records in their entirety, along with portions of an additional six pages containing information in dispute, under s. 14.[14] Instead of providing the information withheld under s. 14 for my review, the University provided affidavit evidence from one of its in-house lawyers who also acts as the University's Access and Privacy Officer (Legal Counsel), including a detailed table of records (s. 14 table).[15]

Solicitor-Client Privilege - s. 14

[15] Section 14 authorizes a public body to refuse to disclose information that is subject to solicitor-client privilege. The term "solicitor-client privilege" in s. 14 encompasses both legal advice privilege and litigation privilege.[16] The University relies on legal advice privilege to withhold all the information in dispute in the s. 14 records and does not claim litigation privilege. I use the terms "solicitor-

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[12] Pages 7, 12-13, 20-22, 26-27, 33-39, 42-44, 48-51, 62-64, 68-70, 75, 80, 82, 86, 90-93, 95, 131, 137-138, 140-141, 143-146, 154-160, 162-163, 169-174, 176-178, 222-225, 234, 248, 265, 267-272, 274-275, 279-280, 335, 343-345, 360, 362-369, and 374.
[13] Some of the Visible records are social media posts, meeting minutes, letters to or from CAUT, or the CAUT Report but no information is withheld from these records.
[14] 466 pages fully withheld per the S. 14 table; pages 17-19 and 40 of the Visible records, fully withheld; and, pages 8, 14, 16, 80, 91, and 374 of the Visible records, partially withheld.
[15] Legal Counsel's affidavit at para. 19 and Exhibit "B".
[16] *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 at para. 26.

client privilege" and "legal advice privilege" interchangeably in the rest of this order.

Evidentiary basis for solicitor-client privilege

[16] As noted above, the University did not provide the information it withheld under s. 14 for my review. Instead, the University provided Legal Counsel's affidavit evidence including the s. 14 table. Based on that evidence, supplemented by the University's other submissions, the University submits that it has provided sufficient evidence to prove privilege.[17] The applicant submits that the University may have improperly claimed privilege and I should order production of the s. 14 records for my review.[18]

[17] The Commissioner has the power, under s. 44 of FIPPA, to order production of records over which solicitor-client privilege is claimed.[19] However, given the importance of solicitor-client privilege, the Commissioner will only exercise this power when it is necessary to decide the issues in dispute.[20]

[18] Past orders explain that it may be necessary to order production if the evidence describing the records is insufficient to adjudicate the privilege claim or if there is evidence that a party claimed privilege "falsely" or inappropriately.[21]

Sufficiency of evidence

[19] Legal Counsel's evidence sets out, for each of the s. 14 records, the number of pages in the record, the date the record was created, and a description of the record including the parties involved in e-mail chains and whether those chains contain attachments.[22] Legal Counsel deposes that they reviewed the s. 14 records when drafting their affidavit and that the description of those records they provide is accurate and complete.[23]

[20] Legal Counsel's evidence identifies the s. 14 records as a combination of,

- e-mail communications, some with attachments, between the University and the University's in-house lawyers, including its in-house general legal counsel (General Counsel);

[17] Public Body's initial submission at para. 28.
[18] Applicant's submission at pp. 8-10.
[19] FIPPA s. 44(1)(b) states the Commissioner may order the production of records, and s. 44(2.1) reinforces that such a production order may apply to records subject to solicitor-client privilege.
[20] Order F19-21, 2019 BCIPC 23 at para. 61.
[21] See Order F22-23, 2022 BCIPC 25 at para. 14. Past orders also contemplate ordering production where a public body is not able to provide evidence supporting a privilege claim without revealing the information in dispute but that is not the case here.
[22] S. 14 Table; Legal Counsel's affidavit at para. 25; See also Visible records table, records 4, 6, 27, 31, and 75.
[23] Legal Counsel's affidavit at paras. 19, 21-22, and 25.

- e-mail communications between the University and the University's external legal counsel (External Counsel); and,

- e-mail communications, some with attachments, among University administrators or other staff.[24]

[21] I find that Legal Counsel, as a practicing lawyer, has a professional obligation to ensure that privilege is not improperly claimed.[25] Therefore, while Legal Counsel's conclusions regarding the s. 14 records are not dispositive, I find their evidence to be informed and reliable.

[22] On this basis, I accept Legal Counsel's description of the s. 14 records and find that Legal Counsel's affidavit evidence, along with the information in the s. 14 table, is sufficient to adjudicate the University's privilege claim.

Evidence of an inappropriate privilege claim

[23] The applicant asserts that the University may have claimed privilege inappropriately but their submission on this point is not supported by adequate evidence or persuasive argument. Furthermore, as noted above, Legal Counsel is a practicing lawyer and has a professional duty to ensure that privilege is properly claimed.[26] In these circumstances, I prefer Legal Counsel's evidence that the University has properly claimed privilege over the applicant's speculative submissions on impropriety.

Conclusion – evidentiary basis for s. 14

[24] I conclude that Legal Counsel's affidavit evidence, along with the information in the s. 14 table, is sufficient to allow me to determine whether s. 14 applies to the s. 14 records. Therefore, it is not necessary to order the University to produce an un-redacted copy of the s. 14 records for my review.

Legal Advice Privilege

[25] Legal advice privilege applies to communications that:

1. Are between solicitor and client;
2. Entail the seeking or giving of legal advice; and

[24] S. 14 Table; Legal Counsel's affidavit at paras. 22 and 25.
[25] See *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner*, 2021 BCSC 266 [*Finance*] at para. 86. See also Order F20-16, 2020 BCIPC 18 at para. 10 and *Nelson and District Credit Union v. Fiserv Solutions of Canada, Inc.* (Master), 2017 BCSC 1139 [*Fiserv*] at para. 54.
[26] See *Finance*, *ibid*. See also Order F20-16, *ibid* and *Fiserv, ibid*.

3. Are intended by the parties to be confidential.[27]

[26] Not every communication between a solicitor and their client is privileged; however, if the conditions above are satisfied, legal advice privilege applies.[28]

[27] Furthermore, it is not only the direct communication of advice between solicitor and client that may be privileged. The "continuum of communications" related to the advice, that would reveal the substance of the advice, attracts the privilege.[29] The "continuum of communications" includes the necessary exchange of information between solicitor and client for the purpose of obtaining legal advice, such as when a client furnishes information to assist their solicitor in providing legal advice.[30] It also includes communications at the other end of the continuum, such as internal client communications about legal advice and its implications.[31]

[28] Legal advice privilege applies to in-house counsel where the elements of the test set out above are met. However, not everything done by in-house counsel is protected by solicitor-client privilege, as in-house counsel may have work duties outside of providing legal advice.[32]

[29] Concerning attachments to e-mails, solicitor-client privilege does not necessarily apply to all attachments.[33] However, attachments may, depending on their content, be privileged on their own, independent of being attached to an e-mail which is itself privileged. Further, an attachment may be privileged if it constitutes an integral part of the communication to which it is attached and disclosure of the attachment would reveal, or allow accurate inferences to be drawn about, privileged information contained in that communication.[34] The party claiming privilege over an attachment must provide some basis for that claim.[35]

The University's position on legal advice privilege

[30] Legal Counsel's evidence is that each of the s. 14 records either relates directly to the seeking or giving of legal advice or forms part of the continuum of communications within which legal advice was sought and received by the University. Legal Counsel also says that the communications comprising the

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[27] *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 [*Solosky*] at 837.
[28] *Solosky*, *ibid* at 829 and 837.
[29] *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 [*Bilfinger*] at paras. 22-24. See also *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 [*Lee*] at paras. 32-33.
[30] See *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 [*Camp*] at para. 40 where the court found that "[i]t is [the] chain of exchanges or communications [between lawyer and client] and not just the culmination of the lawyer's product or opinion that is privileged".
[31] *Bilfinger*, *supra* note 29 at paras. 22-24.
[32] *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at paras. 19-21.
[33] *Finance*, *supra* note 25 at para 110.
[34] Order F20-08, 2020 BCIPC 9 at para. 27 and Order F18-19, 2018 BCIPC 22 at paras. 36-40.
[35] *Finance*, *supra* note 25 at para. 111.

s. 14 records were intended to be confidential.[36] Turning to the specific records withheld under s. 14, the University submits as follows, based on Legal Counsel's evidence,

> **External Counsel E-mail Chain** - Legal Counsel says the University was in a solicitor-client relationship with External Counsel when these e-mails were sent and received, and that these e-mails contain requests for legal advice and responses providing the requested legal advice.[37] Based on this, the University submits that this record is privileged.[38]
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> **In-House Counsel E-mails** - Legal Counsel says that General Counsel and the University's other in-house counsel provided legal advice to the University on the matters canvassed in the s. 14 records.[39] Legal Counsel further says that these specific e-mails concerned legal advice.[40] On these bases, the University submits that releasing these e-mails or their attachments would reveal, or allow accurate inferences to be drawn about, legal advice.[41] In further support of this submission, the University points out that the nature and context of the Investigation and CAUT Report supports finding that advice sought from General Counsel by the University at this time was legal advice, not other professional or business advice.[42]
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> **Other Internal E-mails** - Legal Counsel says that, in each case, these e-mails relate to matters on which the University sought and received legal advice.[43] Based on this, the University submits that releasing these e-mails or their attachments would allow accurate inferences to be drawn regarding legal advice sought and received by the University.[44]

[31] Based on the above, the University submits that all the s. 14 records are subject to legal advice privilege.

The applicant's position on legal advice privilege

[32] The applicant makes three submissions regarding legal advice privilege. First, they question whether the e-mail attachments contained in the s. 14 records are privileged.[45] Second, they submit that the severing of the s. 14

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[36] Legal Counsel's affidavit at paras. 23 and 25; See also Public Body's initial submission at para. 41 and Visible records table, records 4 (pp. 8-9 of Visible records), 6 (pp. 14 and 16-19 of Visible records), 15 (p. 40 of Visible records), 27 (p. 80 of Visible records), 31 (p. 91 of Visible records), and 75 (pp. 374-378 of Visible records) and S. 14 table, generally.
[37] Legal Counsel's affidavit at paras. 8(c), 20(c), and 22(a); S. 14 table, record 12.
[38] Public Body's initial submission at paras. 40-41.
[39] Legal Counsel's affidavit at para. 8(c); See also Public Body's initial submission at para. 38.
[40] Legal Counsel's affidavit at paras. 20, 22 and 25.
[41] Public Body's initial submission at paras. 42-43 and 45.
[42] Public Body's initial submission at para. 39.
[43] Legal Counsel's affidavit at paras. 22 and 25.
[44] Public Body's initial submission at paras. 42-43, 45, and 49.
[45] Applicant's submission at pp. 9-10.

records is overbroad.[46] Third, they say the University waived privilege over information in all versions of the Comms Strategy when it shared a specific version of that record with the Ministry of Advanced Education, Skills, and Training (Ministry).[47]

[33] As the applicant specifically argues that the e-mail attachments in issue may not be privileged, I consider the e-mail attachments contained in the s. 14 records as their own category, below.

Analysis – Legal advice privilege

i. E-mail chain involving External Counsel

[34] Legal Counsel says that the University enlisted External Counsel throughout their dealings with the applicant.[48] Legal Counsel further says that the University relied on External Counsel for advice relevant to the Investigation and CAUT Report and that this advice is reproduced in the s. 14 records.[49] Given this, I find that the University was in a solicitor-client relationship with External Counsel at the time the communications in those records occurred.

[35] The only s. 14 record specifically marked as a communication with External Counsel is a single five-page e-mail chain.[50] Legal Counsel says these e-mails were between General Counsel and External Counsel and are General Counsel's requests for legal advice and replies containing External Counsel's legal advice.[51] I accept Legal Counsel's evidence regarding this communication, and I find that it entailed the seeking and giving of legal advice.

[36] Finally, Legal Counsel's evidence is that everyone involved in the communications underlying the s. 14 records understood those communications to be confidential at the time they occurred. I accept this and find that the e-mail chain involving External Counsel was a confidential communication.

ii. E-mails involving General Counsel or other in-house counsel

[37] Legal Counsel's evidence is that the relationship between the University and its in-house counsel, including General Counsel, has been ongoing throughout the University's disputes with the applicant.[52] The University also directly asserts that it was in a solicitor-client relationship with its in-house

[46] Applicant's submission at p. 10, citing Order F23-33, 2023 BCIPC 39 at para. 35.
[47] Applicant's submission at pp. 8-9, citing *Guelph (City) v. Super Blue Box Recycling Corp.*, 2004 CanLII 34954 (ON SC) at para. 78. The Ministry has since been renamed the Ministry of "Post-Secondary Education and Future Skills".
[48] Legal Counsel's affidavit at para. 8(c).
[49] Legal Counsel's affidavit at para. 20(c).
[50] S. 14 table, record 12.
[51] Legal Counsel's affidavit at para. 22(a) and S. 14 table, Record 12.
[52] Legal Counsel's affidavit at para. 8(c).

counsel when the s. 14 records were created.[53] Based on all of this, I accept that the University was in a solicitor-client relationship with its in-house counsel, including General Counsel, at the time the communications in these records occurred.

a. General Counsel e-mails

[38] Most of the s. 14 records are e-mails involving General Counsel.[54] Legal Counsel's evidence is that these e-mails,

- refer to legal advice requested from or provided by General Counsel;[55]
- contain requests to or from General Counsel for legal advice;[56] or,
- relate to requests made by General Counsel to University staff or administrators for information required to formulate legal advice.[57]

[39] Legal Counsel also says that they reviewed the s. 14 records with General Counsel who has advised Legal Counsel that the advice General Counsel provided to the University and which would be revealed if the s. 14 records were released to the applicant is legal advice, not other professional or business advice.[58] While this is hearsay evidence, I give it weight on the basis that Legal Counsel's direct evidence and the context in which the records were created also support finding that the advice the University sought from General Counsel during this time was legal advice.[59]

[40] Further, I accept that releasing communications where legal advice was requested from or by General Counsel or where General Counsel requested information required to formulate legal advice could allow the applicant to draw accurate inferences about legal advice prepared for the University.

[41] Taking all of this together, I find that the records considered here are communications made for the purpose of seeking or giving legal advice or would reveal the substance of legal advice if disclosed. I also accept Legal Counsel's evidence that these communications were intended to be confidential.

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[53] Public Body's initial submission at paras. 38 and 40-41.
[54] S. 14 table, records 1-11, 13-16, 19-20, 23, 25, 27, 29, 31, 32 (e-mails 2-5), 33, 35, 37 (e-mails 2-7), 38-40, 42-43, 46, and 51-55; Visible records at pp. 80, 91, and 374.
[55] S. 14 table, records 1-4, 8-10, 20, 25, 27, 29, 31, 35, 37 (e-mails 2-7), 38, 40, 42, 47, 51-52, and 55.
[56] S. 14 table, records 5-7, 11, 13-16, 23, 32 (e-mails 2-5), 33, 39, 46, and 53-54; Visible records at pp. 80, 91, and 374.
[57] S. 14 table, records 19 and 43.
[58] Legal Counsel's affidavit at para. 22.
[59] The evidence and the content of the Visible records indicate that other parties were responsible for dealing with the non-legal aspects of responding to the Investigation and CAUT Report.

b. Other in-house counsel e-mails

[42] A small number of the s. 14 records are communications between the University and an in-house lawyer other than General Counsel. Legal Counsel's evidence is that these records concern the lawyer in question reiterating an internal request by General Counsel to compile information relevant to legal advice General Counsel provided to the University.[60]

[43] Communications between lawyers working together to provide legal advice to a client are subject to legal advice privilege where they relate to the legal advice in issue.[61] Given this, I see no meaningful distinction between internal requests for information coming directly from General Counsel and similar requests where another in-house lawyer acted on behalf of General Counsel.

[44] I find that these communications entail the seeking or giving of legal advice. I also accept Legal Counsel's evidence that these communications were intended to be confidential.

iii. Other internal e-mails

[45] Based on Legal Counsel's evidence, I find that the records at issue here fall within three distinct categories:

- Earlier portions of internal e-mail chains culminating in communications with General Counsel that I found above entailed the seeking or giving of legal advice;[62]
- Internal communications discussing information relevant to legal advice which either was later, or had already been, sought from General Counsel;[63] and
- The University compiling information requested by General Counsel to assist in formulating legal advice and furnishing this information to General Counsel.[64]

[46] Records which would allow accurate inferences to be drawn about legal advice, such as e-mails which culminate in privileged communications with counsel or discuss whether to request legal advice, can clearly fall within the continuum of communications.[65] So too can internal client communications discussing received legal advice and its implications or gathering information to

[60] S. 14 table, record 21 (duplicated at records 22 and 48).
[61] Order F20-16, *supra* note 25 at para. 65.
[62] S. 14 table, records 24, 26, 28, 34, 37 (e-mail 1) and 45.
[63] S. 14 table, records 30, 36, 44, and 50; Visible records at pp. 8, 14, and 16-19.
[64] S. 14 table, records 32 (e-mail 1) and 49; Visible records at p. 40.
[65] See *Lee*, *supra* note 29 at paras. 32-33 and *Camp*, *supra* note 30 at para. 46.

be furnished to a solicitor to assist the solicitor in providing informed legal advice.[66]

[47] Here, Legal Counsel's evidence is that the withheld portions of these records in each case relate to the substance of legal advice sought by the University.[67] Legal Counsel's evidence is also that each of these communications was intended to be confidential. Based on this, I find that these records fall within the continuum of communications in this case.

iv. E-mail attachments

[48] Some of the information withheld from the s. 14 records is contained in e-mail attachments. The applicant argues that e-mail attachments are only privileged if originally written or created for the purpose of receiving legal advice.[68]

[49] With respect to the applicant, their submission on this point is overly narrow. Regardless of its original purpose, a document attached to an e-mail can be privileged if it would allow accurate inferences to be drawn about privileged information contained in the e-mail to which it is attached.[69] However, the party claiming an attachment is privileged must provide evidence indicating the basis for that claim.[70] For the reasons that follow, I find the University has done so here.

[50] Legal Counsel's evidence is that the majority of the e-mail attachments in issue are related to matters on which General Counsel provided legal advice to the University.[71] The remaining e-mail attachments are identified as being information General Counsel requested from the University to inform General Counsel's legal advice.[72] Given Legal Counsel's evidence that each attachment in the s. 14 records relates to legal advice sought from or prepared by General Counsel and that the attachments are not auxiliary to the communications to which they are attached, I accept that disclosing any of the attachments to the applicant could allow accurate inferences to be drawn about privileged information.

[51] Therefore, I find that Legal Counsel's evidence demonstrates that each of the attachments contained in the s. 14 records is privileged.

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[66] See *Bilfinger*, *supra* note 29 at paras. 22-24 and *Camp*, *ibid* at para. 43.
[67] Legal Counsel's affidavit at paras. 22(d) and 25(a)-(b).
[68] Applicant's submission at p. 9.
[69] See *Finance*, *supra* note 25 at para. 110, Order F20-08, *supra* note 34 at para. 27, and Order F18-19, *supra* note 34 at paras. 36-40.
[70] *Finance*, *ibid* at para. 111.
[71] Legal Counsel's affidavit at paras. 22 and 25(b); S. 14 table, records 11, 13, 15, 23, 25, 28-34, 36-37, 44-47, 49-51, 53, and 55; Visible records at pp. 16-19.
[72] S. 14 table, records 19 and 42-43.

Waiver

[52] The header of one of the attachments – whose content I found above is privileged – was not withheld from the applicant. It is identified as a version of the Comms Strategy with the header reading "Communications Strategy: Academic Freedom". The applicant says the University later shared a version of the Comms strategy with the Ministry. For that reason, the applicant claims the University waived privilege over the information in this attachment.

[53] Privilege may be waived expressly or impliedly. Express waiver occurs when the holder of the privilege is aware of the privilege and demonstrates a clear intention that the privilege should no longer apply. Implied waiver occurs when there is no demonstrated intention to waive privilege, but fairness and consistency require disclosure of the privileged material.[73] The party asserting waiver must provide clear and unambiguous evidence that privilege has been waived.[74]

[54] The applicant's submissions on waiver do not provide that level of evidence. The fact that the University shared a version of the Comms Strategy with the Ministry does not clearly and unambiguously demonstrate that the University waived privilege over the version in the attachment. Especially as the sharing with the Ministry took place many months after the privileged communication.[75]

[55] I find that the University did not waive privilege over any of the s. 14 records.

Conclusion – s. 14

[56] For the reasons given above, I find that the University has shown that disclosing any of the s. 14 records would reveal information that is protected by legal advice privilege. Therefore, the University is authorized to refuse to disclose all those records under s. 14.[76]

Advice and Recommendations - s. 13(1)

[57] Section 13(1) authorizes a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister.

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[73] See Order F23-53, 2023 BCIPC 61 at para. 71, citing *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BCSC) at para. 6.
[74] See *Maximum Ventures Inc. v. de Graaf et al.*, 2007 BCSC 1215 at para. 40.
[75] See Visible records at pp. 16 and 68 where the privileged attachment is dated February 11, 2019, and the version shared with the Ministry is dated November 19, 2019.
[76] As I find that all the information in the s. 14 records is subject to legal advice privilege, it is not necessary to consider the applicant's argument that some of that information should be hived off and provided to them.

[58] Numerous orders and court cases have considered the scope and application of s. 13(1). In Order F22-39, the adjudicator canvassed the law and distilled the following interpretive principles for applying s. 13(1) [emphasis in original]:[77]

- Section 13(1) applies to information that *would reveal* advice or recommendations and not only to information that *is* advice or recommendations.[78]

- The terms "advice" and "recommendations" are distinct, so they must have distinct meanings.[79]

- "Recommendations" relate to a suggested course of action that will ultimately be accepted or rejected by the person being advised.[80]

- "Advice" has a broader meaning than "recommendations".[81] It includes setting out relevant considerations and options, and providing analysis and opinions, including expert opinions on matters of fact.[82] "Advice" can be an opinion about an existing set of circumstances and does not have to be a communication about future action.[83]

- "Advice" also 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".[84] This is because the compilation of factual information and weighing of significance of matters of fact is an integral component of an expert's advice and informs the decision-making process.

[59] I adopt these principles and add that a public body may not rely on s. 13(1) to withhold information that has already been publicly revealed, whether in the records at issue or elsewhere.[85]

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[77] 2022 BCIPC 44 at para. 67. See also Order F23-29, 2023 BCIPC 33 at para. 27.
[78] Citing Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 135.
[79] Citing *John Doe v. Ontario (Finance)*, 2014 SCC 36 [*John Doe*] at para. 24.
[80] Citing *John Doe*, *ibid* at paras. 23-24.
[81] Citing *John Doe*, *ibid* at para. 24.
[82] Citing *John Doe*, *ibid* at paras. 26-27 and 46-47; *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 726 [*College*] at paras. 103 and 113.
[83] Citing *College*, *ibid* at para. 103.
[84] Citing *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 [*PHSA*] at para. 94; *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 [*ICBC*] at paras. 52-53.
[85] Order F23-42, 2023 BCIPC 50 at para. 89, citing Order F20-32, 2020 BCIPC 38, Order F12-15, 2012 BCIPC 21, and Order F13-24, 2013 BCIPC 31. Order F23-42 is presently the subject of an application for judicial review (B.C. Supreme Court, Vancouver Registry, No. S-234349). However, the portions of that order pertaining to s. 13(1) are not in issue before the court.

[60] The first step in the s. 13 analysis is to determine whether the information in dispute would reveal advice or recommendations. If it would, the next step is to determine whether ss. 13(2) or 13(3) applies. Section 13(2) lists certain classes of records and information that cannot be withheld under s. 13(1) and s. 13(3) says s. 13(1) does not apply to information in a record that has been in existence for more than 10 years. Finally, refusing access to information under s. 13 is discretionary and it is sometimes appropriate to consider whether a public body properly exercised this discretion.

[61] In this case, all the records the University has withheld under s. 13 were created more recently than 10 years ago. Therefore, s. 13(3) is not applicable.

Would the information reveal advice or recommendations?

[62] The University has applied s. 13(1) to withhold information from 63 pages of the visible records and submits that releasing this information would reveal its internal deliberative process in preparing for media and other inquiries it may have received regarding the Investigation and CAUT Report.[86]

[63] The University also says much of the information is "advice provided or initiated by the University's communications and public relations professionals".[87] The University submits that "public relations officials perform an intrinsically advisory role, and … their expert opinion [and] analysis" falls within s. 13(1).[88] Further, the University has withheld certain draft documents under s. 13(1) on the basis that these drafts would reveal advice or recommendations.[89] Finally, the University has withheld some additional information under s. 13(1) without specifically explaining why.[90]

[64] The applicant does not address whether the information in dispute under s. 13(1) is or would reveal advice or recommendations. Rather, the applicant focuses on s. 13(2) and the University's exercise of discretion.

Analysis

[65] For the reasons that follow, I find that some of the information the University has withheld under s. 13(1) is or would reveal advice or recommendations.

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[86] Visible records at pp. 12-13, 33-34 (the records indicate these redactions as under s. 22 but the Visible records table indicates them as under s. 13(1)), 35-39, 42-44, 48-51, 62-64, 68-70, 75, 80, 82, 90-93, 95, 131, 140-141, 143-146, 169-174, 176-178, 222-225, 234, 248, 269-272, 274-275, 279-280, 335, 345, and 360; Public Body's initial submission at para. 18.
[87] Public Body's initial submission at para. 59.
[88] Public Body's initial submission at paras. 61-62, citing Order F17-51, 2017 BCIPC 56 generally, Order F19-41, 2019 BCIPC 46 at para. 19, and Order F09-01, 2009 CanLII 3225 (BC IPC) at paras. 16-17.
[89] Public Body's initial submission at paras. 63-64.
[90] The Visible records table does say this information is "suggested advice or recommendations".

i. Public relations information

[66] I accept that public relations staff perform an expert, advisory function when they help a public body determine if, when, and how to respond to external events and media coverage. Examining the University's submissions and the content of the visible records, I accept that the University's public relations staff performed such a role regarding the Investigation and CAUT Report. I also accept that dialogue between a public body and its public relations staff may reveal the public body's internal deliberative processes in some cases.

[67] Based on this, I find that much of the information the University has withheld under s. 13(1) either is or would reveal advice or recommendations provided to the University by its public relations staff. This includes all versions of the Comms Strategy and SOBE Strategy, a note from one public relations professional to another which details various work-related items and advises on how they rank in terms of priority, and internal correspondence where public relations matters are discussed with a level of detail sufficient to reveal underlying advice and recommendations or related internal deliberation.[91]

[68] However, I find that a small amount of this information is already revealed in the records provided to the applicant and the University does not explain this inconsistent severing. I find the University cannot withhold the same information under s. 13(1) when it has already been disclosed elsewhere in the records.[92]

[69] Finally, I also find that the University has in some cases severed more information than is necessary to protect its deliberative process from records containing public relations information. As the University does not explain how s. 13(1) applies to this information, I find the University must release it.[93]

ii. Draft documents

[70] Some of the information withheld by the University is contained in draft documents. The final versions of some of these drafts have been released to the applicant. Section 13(1) does not apply to records simply because they are drafts. The usual principles apply and a public body can only withhold those parts of a draft which actually are or would reveal advice or recommendations. In some cases, revealing the changes that were made between a draft version of a document and the final version can reveal advice or recommendations.[94]

[71] Applying this reasoning to the information contained in the draft documents at issue, I find that only some of this information would reveal advice

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[91] See Visible records at pp. 12-13, 34-37, 42-44, 48-50, 62-64, 68-70, 75, 80, 82, 90-92, 95, 131, 140-141, 143-146, 169-174, 176-178, 222-224, 234, 248, 269-272, 274-275, and 279-280.
[92] See Visible records at pp. 36, 44, 50, 64, 70, 90-91, and 171.
[93] See Visible records at pp. 12-13, 34, 80, 82, 90-92, 95, 131, 143-146, 234, 248, 270-271, and 274-275.
[94] Order F18-38, 2018 BCIPC 41 at para. 17.

or recommendations if disclosed.[95] Having reviewed the visible records in detail, I find that releasing some of the information the University has withheld from draft documents would not reveal advice or recommendations beyond what has already been disclosed elsewhere in the records. Therefore, the University must release that information to the applicant.[96]

iii. Other information

[72] The University does not explain why it has severed other information under s. 13(1) except by stating that this information is, or would reveal, advice or recommendations.

[73] Having reviewed the information, it is not apparent to me that it would reveal advice or recommendations if disclosed. The University bears the burden of proof on this point and, in the absence of persuasive and clear submissions from the University, I am unable to conclude that this information falls within s. 13(1).[97]

Conclusion – Advice or Recommendations

[74] I have found above that most of the information the University has withheld under s. 13(1) is or would reveal advice or recommendations. However, the remainder of this information is not covered by s. 13(1) and the University must release it to the applicant.

Does s. 13(2) apply?

[75] The applicant submits that some information I found above would reveal advice or recommendations cannot be withheld under s. 13(1) because ss. 13(2)(a), (k), or (n) apply. The applicant requests that I also consider any other subsections of s. 13(2) that apply.[98] The University argues that none of the subsections of s. 13(2) applies here.[99]

Analysis

[76] I have considered each subsection of s. 13(2) as requested by the applicant. However, on the evidence before me, the only parts of s. 13(2) that are relevant to consider are ss. 13(2)(a), (k), and (n).

i. 13(2)(a) – Factual material

[77] Section 13(2)(a) says that a public body must not refuse to disclose "any factual material" under s. 13(1). "Factual material" is narrower than "factual information" and means background facts in isolation which are not intermingled

[95] See Visible records at pp. 38-39, 225, and 269.
[96] See Visible records at pp. 33 and 51.
[97] See Visible records at pp. 93, 335, 345, and 360.
[98] Applicant's submission at pp. 7-8.
[99] Public Body's reply submission at para. 24.

with provided advice or recommendations. Further, s. 13(2)(a) will not apply where disclosure of the facts would allow an accurate inference to be drawn about the advice or recommendations developed based on those facts.[100]

[78] The SOBE Strategy and Comms Strategy include background facts to help the University understand the advice and recommendations they contain. Some of the e-mails and draft documents at issue contain similar information.

[79] However, s. 13(2)(a) also does not apply to facts where they have been compiled by an expert as a necessary part of that expert's advice.[101] I find that this is the case with the facts in the SOBE Strategy and Comms Strategy. Turning to the facts in the other relevant records, I find that in each case they are intermingled with, and would allow accurate inferences to be drawn regarding, advice or recommendations contained in the records where they appear.

[80] Therefore, I find that s. 13(2)(a) does not apply to the information before me.

ii. 13(2)(k) – Report of a task force

[81] Section 13(2)(k) says that a public body must not refuse to disclose "a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations" to the public body under s. 13(1). For s. 13(2)(k) to apply, the information at issue must be contained in a "report". Past orders have defined "report" as "an account given or opinion formally expressed after investigation or consideration".[102]

[82] I find that none of the information I found above would reveal advice or recommendations is contained in a "report". Rather, it is contained in e-mail communications and strategy documents. These records contain evolving internal discussions and are not formal expressions of considered opinions or accounts. As such, I find that s. 13(2)(k) does not apply here.

iii. 13(2)(n) – Decision affecting the applicant's rights

[83] Section 13(2)(n) says 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" under s. 13(1). Section 13(2)(n) only applies to a record of a decision and the underlying reasons for that decision, not to all records related in any way to a decision.[103]

[84] I do not see how any of the information I am considering here relates directly to the exercise of a discretionary power or adjudicative function by or on

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[100] See *ICBC*, *supra* note 84 at paras. 52-53 and Order F18-41, 2018 BCIPC 44 at para. 34.
[101] *PHSA*, *supra* note 84 at para. 94 and *ICBC, ibid*.
[102] See Order F22-27, 2022 BCIPC 30 at para. 31.
[103] Order No. 218-1998, B.C.I.P.C.D. No. 11 at para. 32.

behalf of the University. Rather, as noted above, this information is contained in internal e-mail communications and strategy documents.

[85] Therefore, I find that s. 13(2)(n) does not apply to the information in dispute.

Conclusion – s. 13(1)

[86] I found above that some of the information the University has withheld under s. 13(1) would not reveal advice or recommendations and the University must release it to the applicant.[104] However, I also found that the rest of the relevant information would reveal advice or recommendations and that ss. 13(2) and (3) do not apply to it. Therefore, the University is authorized to refuse to disclose that information under s. 13(1).

The University's Exercise of Discretion Under s. 13

[87] The word "may" in s. 13(1) confers on the head of a public body the discretion to disclose information that it is otherwise authorized to withhold under that section. If the head of a public body has failed to consider exercising this discretion, the Commissioner can require the head to reconsider their severing decisions. The Commissioner can also order the head to reconsider their discretion where the decision to withhold information 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.[105]

[88] The applicant implies that the University improperly exercised its discretion under s. 13(1) regarding some of the information in dispute.[106] The applicant points out that prior orders have considered a public body's "past practice" in disclosing information to be relevant when assessing the exercise of discretion.[107] On this basis, the applicant questions the University's decision to withhold the Comms Strategy under s. 13(1) as the revealed portions of the records demonstrate that a version of this document was shared with the Ministry. I understand the applicant's point to be that this shows the University's decision to refuse the applicant access to the information under s. 13(1) deviates from its past practice of disclosing such information in response to access requests.

[89] Legal Counsel says that the University considered the following factors when deciding which information to withhold pursuant to s. 13(1):

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[104] I consider below whether s. 22(1) applies to this information and find that it does not. I have highlighted the information the University is not authorized to refuse to disclose under s. 13(1) in a copy of the relevant pages that I am providing to the University along with this order.
[105] Order F23-51, 2023 BCIPC 59 at para. 142, citing *John Doe*, *supra* note 79 at para. 52. See also Order F21-15, 2021 BCIPC 19 at para. 57 and FIPPA s. 58(2)(b).
[106] Most of the applicant's arguments on discretion concern records that are no longer in issue.
[107] Applicant's submission at pp. 6-7, citing Order F07-17, 2007 CanLII 35478 (BC IPC) at para. 43.

- The purposes of FIPPA and s. 13;
- Prior OIPC and court decisions interpreting and applying s. 13;
- Its past practice relating to disclosure of records similar to those in dispute;
- The nature and sensitivity of the records and the passage of time;
- The harms that may arise from disclosure and the importance of protecting the University's internal deliberative processes;
- The fact that no compelling public interest would be served by disclosure; and
- The applicant's interests in receiving the records.[108]

[90] The University does not explain how it applied these factors.

Analysis

[91] What the applicant says does not convince me that the University deviated from its past practice when it denied the applicant access to the information withheld under s. 13. There is nothing to suggest that the University's past practice is to disclose information of this kind in response to access requests. Clearly, the University did not provide the Comms Strategy to the Ministry in response to an access request but as part of ongoing communication with the Ministry concerning issues of importance to the University. A government Ministry is a public body under FIPPA and does not sit in the same shoes as an access applicant when it comes to receiving information from other public bodies.

[92] Further, based on Legal Counsel's evidence, I am satisfied that the University considered whether to exercise its discretion and release additional information. Moreover, there is nothing before me which supports finding that the University exercised its discretion in bad faith, improperly, or based on irrelevant considerations. Legal Counsel's evidence, though somewhat sparse, demonstrates that the factors considered by the University are relevant.

[93] For these reasons, I find that the University reasonably exercised its discretion in deciding whether to release the information it has withheld under s. 13(1).

Unreasonable Invasion of Privacy – s. 22(1)

[94] Section 22(1) requires a public body to refuse to disclose information if disclosure would be an unreasonable invasion of a third party's personal privacy. The University has withheld information from 36 pages of the visible records under s. 22(1).[109] I found above that the University is authorized to withhold some

[108] Legal Counsel's affidavit at para. 29.
[109] See Visible records at pp. 7, 20-22, 26-27, 86, 137-138 (some of this information is indicated as withheld under s. 13 but is clearly intended to be withheld under s. 22), 141, 154-160, 162-163, 265, 267-268, 279-280, 335, 343-344, 362-369, and 374.

of this information under s. 13(1) and I will not consider whether s. 22(1) applies to that same information.[110] However, because s. 22(1) is a mandatory disclosure exception, I will consider whether it applies to some information I found above is not covered by s. 13(1) but that the University does not submit is subject to s. 22(1).[111]

Personal Information

[95] Since s. 22(1) only applies to personal information, the first step in the analysis is to determine whether the information in dispute is personal information.

[96] Under schedule 1 of FIPPA,

> "personal information" means recorded information about an identifiable individual other than contact information; [and]
>
> "contact information" means 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[.]

[97] Therefore, "contact information" is not "personal information" under FIPPA. Whether information is contact information is context dependent.[112]

[98] The University submits that the information it has withheld under s. 22(1) is clearly personal information.[113] The applicant submits that much of the information in dispute under s. 22(1) is "contact information" on the basis that it includes names and e-mail addresses.[114]

[99] For the reasons that follow, I find that all the information in dispute under s. 22(1) is personal information.[115]

[100] Some of the information is names, telephone numbers, and workplace or personal e-mail addresses. These kinds of information may be contact information or personal information, depending on the context in which they appear.[116] In the context of this case, I find that this information is not contact information because disclosing such details would reveal the identities of individuals who made comments about the applicant, the Investigation, and the

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[110] Visible records at pp. 279-280.
[111] See Visible records at p. 360.
[112] Order F20-13, 2020 BCIPC 15 at para. 42.
[113] Public Body's initial submission at paras. 72-74.
[114] Applicant's submission at p. 2.
[115] Visible records at pp. 7, 20-22, 26-27, 86, 137-138, 141, 154-160, 162-163, 265, 267-268, 335, 343-344, 360, 362-369, and 374.
[116] Order F20-13, *supra* note 112 at para. 42.

CAUT Report outside the scope of their regular workplace or business activities, or individuals who the applicant accused of workplace misconduct.

[101] Further, some of the information is third-party opinions regarding the applicant, the Investigation, and the CAUT Report. A person's opinion is their personal information, including the identity of the opinion holder where it is an integral part of the opinion expressed.[117] Further, A's opinion about B can also be B's personal information in some cases.[118]

[102] Finally, the remaining information includes job statuses, academic histories, publication lists, and information about work scheduling or domestic matters. I find that this information clearly relates to identifiable individuals and is personal information on that basis.

Section 22(4)

[103] Section 22(4) sets out circumstances where disclosure of personal information is not an unreasonable invasion of third-party personal privacy. If s. 22(4) applies to any information, the public body must provide it to an applicant.

[104] The University says s. 22(4) does not apply to the information in dispute.[119] The applicant does not address s. 22(4). I have reviewed the information in dispute and I find that s. 22(4)(e) applies to a small amount of it.

[105] Section 22(4)(e) says that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information is about the third party's position, functions, or remuneration as an officer, employee, or member of a public body or as a member of a minister's staff.

[106] Numerous prior orders have considered the meaning and scope of s. 22(4)(e). Key principles are that s. 22(4)(e) applies to information that reveals a public body employee's name, signature, job title, duties, functions, remuneration (including salary and benefits) or position and to objective, factual information about what the public body employee did or said in the normal course of discharging their job duties.[120]

[107] On page 335 of the visible records, the University has partially withheld the content of a statement made by a University administrator. I find that releasing the information withheld from this statement would only reveal objective

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[117] See, for example, Order F14-47, 2014 BCIPC 51 at para. 14.
[118] See, for example, Order F17-01, 2017 BCIPC 1 at para. 48.
[119] Public Body's initial submission at para. 75.
[120] See Order F20-54, 2020 BCIPC 63 at para. 56 and note 45; Order F18-38, *supra* note 94 at para. 70; Order F22-62, 2022 BCIPC 70 at para. 27.

factual information about something the administrator said in the normal course of discharging their job duties. Therefore, s. 22(4)(e) applies to this information and the University must release it.

[108] Further, on page 366 of the visible records, the University has withheld its president's signature from a letter the president signed in their official capacity. I find that s. 22(4)(e) also applies to the signature and the University must release it.

Section 22(3)

[109] Section 22(3) lists circumstances where disclosure of personal information is presumed to be an unreasonable invasion of third-party personal privacy. The University submits that much of the personal information in dispute is subject to s. 22(3)(d). The applicant does not address s. 22(3). Based on my review of the personal information in dispute, for the reasons that follow, I find that s. 22(3)(d) applies to some of it.

[110] Under s. 22(3)(d), disclosing a third party's employment, occupational, or educational history is presumed to be an unreasonable invasion of privacy. The University asserts generally that "it is clear … that section 22(3)(d) applies to much of the [personal information in dispute]".[121] The University specifically says s. 22(3)(d) applies to some of this information because it is information that third parties provided during a "workplace complaint or investigative process".[122]

[111] I find that some of the personal information in dispute relates to the employment and occupational histories of third parties. Some of the information relates to academic publications or ongoing research or reveals the positions that academics took on contentious issues within their profession and I find that it constitutes occupational history. Further, some of the information reveals third-party work schedules or reveals allegations of workplace misconduct the applicant made against third parties and I find that it constitutes employment history. Finally, in some cases information of these kinds is already revealed in the records, but the identities of the third parties to whom it relates or who provided it is not. In those cases, I find that releasing information which could allow someone to infer the third parties' identities is presumptively unreasonable under s. 22(3)(d).

[112] However, I do not accept the University's submission that s. 22(3)(d) covers all information related to the Investigation and CAUT Report. The Investigation was independently initiated, arm's-length of the University, and concerned with institutional treatment of the applicant, not any other individuals'

[121] Public Body's initial submission at para. 80.
[122] Public Body's initial submission at paras. 77-79.

workplace conduct.[123] On those bases, it is not clear to me that the Investigation concerned a "workplace complaint" as that term is explained in prior orders.[124] Therefore, I find that s. 22(3)(d) only applies to some of the information that third parties supplied during the Investigation.

[113] Based on the above, I find that s. 22(3)(d) applies to some, but not all, of the personal information in dispute.[125]

Section 22(2)

[114] Section 22(2) says that when a public body decides if disclosure of personal information constitutes an unreasonable invasion of third-party personal privacy, it must consider all relevant circumstances, including those listed in s. 22(2). Some circumstances weigh in favour of disclosure and some weigh against. Circumstances favouring disclosure may rebut the applicable s. 22(3) presumptions.

[115] The applicant submits that ss. 22(2)(a) and (c) favour releasing the personal information in dispute and that some of this information should also be released as it is the applicant's own personal information, is third-party personal information that the applicant is already aware of, or was provided to the University with an expectation that it would be publicly disclosed.[126] The University submits that ss. 22(2)(a) and (c) do not apply here.[127] Further, the University says that ss. 22(2)(e), (f), and (h), and the sensitivity of the personal information in dispute each weigh against disclosure.[128]

[116] Having reviewed the information in dispute, I do not find that any relevant circumstances other than those addressed by the parties may apply. Therefore, I consider ss. 22(2)(a), (c), (e), (f), and (h), and three additional points, below.

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[123] See Visible records at p. 1 where the Investigation's intended scope is set out.
[124] See Order 01-53, 2001 CanLII 21607 (BC IPC) at para. 32 where the former Commissioner specified that the workplace investigations covered by s. 22(3)(d) are in the nature of a "complaint investigation and disciplinary matter in the workplace that consists of evidence or statements by witnesses or a complainant about an individual's workplace behaviour and actions" [emphasis added]; see also these orders where such investigations are described as "workplace complaints or discipline investigations": Order F23-48, 2023 BCIPC 56 at para. 45 and Order F20-38, 2020 BCIPC 44 at para. 79.
[125] See Visible records at pp. 7, 20-22, 26-27, 86, 154-160, 162-163, 265, 267, 343-344, 360, 362-369, and 374.
[126] Applicant's submission at pp. 2-6.
[127] Public Body's initial submission at paras. 84 and 87.
[128] Public Body's initial submission at paras. 71, 91, and 93.

Section 22(2)(a) – Public scrutiny of a public body

[117] Section 22(2)(a) recognizes that if disclosing personal information would foster the accountability of public bodies this favours disclosure.[129]

[118] The applicant submits that the University engaged in "unethical practices", that the Investigation concerned retaliation against the applicant for exposing these practices, and therefore, that s. 22(2)(a) supports releasing any information related to the Investigation or the University's alleged unethical conduct.[130]

[119] The University submits that the personal information in dispute relates to specific individuals, not to the broad operations of a public body, that disclosure is clearly not necessary or desirable for public accountability, and that the applicant's allegations have been made public, such that the University already faces public scrutiny regarding the conduct the applicant alleges is unethical.[131]

[120] I find that the personal information in dispute is not related to broad conduct by the University but is, primarily, the opinions and analysis of individuals regarding their own conduct and their subjective understanding of the disputes between the applicant and the University. I do not see how releasing this information would promote public scrutiny of the University or any other public body. The rest of the information clearly falls outside s. 22(2)(a).

[121] Based on the above, I find that s. 22(2)(a) is not a relevant circumstance in this case.

Section 22(2)(c) – Fair determination of an applicant's rights

[122] Section 22(2)(c) applies to personal information that is relevant to a fair determination of an applicant's rights. Section 22(2)(c) applies where:

1. The right in question is a legal right drawn from the common law or statute, as opposed to a non-legal right based only on moral or ethical grounds;
2. The right is related to a proceeding which is either underway or is contemplated, not a proceeding that has already been completed;
3. The personal information sought by the applicant has some bearing on, or significance for, determination of the right in question; and

[129] Order F05-18, 2005 CanLII 24734 (BC IPC) at para. 49.
[130] Applicant's submission at pp. 3-4.
[131] Public Body's initial submission at paras. 83-84; Public Body's reply submission at para. 16.

4. The personal information is necessary to prepare for the proceeding or to ensure a fair hearing.[132]

[123] The applicant submits that they currently have grievances against the University before the LRB and, if their union refuses to pursue the grievances, the applicant intends to file LRB complaints against the union. The applicant believes the information in dispute will be useful in preparing for the grievances or complaints and that the applicant may not be able to obtain this information via alternative means.[133]

[124] The University says that the applicant has not shown that disclosure of the information in dispute is relevant or necessary for any proceedings.[134] The University further submits that the applicant has present rights to information disclosure in the grievance proceedings. It also says that the applicant has already brought a complaint against their union which was resolved by the LRB.

[125] I accept that the grievances and the potential for further complaints against the union engage the applicant's legal rights under the *Labour Relations Code* [LRC].[135] I also accept that the grievances are already underway. Regarding the complaints against the union, prior orders say that an applicant only needs to establish that they are intently considering commencing proceedings.[136] Based on the evidence, I find that the applicant is "intently considering" bringing these complaints.

[126] Moving on, I find that some of the information in dispute could have a bearing on, or a significance for, determining the applicant's rights during the grievances or complaints. This information relates to the state of affairs between the applicant, the applicant's co-workers, the union, and the University. Therefore, this information has some bearing on whether those parties complied with their obligations under the LRC.

[127] With respect to whether the information is necessary to prepare for proceedings or ensure a fair hearing, the University submits that the applicant has discovery rights in the grievance matters and release of related information under FIPPA is therefore not necessary. The University does not say if the applicant would have discovery rights in any further complaints against the union. For their part, the applicant asserts that getting the information under FIPPA is necessary because they will have no discovery rights regarding the further complaints against their union.

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[132] Order F23-71, 2023 BCIPC 84 at para. 69, citing Order 01-07, 2001 CanLII 21561 (BC IPC).
[133] Applicant's submission at pp. 4-6.
[134] Public Body's reply submission at paras. 18-20.
[135] RSBC 1996, c. 244.
[136] Order F23-71, *supra* note 132 at para. 75, citing Order F16-36, 2016 BCIPC 40 at para. 50.

[128] I do not need to decide whether the LRB's processes provide the applicant with discovery rights to make my finding on s. 22(2)(c). The existence of alternate mechanisms for securing information is not, on its own, sufficient to find that s. 22(2)(c) does not apply but is simply one factor to consider.[137] Recognizing this, I find, on a balance of probabilities, that to prepare for the LRB proceedings it could be necessary for the applicant to receive some of the personal information in dispute related to the state of affairs between the University, the applicant, the applicant's co-workers, and the union.[138]

[129] Based on the above, I find that s. 22(2)(c) applies to some of the personal information in dispute. However, the applicant did not provide me with sufficient substantive information regarding the grievances or complaints to allow me to individually assess whether each piece of third-party personal information in dispute may properly have a bearing on the applicant's legal rights under the LRC.[139] Therefore, I give s. 22(2)(c) only moderate weight in this case.

Sections 22(2)(e) and (h) – unfair harm and damage to reputation

[130] Section 22(2)(e) asks if disclosure of information will unfairly expose a third party to financial or other harm. "Other harm" means serious mental distress, anguish, or harassment.[140] Section 22(2)(h) asks if disclosure of information could damage the reputation of any person and, further, if such damage would be unfair.[141] If either section applies, this favours withholding information.

[131] The University submits that disclosure would expose third parties unfairly to reputational and other harms.[142] The University says it is particularly concerned about what it says is the applicant's history of publishing disparaging information about third parties.[143] The applicant does not address ss. 22(2)(e) or (h).

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[137] See Order F16-36, *ibid* at para. 56.
[138] However, I consider the uncertainty regarding the applicant's disclosure rights under the LRC to reduce the weight I should give s. 22(2)(c) when deciding if releasing the personal information in dispute would be an unreasonable invasion of a third party's personal privacy.
[139] The applicant attaches initiating documents for three separate grievances to their submission as appendices: applicant's submission at Appendix "D", "E", and "F". However, these initiating documents provide only high-level details regarding the applicant's concerns with certain actions by the University and do not assist me in determining how the personal information of some third parties may be relevant to the rights breaches asserted in the grievances.
[140] Order 01-37, 2001 CanLII 21591 (BC IPC) at para. 42.
[141] See Order F19-02, 2019 BCIPC 2 at para. 69.
[142] Public Body's initial submission at para. 91.
[143] Public Body's reply submission at para. 8. While this submission is not made in the context of ss. 22(2)(e) and (h), I find it relevant here.

[132] For ss. 22(2)(e) or (h) to apply, the unfair harm or damage to reputation must relate directly to disclosure of the information in dispute.[144] Having reviewed the personal information in dispute, it is not clear to me how releasing any of it, on its own, may unfairly expose third parties to harm or reputational damage. Further, I find that the University's submission that the applicant may use information disclosed to them to unfairly harm or damage the reputations of third parties is not supported by adequate evidence or persuasive argument.

[133] Therefore, I find that s. 22(2)(e) and (h) do not apply to the information in dispute.

Section 22(2)(f) – supplied in confidence

[134] Under s. 22(2)(f), if information was supplied to a public body in confidence, this favours withholding the information.

[135] The University submits that the third parties identified in the visible records intended the personal information they supplied to the University to be held in confidence but accepts that information supplied to CAUT during the Investigation was not generally supplied in confidence.[145] The applicant identifies one third party who, the applicant says, would have expected that some of their personal information would be disclosed.[146]

[136] Having reviewed the information in dispute, I find that some of it was supplied in confidence. This includes information which was supplied to CAUT and is marked "confidential", comments on the University's internal investigations of the applicant's conduct, or concerns domestic matters such as the wellbeing of family members. I find in each case that the third parties who supplied this personal information would have had a reasonable expectation that it would be kept in confidence.

[137] However, I find that the balance of the personal information in dispute was not supplied in confidence. First, most of this information is related to the Investigation, not to matters internal to the University. I agree with the University that the Investigation was not confidential, and I do not have sufficient evidence before me to find that information related to the Investigation was generally supplied in confidence, whether it was supplied to CAUT or to the University.

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[144] Order F14-10, 2014 BCIPC 12 at para. 37.
[145] Public Body's initial submission at para. 93; Public Body's reply submission at para. 10, stating "all of the workplace complaints or investigations referenced in the materials (with the exception of the CAUT investigation) involved … personal information … supplied in confidence" [emphasis added].
[146] Applicant's submission at p. 3.

[138] Furthermore, some of the information in dispute is the identity of a third party who corresponded with the University and criticized its treatment of the applicant.[147] The University suggests that the third party intended their communications to be confidential because they did not expressly indicate that they wanted to be identified.[148] However, it is not clear to me that this is the case given that the third party's initial e-mail directly states that the e-mail should be forwarded to all of the University's board members and the attached letter is addressed "to all it may concern" at the University. The third party also followed-up to ensure a further e-mail they sent had been forwarded to University board members and it is clear from the contents of their letter that they communicated with the University for the purpose of supporting the applicant.

[139] All of this is evidence that the third party did not supply their identity information to the University with an expectation that it would be kept confidential, particularly from the applicant. Therefore, I find that s. 22(2)(f) is not a circumstance that weighs against disclosing information that reveals this third party's identity.

[140] Based on all of the above, I find that some of the personal information in dispute was supplied in confidence.[149] Therefore, s. 22(2)(f) is a circumstance that favours withholding that information.

Sensitivity

[141] Sensitivity is often considered a relevant circumstance under s. 22(2). If information is sensitive, this favours withholding it.[150] If information is clearly not sensitive, this favours disclosure.[151] The University asserts the personal information in dispute is sensitive. The applicant does not address the issue of whether the personal information is sensitive.

[142] The University does not provide sufficient argument or evidence supporting their claim that the personal information in dispute is sensitive. Having reviewed that information, it is not clear to me that any of it is of a kind that is generally considered to be sensitive. Therefore, I find that none of the personal information in dispute is sensitive.

[143] Further, I find that a small amount of the information is general workplace statements about vacation or travel plans.[152] Prior orders have found this kind of information to be "innocuous" and have held that this favours disclosure,

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[147] Visible records at pp. 265, 267, 360, and 362-368.
[148] Public Body's reply submission at para. 14.
[149] Visible records at pp. 7, 26-27, 137, and 268.
[150] Order F19-15, 2019 BCIPC 17 at para. 99.
[151] Order F16-52, 2016 BCIPC 58 at para. 91.
[152] Visible records at pp. 137-138, 141, and 154.

particularly where the information is more than two years old.[153] In this case, all the information of this kind is at least three years old. Therefore, I find that it is "innocuous" and that this favours disclosure.

Applicant's prior knowledge

[144] An applicant's prior knowledge of personal information may weigh in favour of disclosing it. Here, the applicant speculates about the identities of certain third parties, but speculation is not the same as knowledge and I find the applicant's speculative submissions to be irrelevant under s. 22(2).[154]

[145] However, some of the third-party personal information in dispute is contained in e-mails sent by the applicant.[155] I do not see how releasing some of this information would unreasonably invade third-party personal privacy as doing so would not reveal anything which the applicant is not already aware of.[156] This favours disclosing that information.

Applicant's personal information

[146] Where an applicant is seeking release of their own personal information, this can weigh heavily in favour of disclosing that information to them. However, where the applicant's personal information is interwoven with the personal information of third parties this factor carries less weight.[157]

[147] All the severed information which is the applicant's personal information is contained in the opinions of third parties about the applicant or the opinions of the applicant about third parties. Therefore, this information is all the personal information of both the applicant and third parties. Given this, while the fact that the opinions in question contain the applicant's personal information weighs in favour of disclosing them, I find that this factor carries minimal weight.

Conclusion – s. 22(1)

[148] I have found above that all the information in dispute under s. 22(1) is personal information.

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[153] See Order F19-27, 2019 BCIPC 29 at para. 71.
[154] Applicant's submission at p. 2.
[155] Visible records at pp. 22, 369 and 374.
[156] Visible records at pp. 369 and 374. I find that, in context, releasing any of the information on p. 22 of the Visible records would reveal new third-party personal information to the applicant and therefore the applicant's prior knowledge of some information on that page does not weigh in favour of disclosing it.
[157] Order F14-47, *supra* note 117 at para. 36.

[149] I have also found that s. 22(4)(e) applies to a small amount of the personal information in dispute and the University must disclose it.[158] With respect to s. 22(3), I have found that s. 22(3)(d) applies to some of the personal information in dispute.[159] Releasing this personal information is therefore presumed to be an unreasonable invasion of third-party personal privacy.

[150] Considering s. 22(2) and all the relevant circumstances, I have found that s. 22(2)(f) favours withholding some of the personal information in dispute. I have also found that some of the personal information is innocuous and that this favours disclosing that information. Further, I have found that the fact that the applicant is already aware of some of the personal information, the fact that some of the personal information was supplied with an expectation it could be more widely disclosed, and the application of s. 22(2)(c) each favour disclosing some of the personal information I found falls under ss. 22(3)(d) or 22(2)(f).[160] On these bases, I find that the presumption under s. 22(3)(d) is rebutted regarding a small amount of the personal information in dispute.[161]

[151] Taking all of this together, I find that it would be an unreasonable invasion of third-party personal privacy to release most of the personal information in dispute.[162] However, I find that the University must release some information which the applicant is already aware of, was supplied with an expectation of wider disclosure, only reveals that a third party made or was copied on non-confidential submissions to CAUT and uncontroversial material contained in those submissions, is innocuous, or is subject to s. 22(4)(e).[163]

[152] Finally, I find that there is identifying information about third parties in several e-mails that must be withheld under s. 22(1). However, s. 22(1) does not apply to the balance of the information in those e-mails because once the identifying information is severed, what is left is not personal information.[164]

CONCLUSION

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

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[158] Visible records at pp. 335 and 366.
[159] Visible records at pp. 7, 20-22, 26-27, 86, 154-160, 162-163, 265, 267, 343-344, 360, 362-369, and 374.
[160] However, for the reasons given above, I have afforded only moderate weight to s. 22(2)(c).
[161] Visible records at pp. 265, 267, 360, 362-369 and 374.
[162] Visible records at pp. 7, 20-22, 26-27, 86, 137, 154-160, 162-163, 268, and 343-344.
[163] Visible records at pp. 20-21, 137-138, 141, 154, 265, 267, 335, 360, 362-369, and 374. I have highlighted the information s. 22(1) does not apply to in a copy of these pages that I am providing to the University along with this order.
[164] Visible records at pp. 155-158 and 160. I have highlighted the information which s. 22(1) does not apply to in a copy of these pages that I am providing to the University along with this order.

1. I confirm that the University is authorized to withhold the information in dispute under s. 14.

2. Subject to item 4, below, I confirm that the University is authorized, in part, to withhold the information in dispute under s. 13(1).

3. Subject to item 4, below, I confirm that the University is required, in part, to withhold the information in dispute under s. 22(1).

4. The University is not authorized under s. 13(1) or required under s. 22(1) to refuse access to the information I have highlighted in yellow on pages 12-13, 20-21, 33-34, 36, 44, 50-51, 64, 70, 80, 82, 90-93, 95, 131, 137-138, 141, 143-146, 154-158, 160, 171, 234, 248, 265, 267-268, 270-271, 274-275, 279, 285, 288, 335, 345, 360, 362-369, and 374 of the copy of the records provided to the University alongside this order. The University is required to provide the applicant with the highlighted information on those pages.

5. The University must provide the OIPC registrar of inquiries a copy of its cover letter and the records it provides to the applicant in compliance with item 4, above.

[154] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by April 4, 2024.

February 20, 2024

ORIGINAL SIGNED BY

Alexander Corley, Adjudicator

OIPC File No.: F21-87726