OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 02-43

UNIVERSITY OF VICTORIA

David Loukidelis, Information and Privacy Commissioner
September 6, 2002

Quicklaw Cite: [2002] B.C.I.P.C.D. No. 43
Document URL: http://www.oipc.bc.ca/orders/Order02-43.pdf
Office URL: http://www.oipc.bc.ca
ISSN 1198-6182

Summary: The applicant journalist sought records relating to UVic's discipline of students, faculty and staff. UVic denied his request for a public interest fee waiver. The requested records relate to a matter of public interest and their dissemination through articles published by the applicant would yield a public benefit. A partial fee waiver is warranted in this case and the parties are encouraged to find ways to further reduce or eliminate that fee.

Key Words: fee waiver – public interest – dissemination of information – public benefit – use of information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 58(3)(c), 75(5)(b).

Authorities Considered: B.C.: Order 01-04, [2001] B.C.I.P.C.D. No. 4; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order 01-24, [2001] B.C.I.P.C.D. No. 25; Order 01-35, [2001] B.C.I.P.C.D. No. 36; Order 01-53, [2001] B.C.I.P.C.D. No. 56.

Cases Considered: *Clubb* v. *Saanich (District)*, [1996] B.C.J. No. 218 (S.C.).

1.0 INTRODUCTION

[1] The applicant in this case is the news editor of *Monday Magazine*, a weekly newspaper in Victoria. He requested, under the *Freedom of Information and Protection of Privacy Act* ("Act"), records of students, staff and professors disciplined by the public body, the University of Victoria ("UVic"), from September 1, 2000 to the date of his request, November 15, 2001. He asked for a description of each offence, along with the

penalty applied in each case, and asked that UVic waive any fees, on the ground that release of the records was in the public interest.

[2] UVic responded by telling the applicant it was assessing a fee for searching for and photocopying the requested records. It says that records of faculty, student and staff discipline are not centrally-filed, but are dispersed throughout various UVic offices, including human resources and individual faculties and departments. It says it had calculated an estimated fee of $940, based on 28 hours of search time at $30 per hour (charging, as required, no fee for the first three hours) and photocopying of 400 pages at 25¢ per page. It requested a deposit of $658 before it would begin work on retrieving the records.

[3] UVic told the applicant he could request a fee waiver and asked that he provide detailed reasons for requesting a waiver if he did so. UVic also told the applicant that it considered the requested records fell under s. 22(3)(d) of the Act (information on employment, occupational or educational history, disclosure of which is presumed to be an unreasonable invasion of privacy).

[4] UVic later wrote to the applicant denying his request for a fee waiver, saying it was not convinced that "third party discipline records are sufficiently in the public interest to be released without payment of a fee…". The applicant requested a review of the decision to deny him a fee waiver. As the matter did not settle in mediation, I held a written inquiry under Part 5 of the Act.

2.0 ISSUE

[5] The issue here is whether UVic was justified under s. 75(5)(b) of the Act in refusing to waive the estimated fee.

[6] The applicant provided arguments on s. 75(5)(a) of the Act in his initial submission, to which UVic objected in its reply, saying s. 75(5)(a) was not raised in the applicant's request for review.

[7] I note that the applicant's request for records asked for a fee waiver only on s. 75(5)(b) public interest grounds and UVic considered only that request. Section 75(5)(b) is the only issue properly before me in this inquiry.

[8] In their initial submissions, both parties referred to matters and records that arose out of mediation by this Office. In accordance with this Office's policies and procedures, each party was asked to consent to inclusion of mediation materials in the other's submission and each consented. I have considered such parts of these mediation materials as are relevant to the issue before me.

3.0 DISCUSSION

[9] **3.1 Public Interest Fee Waivers** – The wording of s. 75(5)(b) was amended on April 11, 2002. The version in effect at the time of the applicant's request reads as follows:

> **75** (5) The head of a public body may excuse an applicant from paying all or part of a fee if, in the head's opinion,
>
> …
>
> (b) the record relates to a matter of public interest, including the environment or public health or safety.

[10] I have described in several cases the two-stage analysis for determining if a public interest fee waiver is warranted. In Order 01-24, [2001] B.C.I.P.C.D. No. 25, I expressed it this way, at paras. 32 and 33:

> [32] For convenience, I reproduce here the two-step process I set out at p. 5 of Order No. 332-1999:
>
> 1. The head of the Ministry must examine the requested records and decide whether they relate to a matter of public interest (a matter of public interest may be an environmental or public health or safety matter, but matters of public interest are not restricted to those kinds of matters). The following factors should be considered in making this decision:
>
> (a) has the subject of the records been a matter of recent public debate?;
>
> (b) does the subject of the records relate directly to the environment, public health or safety?;
>
> (c) could dissemination or use of the information in the records reasonably be expected to yield a public benefit by:
>
> (i) disclosing an environmental concern or a public health or safety concern?;
>
> (ii) contributing to the development or public understanding of, or debate on, an important environmental or public health or safety issue?; or
>
> (iii) contributing to public understanding of, or debate on, an important policy, law, program or service?;
>
> (d) do the records disclose how the Ministry is allocating financial or other resources?
>
> 2. If the head of a Ministry, as a result of the analysis outlined in paragraph 1, decides the records relate to a matter of public interest, the head must still decide whether the applicant should be excused from

> paying all or part of the estimated fee. In making this decision, the head should focus on who the applicant is and on the purpose for which the applicant made the request. The following factors should be considered in doing this:
>
> (a) is the applicant's primary purpose for making the request to use or disseminate the information in a way that can reasonably be expected to benefit the public or is the primary purpose to serve a private interest?
>
> (b) is the applicant able to disseminate the information to the public?
>
> [33] It should be emphasized here that the references in para. 1, above, to the environment and public health or safety do not exhaust the scope of what may be a matter of public interest. This is made clear by para. 1(c)(iii).

[11] Regarding the second part of the above analysis, I said the following in Order 01-35, [2001] B.C.I.P.C.D. No. 36, at para. 46:

> [46] Although the list of factors will never be exhaustive, I consider that the following criteria may, in addition to those described or referred to above, be relevant to a head's exercise of discretion:
>
> 1. As expressly contemplated by s. 58(3)(c) of the Act, whether "a time limit is not met" by the public body in responding to the request;
>
> 2. The manner in which the public body attempted to respond to the request (including in light of the public body's duties under s. 6 of the Act);
>
> 3. Did the applicant, viewed reasonably, cooperate or work constructively with the public body, where the public body so requested during the processing of the access request, including by narrowing or clarifying the access request where it was reasonable to do so?;
>
> 4. Has the applicant unreasonably rejected a proposal by the public body that would reduce the costs of responding to the access request? It will almost certainly be reasonable for an applicant to reject such a proposal if it would materially affect the completeness or quality of the public body's response;
>
> 5. Would waiver of the fee shift an unreasonable cost burden for responding from the applicant to the public body?

Do the records relate to a matter of public interest?

[12] The applicant correctly points out, in his initial submission, that the records need not relate to the environment or public health or safety in order to relate to a matter of public interest. He suggests that the records in this case do relate to a matter of public interest, noting that UVic is a publicly-funded institution. He says that roughly 75% of its revenue is provided by the government of British Columbia, with the balance coming from student fees. He argues the records should be disclosed if they show that there has been "serious misbehaviour by a university employee." Publicizing details of student misdeeds and the resulting penalties, he continues, would deter others. If, on the other hand, the records show that no students have been disciplined, he suggests, it would be "of public interest that the University of Victoria attracts such honest students."

[13] In a March 8, 2002 letter, in which he provided written reasons for believing that a fee waiver was warranted, the applicant argued that colleagues of a disciplined employee deserve to be told the results of disciplinary hearings. He also says the public has a right to know the results of a disciplinary hearing the result of which is adverse to an employee on the public payroll. He gave a fictitious example of a professor being removed from a classroom because of continuing sexist or racist remarks.

[14] UVic countered his arguments by saying the applicant's arguments fail to account for employees' privacy interests. It referred to a number of orders in which I have upheld the public bodies' decisions to protect employees' discipline records. It acknowledged that there might be situations in which an employer would provide information on discipline matters to its employees, but UVic says the Act does not require this in all cases (para. 37-39 & 42, initial submission).

[15] The applicant also points out that other public bodies – such as the College of Teachers, the Real Estate Council of British Columbia and the University of British Columbia ("UBC") – disclose the results of their disciplinary processes in varying levels of detail. UVic responded that the first two are self-governing bodies with a legislated mandate to protect the public and to inform their members and others of certain disciplinary matters. UVic does not have such obligations, it says. UVic also says UBC has a centralized system for student discipline, while it does not, and UVic says, without explaining how, that UBC's centralized system eases the compilation of anonymized discipline summaries (paras. 33 & 42, initial submission).

[16] The applicant says UVic has not, to his knowledge, increased its flow of public records in the years since the Act came into effect. If UVic had a centralized system of reporting disciplinary matters as UBC does, he says, the part of his request that deals with student discipline, at least, would not have to be a subject of this inquiry. He says the Premier, while in opposition, asked the government of the day to roll back access fees for information that the public has already paid for. The same consideration applies to publicly-funded universities, he argues.

[17] UVic says that it went through the two-step process I set out above and carefully considered the relevant factors in exercising its discretion. It first considered the subject

matter of the records and decided that it did not relate to a matter of public interest, as follows (paras. 27-31, initial submission):

- there was no evidence that disciplinary matters had been the subject of recent (or past) public debate,

- the records do not relate to an environmental concern, or a public health or safety concern,

- dissemination of information in the records could not reasonably be expected to yield a public benefit in any of the ways listed in para. 1(c), and

- the records would not disclose how UVic is allocating financial or other resources.

[18] Apparently referring to para. 1(a) of the above public interest fee waiver analysis, the applicant says in his initial submission that it is not relevant that the issue of discipline imposed on students and staff has not been a matter of public debate. He suggests that the records might, in principle, be a matter of public interest if they were released. He says he is not aware of the publication in recent years of any stories on university discipline records obtained in response to a freedom of information request. He does not believe any such stories ever will be, if UVic's fee decision stands.

[19] UVic went on to say that, in Order 01-04, [2001] B.C.I.P.C.D. No. 4, I had found that records related to discipline hearings of the Institute of Chartered Accountants of British Columbia ("ICABC") did not relate to a matter of public interest. That case dealt with a fee waiver request made by a former chartered accountant. The applicant requested records related to the ICABC's handling of a professional disciplinary matter involving the applicant. He alleged that he had suffered from a miscarriage of justice by the ICABC. The applicant's interest in the records was personal and I found that the ICABC's publication of advertisements about the applicant's discipline, and its notice to another professional body of the disciplinary action against the applicant, did not make it a matter of public interest. In light of the personal nature of the applicant's request, I concluded that dissemination of the requested information could reasonably be expected to yield a public benefit.

[20] This case is different. Here, the applicant is not asking for information about himself in order to show that he has suffered at UVic's hands. He has a journalistic goal here and intends, if he actually is successful in obtaining records, to write articles respecting UVic's activities. As I have said, Order 01-04 involved one individual's request for access to information for primarily, if not exclusively, personal purposes.

[21] UVic makes several arguments relating to s. 22. It says disclosure of allegations and discipline reports would harm the reputations of third parties. In support of this, it cites Order 01-53, [2001] B.C.I.P.C.D. No. 56, and Order 01-07, [2001] B.C.I.P.C.D. No. 7, in which I found that s. 22 applies to discipline information related to third parties. UVic acknowledges that it has not yet considered the s. 22 issue in relation to any responsive records, but argues it would likely be required under s. 22(1) to withhold

much of the requested information. I am not persuaded that UVic's s. 22 arguments counter the applicant's contention that the records relate to a matter of public interest.

[22] Among other things, I note that s. 22(2)(a) of the Act contemplates that disclosure of third-party personal information, including information subject to a presumed unreasonable invasion of personal privacy under s. 22(3), may be "desirable for the purpose of subjecting the activities of … a public body [including UVic] to public scrutiny". I also note that UVic's s. 22 arguments pre-suppose that third-party personal information will be disclosed, such that the records cannot be said to relate to a matter of public interest. Yet the records' contents may relate to a matter of public interest even if the personal information they contain is ultimately withheld under s. 22 (and, as I note below, the applicant says he is prepared to accept records with identifying information removed).

[23] UVic argues that it cannot be said there is clearly a public interest in disclosing the records (examples of which were not given to me). It makes its policies available and individuals may complain or make a matter public if they feel that they have not been treated fairly under a given discipline process. UVic counters the applicant's argument that there is a public interest in allowing employees to know of allegations against their peers by saying that he fails to acknowledge the stigma arising from mere accusations and resulting investigations, as well as the stigma of being the subject of an investigation report. I note, however, that elsewhere UVic says the records relate to routine administrative matters (paras. 6, 35, 43-45 & 48, initial submission).

[24] The previous decisions under the Act that UVic cites involve discipline or complaint records in which the applicant and third parties were involved in specific complaint or discipline processes and knew each other. In such a case it is rarely possible to sever records without nonetheless disclosing information about an identifiable individual in a manner that unreasonably invades the privacy of the known third parties.

[25] The applicant says in his reply submission that he would accept records with identifying information removed. If identifying information is severed, such that no "personal information" is disclosed, potential s. 22(1) issues fall away. Even if severing of the records under s. 22 is not practicable in some or all cases, one would expect that, even if UVic is not required to do so under the Act, it should be possible to prepare a summary of the various cases, along the lines of the student discipline summary that UBC issues, a copy of which was attached to UVic's initial submission. Whether this is practicable is another issue. At all events, I am not persuaded that the mere possibility that some information may have to be withheld under s. 22(1) means that the records themselves do not, individually or together, relate to a matter of public interest.

[26] UVic does not say whether it considers itself accountable in even a general way for how it disciplines its staff, students and faculty. Public release of its discipline policies is commendable, but does not, in my view, assist the public – or UVic's students, staff and faculty – in understanding what has happened in individual cases through the release of anonymized accounts. It also follows, in my view, that observers are deprived

of information that would enable them to scrutinize UVic's activities and attempt to hold it accountable for its actions.

[27] UVic says the parties to a discipline process are given access to records and suggests that any problems with this process will come out through individuals' complaints. Accordingly, UVic says, the applicant is wrong to suggest that relevant information will not otherwise be available (para. 53, initial submission).

[28] I do not accept UVic's argument. The fact that parties to particular discipline cases may have some sort of access to discipline records does not mean the records do not relate to a matter of public interest. Nor does the fact that the parties to a disciplinary matter have some sort of access to relevant records mean a public body has no obligation to be accountable to the public for its actions in disciplinary matters.

[29] Further, UVic says, at para. 56 of its initial submission, a matter of interest to the public is not necessarily a matter of public interest. It notes that I have agreed with this proposition and cites Order 01-24. It also relies on *Clubb* v. *Saanich (District)*, [1996] B.C.J. No. 218, at para. 33, in which Melvin J. said that the term "public interest" does not encompass anything the public may be interested in learning and is not defined by various levels of public curiosity.

[30] In Order 01-24, however, I also said (at p. 6) that it is not possible or desirable to define what is meant by the "public interest" or to provide definitive guidance on the point. Nor, as I indicated in Order 01-24, are the factors in the first step of the public interest fee waiver analysis exhaustive – records may relate to a matter of public interest for the purposes of s. 75(5)(b) even if the factors set out in that case, and repeated above, are not present.

[31] It is true that self-governing bodies generally have specific statutory mandates to investigate and discipline members. The College of Teachers, for one, regulates teachers who have been entrusted with the education and care of children and youth. But some public bodies without an express statutory mandate to investigate and discipline misconduct decide to do so as a matter of policy. UVic itself has done so, as has UBC, apparently.

[32] I would be surprised if anyone disputed the proposition that post-secondary institutions such as UVic play important roles in the education and lives of young people. Young people (and even adults) attending post-secondary educational institutions may not be as vulnerable in the same ways or to the same degree as primary or secondary school students, but it surely cannot be doubted that faculty and staff of post-secodnary institutions have considerable influence on them and the power to affect their interests. The fact that accountability and transparency in the practices of self-governing professions are generally statutorily mandated does not mean that records relating to the disciplinary activities of a post-secondary institution such as UVic are not records that relate to a matter of public interest for the purposes of a fee waiver under s. 75(5)(b).

[33] As I noted earlier, UVic distinguishes its situation from that of self-governing professions on the basis that UVic does not have a statutory mandate to investigate and discipline members' misconduct. In this respect, I note that my predecessor adopted a public interest argument in relation to College of Teachers discipline activities that does not turn on the College having a statutory mandate for discipline. See Investigation Report P99-013, at pp. 9 and 10.

[34] Moreover, I consider that, as the applicant's submissions suggest, the integrity of an institution and the quality of the education it offers depend to some degree on its record in investigating and disciplining student misconduct, both cheating and other misconduct. UVic's activities in that regard are of public interest within the meaning of s. 75(5)(b) for reasons similar to those just given respecting discipline of faculty.

[35] I am persuaded that the requested records relate to a matter of public interest, within the meaning of s. 75(5)(b), because they deal directly with UVic's investigation and discipline of alleged misconduct by students, staff and faculty. I find that the applicant has met the first part of the test under that section. I will now consider the second part of the test, regarding UVic's exercise of discretion in denying a partial or complete fee waiver.

Should the estimated fee be waived?

[36] Although UVic concluded that the applicant had not fulfilled the requirements of the first step of the fee waiver analysis, it has provided me with argument on the exercise of discretion in case I found that the records relate to a matter of public interest. It suggests that a relevant factor in denying a fee waiver is whether an applicant is a frequent user of the Act. It does not explain how it considers this factor to be relevant in a fee waiver case and has not provided me with any details of the applicant's history as a requester with UVic.

[37] UVic also suggests that the applicant's interest in this case is a private commercial one, in that he wants to write stories for his newspaper, which it says will increase the newspaper's circulation and thus its advertising revenue. It argues that this is not a dissemination of information in a way that could benefit the public interest (para. 51-52 & 55, initial submission).

[38] The applicant replies that this is

> … a naïve and false view of the relationship between the cost of researching a story and increased advertising revenue. Indeed, many of the strongest stories, that draw the greatest reader interest, cost the newspaper revenue when ads are cancelled.

[39] In my view, while the applicant's proposed use of the information to write stories has a commercial aspect, his intention is evidently to disseminate the information by publishing articles in a newspaper. In light of the nature of the information in this case,

this dissemination of information would, in my view, disseminate information in a way that would benefit the public's understanding of UVic activities that are of public interest.

[40] I note in passing that few, if any, professional journalists would escape the consequences of UVic's argument. Taken to its logical conclusion, it would preclude journalists from qualifying for public interest fee waivers, at least where they intend to publish articles using information they have requested. This would approach excluding a class of users under s. 75(5), a result for which there is no support in the language of the section. A journalist is not entitled to a public interest fee waiver because he or she is a journalist, but a journalist is not precluded from obtaining a public interest fee waiver because she or he is a journalist.

[41] UVic acknowledges that the Act allows me to substitute my decision for the public body's or to order a partial fee waiver. Given the time it would take to compile the records and what it describes (without elaboration) as the "competing interests at play in this matter", it suggests that any fee waiver should be partial in this case. I do not think a partial fee waiver would be appropriate on the basis that the "competing interests at play" are possible third-party interests that may require UVic to spend time severing records, for which it cannot charge a fee under the Act. If I were to uphold part of the estimated fee on this basis, I would be allowing UVic to do indirectly what s. 75(2)(b) says it cannot, *i.e.*, charge a fee for the time spent severing records.

[42] UVic says, at paras. 51 and 58 of its initial submission, that its actions in attempting to assist an applicant under s. 6(1) of the Act and the applicant's status as a journalist are relevant factors, but it does not elaborate on these points. It does not, for example, say whether it encouraged the applicant to narrow or reformulate his request or otherwise attempted to address the applicant's request for information in a manner that would reasonably serve his needs while easing any burden on UVic.

[43] By the same token, the applicant has not indicated whether he offered, for example, to accept a representative sample set of severed records from a shorter time-frame than his request specifies, in order to ease the burden on UVic. This is not to say the applicant has an explicit duty to do so under the Act, but this is a legitimate consideration at the second stage of the above analysis, as indicated in Order 01-35.

[44] I have carefully considered the parties' arguments, and the circumstances of this case, in light of all of the criteria set out above. Bearing in mind the second-stage criteria set out in Order 01-24 and Order 01-35, I have decided that a partial fee waiver is in order under s. 75(5)(b), with a fee of $300 being appropriate. In arriving at this conclusion, I have (among other things) noted there is no clear indication as to whether the applicant and UVic have or have not attempted to reduce the costs of the request, as contemplated by Order 01-35. The parties are, in light of the partial fee waiver, free to determine whether they can accommodate the applicant's information needs in a manner that further reduces, or eliminates, the estimated fee. As an example only, they might agree to test the value of the information that will be disclosed – after application of the Act's exceptions – by proceeding with a few test cases or by picking a shorter period for the request before responding to the applicant's full request.

[45] While I acknowledge that UVic is entitled to manage its information and records as it sees fit, in accordance with applicable laws, I suspect that any future requests of this or a similar kind could be more cheaply accommodated if UVic were to adopt a system of record-keeping, and publication of discipline summaries, such as that UBC employs.

4.0 CONCLUSION

[46] For the reasons given above, under s. 58(3)(c) of the Act, I reduce the estimated fee to $300.

September 6, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia