Order 02-57

SIMON FRASER UNIVERSITY

David Loukidelis, Information and Privacy Commissioner
November 29, 2002

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Summary: The applicant in this case is the daughter of a woman whose attempt to revisit a mediated settlement of her previous access request to SFU was dealt with in Order 01-16. In Order 01-16, it was held that SFU need not process the woman's new access request. The evidence establishes that the daughter's access request, made 10 days after Order 01-16 was issued, was made on her mother's behalf, as an attempt to circumvent Order 01-16. This is an abuse of process and will not be allowed. The principle of *res judicata* also applies. SFU's decision on the merits of the daughter's access request, as an arm's-length applicant, is upheld.

Key Words: *res judicata* – abuse of process.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 13(1), 13(2)(k), 22(1), 22(2)(a), (f) and (h), 22(3)(d) and 22(4)(e).

Authorities Considered: B.C.: Order 01-03, [2001] B.C.I.P.C.D. No. 3; Order 01-16, [2001] B.C.I.P.C.D. No. 17.

Cases Considered: *Bank of British Columbia* v. *Singh* (1987), 17 B.C.L.R. (2d) 256 (S.C.); *Las Vegas Strip Ltd.* v. *Toronto (City)* (1996), 30 O.R. (3d) 286 (O.C.J.), (upheld at (1997) 32 O.R. (3d) 651); *Gleeson* v. *J. Whippel & Co.*, [1977] 3 All E.R. 54 (Ch.).

1.0 INTRODUCTION

[1] In Order 01-16, [2001] B.C.I.P.C.D. No. 17, I found that an applicant's pursuit of the review and inquiry process under Part 5 of the *Freedom of Information and Protection of Privacy Act* ("Act") was, in the circumstances, an abuse of process and that the public body, Simon Fraser University ("SFU"), did not have to process her access request. (I refer to that applicant below as the "original applicant".) Shortly after Order 01-16 was

issued, the original applicant's daughter, who lives with the original applicant, requested the same three-page record from SFU. The evidence here leads to only one reasonable conclusion – by using her daughter, the original applicant is attempting to do indirectly what Order 01-16 said she could not do directly. That attempt fails.

[2] Some background is in order, although much of it is already set out in Order 01-16. In 1998, the original applicant made a request to SFU for a copy of a three-page report, by an SFU harassment investigation panel, respecting a harassment complaint. SFU responded in 1999 by giving the original applicant a severed copy of the record. The original applicant requested a review of this decision and, as a result of mediation by this Office, SFU disclosed further information to her. The original applicant did not pursue the matter further at that time and the review file was closed as settled.

[3] In March of 2000, however, the original applicant made a second request for access to the same record. SFU declined to respond to the request, on the basis that the new request was an attempt to get around the settlement of her first request. The original applicant requested a review of SFU's refusal to respond and, in Order 01-16, I upheld SFU's refusal. As appears below, the original applicant's representative in that case – who is also the present applicant's representative – contended that there was little point in my ruling as I did. He referred more than once in his submissions on the original applicant's behalf to the ease with which one could thwart my decision, by using others to make the same request.

[4] On April 30, 2001, only 10 days after I issued Order 01-16, the applicant wrote to SFU and requested the same record her mother, the original applicant, had sought in 1998 and again in 2000. The applicant's letter to SFU enclosed a letter from the original applicant, in which she said "I agree to waive all my privacy rights in regard to" the applicant's request for the report. SFU wrote to the applicant on May 8, 2001 and said the following:

> Your letter does not make clear who the actual applicant is in this matter. One possible interpretation of your request is that you are applying on your own behalf for material that has already been released to … [the original applicant]. You may believe that, by having her waive her confidential rights, you can obtain the same amount of information that would have been released to her and you could then request a review of that material. Were that to be the case, you would be able to circumvent the Information and Privacy Commissioner's Order 01-16, which was issued only ten days before your letter was written. It is now a matter for the public record that the Commissioner ruled against … [the original applicant]. Your request may be an attempt to circumvent the Commissioner's Order. If so, it will not succeed.
>
> If you are the applicant on your own behalf, we can release a severed version of this report as we would to any third party. However, I must caution you that the amount of information in the record that would be disclosed would be highly severed because you were not a party to the proceeding (the panel hearing) that formed the subject matter of the report. If you are applying on … [the original applicant's] behalf, the question of whether we are required to release the panel report another

> time was, as mentioned earlier, the subject of an Order made by the Information and Privacy Commissioner, that is, Order 01-16 which was released on April 20, 2001.
> …
>
> In your correspondence of April 30 you state that … [the original applicant] is waiving her confidentiality rights with respect to this request. In view of this, there would appear to be no reason to involve this University in your transaction. Since you have indicated that … [the original applicant] does not object to you being in possession of confidential information pertaining to her, I suggest that you obtain the report directly from her.
>
> I trust that this matter is now concluded, unless you wish to make a third-party access request on your own behalf.

[5] The applicant responded, on May 28, 2001, by saying she made the request as a "third party" and asserting that Order 01-16 was not binding on her. She added the following:

> There was no ambiguity since I never stated anything that justifies your suggestion that I was acting as an agent for … [the original applicant]. I have my own reasons for wanting this report, which reasons I do not need to disclose when making an FOI request.

[6] As suggested by its June 6, 2001 letter, SFU treated May 29, 2001 as the start-date for the applicant's request, apparently because this was the date on which SFU received the applicant's May 28 letter. SFU wrote to the applicant again, on June 29, 2001, and told her its response would be delayed. Apologizing for the delay, SFU also acknowledged that its late response was deemed to be a decision to deny access under the Act.

[7] SFU's response on the merits came, as it turned out, almost four months after the daughter's April 30, 2001 request, on August 22, 2001. It is not clear why SFU took so long. SFU's response letter characterized the applicant's request as an attempt by the original applicant to, as SFU put it, "circumvent Order 01-16." SFU went on to say the following, at p. 3:

> In your letter dated May 28, 2001 wherein you clarify your request as that of a third party and which the University acknowledged as a request for information under the Act you state, "I have my own reasons for wanting this report, which reasons I do not need to disclose when making an FOI request." We realize that and are not interested in the reasons for your request. However, if you wish to receive a copy of the record which reveals … [the original applicant's] personal information, we suggest you obtain it from her directly. The University is not required and will not disclose yet again a copy of this record revealing … [the original applicant's] personal information as last disclosed to her subsequent to the 1998 mediation referred to above.

[8] SFU then went on to respond to the applicant's request on the basis that she is a third party, *i.e.*, at arm's length from the original applicant and other third parties whose

personal information is contained in the record. SFU severed and withheld substantial amounts of information under ss. 13(1) and 22(1) of the Act.

[9] As was the original applicant in Order 01-16, the applicant is represented by David Finley. He was on the scene again very soon after SFU's response to the original applicant's request. On September 7, 2001, he wrote to my Office and requested, on the applicant's behalf, a review of "both the decision and the procedures of SFU in this matter." His letter said the applicant wished to 'protest' the manner in which SFU had handled her request. The letter alluded, in this vein, to SFU's alleged failure to "conform to" s. 6 of the Act.

[10] As the matter did not, perhaps unsurprisingly, settle in mediation, I held a written inquiry under Part 5 of the Act.

[11] My office gave notice of the inquiry to a third party who had also been involved in the original SFU harassment investigation and whose personal information is therefore contained in the record. The third party made submissions in the inquiry.

2.0 ISSUES

[12] The issues in this case are as follows:

1. Did SFU, in responding as it did to the applicant's access request, perform its s. 6(1) duty to assist the applicant?

2. Is SFU authorized by s. 13(1) to refuse to disclose information to the applicant?

3. Is SFU required by s. 22(1) to refuse to disclose information to the applicant?

[13] Section 57(1) of the Act requires SFU to establish that s. 13(1) authorizes it to withhold information, while s. 57(2) places the burden on the applicant to show that third-party personal information can be disclosed to her without unreasonably invading the personal privacy of a third party. Section 57 is silent on the burden of proof respecting s. 6(1) of the Act, but previous decisions have established that the public body bears that burden.

3.0 DISCUSSION

[14] **3.1 Duty to Assist** – The thrust of the applicant's s. 6(1) complaint is that SFU improperly ignored the original applicant's written consent to disclosure of her personal information to the applicant. The applicant also complains that SFU's failure to respond to her request within the time required under the Act "is a palpable violation of the standards set in the Act and is inexcusable" (p. 4, initial submission). The applicant also claims that SFU's May 8, 2001 letter was unhelpful and "would tend to intimidate, mislead, and discourage a lay applicant" (p. 4, initial submission).

SFU's late response

[15] As I have said in previous cases, the s. 6(1) obligation to respond "without delay" requires a public body to make reasonable efforts to respond as soon as possible within the 30-day time limit set in s. 7 of the Act. SFU failed to respond within the required time and therefore must be found not to have made every reasonable effort to respond without delay, as required by s. 6(1). Since SFU has responded, however, there is no remedy available to the applicant under the Act. I note, in this respect, that SFU has acknowledged that it responded late and has apologized for it. There is nothing more I can do.

Allegation that SFU acted in a discreditable fashion

[16] I do not agree with the applicant's allegation that SFU's communications with her are, or could reasonably be interpreted as being intimidating, confusing, speculative, counterproductive or misleading. SFU's correspondence is straightforward. From the very beginning, SFU considered that the applicant might be acting on the original applicant's behalf in an attempt to get around Order 01-16. It aired its concerns about this and asked for clarification, in its May 8, 2001 letter, in a straightforward and reasonable way. SFU ultimately responded in similar vein. I find no fault with SFU's handling of this aspect of the matter in terms of the tone or content of its correspondence.

Alleged inappropriateness of treating an applicant as a third party

[17] The applicant's main point is, as indicated in para. 42 of her initial submission, that

> SFU tried to prevent the applicant from exercising her legitimate right under section 22(4)(a) to get a third party to waive her privacy rights in order to increase the applicant's degree of access.

[18] The applicant says, on p. 7 of her initial submission, that SFU's May 8, 2001 letter "was an inappropriate response to a legitimate request" and was a breach of SFU's s. 6(1) duty.

[19] The applicant contends that SFU is not entitled to ignore the original applicant's written consent to disclosure of her personal information. She argues that the original applicant's consent "defeats all Section 22 severing based on … personal privacy" (p. 12, initial submission). She also says the following, at para. 23 of her initial submission:

> 23. Since SFU has frequently referred to Order 01-16, we will briefly show that this order has no bearing on the present severing case. The reasons follow.
>
> a. The Order does not apply to the current applicant, since she was not a party to that case.
>
> b. The Order does not apply as a precedent, since the current applicant has never agreed to a mediation settlement. On the contrary, the Portfolio officer noted her lack of agreement and then posted the Inquiry.

c. Even in the unlikely event that Order 01-16 could have been invoked as a reason for not processing the application, it is far too late now, since SFU did process the request and the matter has gone to Inquiry.

d. Nothing in Order 01-16 prohibits … [the original applicant] from waiving her privacy rights or gives SFU the right to ignore such a waiver.

[20] SFU acknowledges that its May 8, 2001 letter was intended to elicit from the applicant information about whether she was acting on behalf of the original applicant. It ultimately decided, SFU says, that this was the case and therefore treated the applicant as an arm's-length requester. SFU therefore severed the original applicant's personal information despite her written consent to disclosure. SFU says its response was reasonable and that "it is entitled to refuse to process access requests that are an abuse of process" (para. 25, initial submission).

[21] SFU's contention that it is entitled to refuse to process access requests that it considers to be an abuse of process goes too far. There is no authority in the Act, explicit or implicit, for this proposition. This is abundantly clear given the existence of s. 43 of the Act, which gives the commissioner the power to authorize a public body to disregard certain access requests. I cannot see any source in the Act's language for an implied power on the part of a public body to reject an access request it considers to be an abuse of the right of access. Nor does Order 01-16 purport to give SFU such authority.

[22] The real question, it seems to me, is whether I should prevent the original applicant from subverting Order 01-16. I have decided, for the reasons given below, that this is appropriate. As for the situation that originally confronted SFU in the process leading to Order 01-16, a public body confronted with that situation can now apply for authorization under s. 43(b) to disregard a request on the basis that it attempts to circumvent the settlement of an earlier request or earlier order and is therefore frivolous or vexatious. This authority under s. 43 was not available to SFU in the Order 01-16 situation or at the time the present request was made. For a discussion of s. 43(b), see Auth. (s. 43) 02-02, [2002] B.C.I.P.C.D. No. 57.

[23] SFU argues that the *res judicata* principle applies here, such that the applicant is bound by the outcome in Order 01-16. As I noted at para. 17 of Order 01-03, [2001] B.C.I.P.C.D. No. 3, "*res judicata* stops a party from re-litigating any issues that could have been, should have been or were litigated in the previous action" (citing *Bank of British Columbia* v. *Singh* (1987), 17 B.C.L.R. (2d) 256 (S.C.), at p. 262). The courts have also held that, where a party attempts to circumvent an earlier decision by having someone else re-litigate the matter, the court or tribunal can apply the *res judicata* rule to prevent this from succeeding. In *Las Vegas Strip Ltd.* v. *Toronto (City)* (1996), 30 O.R. (3d) 286 (O.C.J.), Sharpe J., as he then was, did exactly this. His decision was upheld on appeal by the Ontario Court of Appeal at (1997), 32 O.R. (3d) 651.

[24] Another judge had dismissed a lawsuit in which the plaintiffs asked the court to declare that their strip club was a lawful non-conforming use and therefore was not prohibited by a zoning bylaw that prevented adult entertainment establishments from operating in part of downtown Toronto. After this adverse decision was made, an

individual acquainted with one of the principals of the original plaintiff company started a new lawsuit for the same declaratory relief. Sharpe J. cited evidence that the new plaintiff was acquainted with one of the principals of the previous plaintiff, that her Toronto address was the address for an apartment owned by the principal, that she had no previous involvement in the adult entertainment business and that she was represented by the same lawyers who had represented the original plaintiff.

[25] On this basis, Sharpe J. ruled that the new plaintiff was advancing a claim by or on behalf of the original plaintiff, which meant the new plaintiff was in "privity of interest" with the original plaintiff. He defined "privity of interest" as "such a degree of identification between the two to make it just to hold that the decision to which one was a party should be binding in proceedings where the other is party", citing Megarry V.C. in *Gleeson* v. *J. Whippel & Co.*, [1977] 3 All E.R. 54 (Ch.), at p. 60.

[26] In this case, SFU cites the following circumstances, which I find to be established by the evidence, in support of its argument that the principle in *Las Vegas Strip* applies here:

- The applicant and the original applicant are related, *i.e.*, they are mother and daughter.
- The original applicant and the applicant live together.
- The original applicant has been involved in the applicant's request from the start, by signing a consent to disclosure.
- Although she says she would like to know what happened to her mother, the applicant has no apparent legal or similar interest in the disputed record.
- If the original applicant has no objection to the applicant having access to her personal information, as suggested by the original applicant's written consent to disclosure, it is, as SFU says, "inexplicable" why the original applicant does not simply give the applicant a copy of the disputed record, which SFU provided to the original applicant in response to her access request underlying Order 01-16.
- Both the applicant and the original applicant have used David Finley as their agent in the processes leading to Order 01-16 and this inquiry.
- David Finley argued in his submissions on the original applicant's behalf in Order 01-16 that there was no point my granting relief to SFU, since any order in SFU's favour could readily be circumvented by employing another individual to make a new request on behalf of the original applicant.

[27] I add the observation that, if the applicant wishes to know what happened to her mother, as she says she does, she has not said why she cannot simply ask her mother what happened.

[28] The applicant says *Las Vegas Strip* does not apply and that any attempt to argue that it is relevant "is grievously strained" (p. 11, reply submission). I am satisfied, however, that the principles in that case are relevant here. I am satisfied there is a privity

of interest between the applicant and the original applicant, as contemplated by *Las Vegas Strip*.

[29] I also consider this is an appropriate case in which to exercise my authority to prevent an abuse of process under the Act, as I did in Order 01-16. Applying the considerations set out in para. 41 of that decision, I am satisfied that the applicant's request, to the extent it is based on the original applicant's consent, is an abuse of process. I note the following:

1. The present access request is a request for the same records as the original applicant has twice sought.

2. The first request by the original applicant was the subject of a request for review under Part 5 of the Act.

3. The original applicant's previous request was settled or resolved by mediation and then put to rest by Order 01-16.

4. The original applicant accepted the outcome of the previous request's settlement or resolution, although she later unsuccessfully tried to get around that outcome. Order 01-16 stopped that.

[30] In Order 01-16, I decided that, in fairness, the original applicant should be held to the previous mediated outcome of her original request. The same applies here. The applicant's request, to the extent it is based on the original applicant's consent, is an attempt to subvert Order 01-16, which authorized SFU to disregard the original applicant's attempt to revisit her original access request. The applicant and the original applicant presumably hoped that, because the original applicant consented to disclosure of her personal information, the applicant would get the same information the original applicant originally received, and then she could appeal SFU's decision, despite Order 01-16.

[31] I consider it appropriate to apply the abuse of process principle in Order 01-16 and therefore am not prepared to interfere with what SFU has done here. I consider it is appropriate to treat the applicant's access request as if she is at arm's length from the situation and as if the original applicant had not consented in writing to disclosure of her personal information to the applicant. The applicant's request is to be treated at arm's length to the original applicant and other parties involved.

[32] **3.2 Personal Privacy Issues** – Section 22 of the Act requires a public body to refuse to disclose personal information if its disclosure would unreasonably invade a third party's personal privacy. The relevant portions of s. 22 read as follows:

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

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

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

…

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

…

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

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

…

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

…

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

…

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

[33] As SFU notes, it severed all third-party personal information from the disputed record, including individuals' names, information respecting their employment history, any identifying information (including their position or functions where this information would identify them), individuals' opinions and individuals' opinions about others. It is convenient to reproduce here the essence of SFU's s. 22 arguments:

39. The University considered several subsections of section 22 that provide guidance in determining whether or not the disclosure of personal information constitutes an unreasonable invasion of privacy:

(a) Section 22(4)(e) provides that disclosure of information about a person's position, functions or remuneration as an employee of a public body is not an unreasonable invasion of privacy. In this case, information about University employees' positions or functions was not disclosed because disclosure would serve to identify those persons and therefore be an unreasonable invasion of privacy in accordance with section 22(1);

(b) Section 22(2)(a) provides for disclosure of information that subjects the activities of the public body to scrutiny. Information was disclosed under this section describing the process followed by the Harassment Panel, the

fact that the Committee conducted an investigation and made recommendations, and the names of the Panel members;

(c) Section 22(2)(f) states that where personal information is provided to a public body in confidence, that element of confidentiality is a factor that supports the conclusion that disclosure would be an unreasonable invasion of privacy. In this case, the evidence establishes that, in accordance with the Harassment Policy and the standard practice of the University, the personal information of the complainant, respondent and witnesses was supplied to the University in confidence;

(d) The personal information in the Report relates to a harassment investigation and involves a sensitive personal matter for the complainant and respondent. As such, disclosure of the personal information may unfairly damage the reputation of either or both parties and is therefore considered to be an unreasonable invasion of privacy under section 22(2)(h).

[34] SFU also notes that, since the harassment investigation that led to creation of the disputed record "proceeded without jurisdiction, the disclosure of the personal information of the parties would be especially prejudicial and unfair" (para. 40, initial submission). The third party supports SFU's s. 22 arguments. He also argues that the circumstance set out in s. 22(2)(g) applies here. He argues the report is flawed, such that the personal information it contains is "likely to be inaccurate or unreliable".

[35] For her part, the applicant argues that disclosure is desirable to subject SFU's activities to public scrutiny (s. 22(2)(a)), that the personal information in the disputed record was not supplied in confidence (s. 22(2)(f)) and that disclosure would not unfairly harm anyone's reputation or prejudice them (s. 22(2)(h)). The applicant also argues that none of the information in the record is covered by s. 22(3)(d).

[36] Most of the severed third-party personal information is undoubtedly information about employment history within the meaning of s. 22(3)(d). This is so because of the nature of the information itself and also the context in which it is found, *i.e.*, a harassment investigation report about harassment alleged to have occurred in the course of employment. The presumed unreasonable invasion of personal privacy under s. 22(3)(d) therefore arises. I also agree that s. 22(4)(e) does not apply in this case, as disclosure of information about position or functions would identify the third party and others in a manner that would disclose s. 22(3)(d) information.

[37] Having considered the matter carefully, I do not consider that any of the relevant circumstances – including those on which the applicant relies – favours disclosure of the severed third party personal information. To the contrary, I am persuaded that SFU is required by s. 22(1) to refuse to disclose the third-party personal information it has withheld from the record. The applicant has not met her burden of proof under s. 57 of the Act.

[38] **3.3 Advice or Recommendations** – SFU relies on s. 13(1) of the Act to withhold the recommendations made to SFU by the panel that investigated the original harassment claim. The relevant portions of s. 13 read as follows:

Policy advice, recommendations or draft regulations

13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

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

…

(k) 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 a public body, … .

[39] I agree with SFU's argument that the harassment panel is not, as the applicant argues, a body of a kind contemplated by s. 13(2)(k). I also agree that its recommendations to SFU's President were not "findings", or a quasi-judicial decision or order, but are, in the circumstances of this case at least, "recommendations" within the meaning of s. 13(1). They are accordingly protected from disclosure under that provision. It is also clear from the evidence submitted on SFU's behalf that its head properly considered exercising the s. 13(1) discretion to disclose information, but decided not to do so. There is no basis for interfering with that exercise of discretion.

4.0 CONCLUSION

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

1. I confirm that s. 13(1) of the Act authorizes SFU to refuse to disclose the information it withheld under that section; and

2. I require SFU to refuse to disclose the personal information it withheld under s. 22(1) of the Act.

In light of my findings respecting s. 6(1), no order is necessary in that respect.

November 29, 2002

ORIGINAL SIGNED BY

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David Loukidelis
Information and Privacy Commissioner
for British Columbia