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INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

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UNIVERSITY OF VICTORIA

David Loukidelis, Information and Privacy Commissioner
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Summary: Applicant requested records relating to his previous attendance at UVic as a student. UVic is authorized to refuse disclosure under s. 13(1), 14, 15(1)(f) and 19(1)(a) and is required by s. 22(1) to refuse disclosure. UVic also conducted a reasonable search for responsive records.

Key Words: duty to assist – respond openly, accurately and completely – adequacy of search – every reasonable effort – advice or recommendations – solicitor client privilege – disclosure harmful to individual or public safety – threaten – mental or physical health – safety – reasonable expectation of harm.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 13(1), 14, 15(1)(f), 19(1)(a), 22(1) and 22(2)(c), (e) and (f).

Authorities Considered: B.C.: Order No. 197-1997, [1997] B.C.I.P.C.D. No. 58; Order No. 330-1999, [1999] B.C.I.P.C.D. No. 43; Order 00-02, [2000] B.C.I.P.C.D. No. 2; Order 00-17, [2000] B.C.I.P.C.D. No. 20; Order 00-28, [2000] B.C.I.P.C.D. No. 31; Order 00-40, [2000] B.C.I.P.C.D. No. 43; Order 01-01, [2001] B.C.I.P.C.D. No. 1; Order 01-10, [2001] B.C.I.P.C.D. No. 11; Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-17, [2002] B.C.I.P.C.D. No. 17; Order 02-50, [2002] B.C.I.P.C.D. No. 51.

1.0 INTRODUCTION

[1] The applicant made a request to the University of Victoria (“UVic”), under the *Freedom of Information and Protection of Privacy Act* (“Act”), for records “relating to my conduct during my term there and the written records of any/all corresponding actions taken” by UVic administrators. UVic responded by disclosing most of the approximately 1,137 pages of records that it found during its searches for records. It withheld all or portions of some 124 pages of records under ss. 13(1), 14, 15(1)(f), 19 and 22(1) of the

Act. Some records that had been gathered for review were withheld because UVic staff ultimately determined they fell outside the scope of the applicant's request.

[2] UVic's response prompted the applicant to request a review by this office. UVic disclosed further records to the applicant during mediation, but because the matter did not settle during mediation, a written inquiry was held under Part 5 of the Act.

2.0 ISSUES

[3] The issues in this inquiry are as follows:

1. Is UVic authorized by s. 13(1), 14, 15(1)(f), 19(1) of the Act to refuse to disclose information?
2. Is UVic required by s. 22(1) of the Act to refuse to disclose information?
3. Did UVic fulfill its duty under s. 6(1) to undertake an adequate search for records responsive to the applicant's request?

[4] Section 57(1) of the Act provides that UVic has the burden of proof respecting ss. 13, 14, 15 and 19. Under s. 57(2) of the Act, the applicant has the burden of proof respecting the application of s. 22(1) to third-party personal information. Consistent with Order No. 330-1999, [1999] B.C.I.P.C.D. No. 43, if the applicant is refused access to his own personal information, UVic has the burden of proof in that respect. Previous decisions have established that UVic has the burden of establishing that it has fulfilled its s. 6(1) duties.

3.0 DISCUSSION

[5] **3.1 Background to the Applicant's Request** – The applicant was, some time ago, a student at UVic, but he ceased at some point to be registered as a student. Because of concerns about the applicant's behaviour, UVic's President wrote to the applicant and told him that he was barred from re-registering as a student before a date specified in the President's letter. The letter also laid down a series of conditions, including that the applicant was not to be present on UVic property except for medical purposes and that the applicant would only be permitted to re-register after the specified date if he produced a medical and psychiatric certificate of behavioural competence and written permissions from relevant UVic officials. The letter also stipulated that re-registration would be probationary, with UVic being entitled to immediately dismiss the applicant if his behaviour was determined to be unacceptable.

[6] Some years later, the applicant contacted UVic and asked for registration forms for re-admittance. UVic wrote to the applicant and confirmed the conditions laid down in the President's letter some time before. Shortly after that, the applicant made his request for access to records about his past at UVic.

[7] **3.2 UVic's Search for Records** – A few days after UVic received the applicant's request, its University Secretary, who is responsible for access to information requests, sent a memorandum to the Office of the President, UVic Campus Security Services, the Dean of the faculty involved, and UVic's Administrative Registrar, asking that they find and produce any records that responded to the applicant's request. The same memorandum was sent to UVic's Office for the Prevention of Discrimination and Harassment. (It was later determined that any files relating to the applicant in the custody or control of the Office for the Prevention of Discrimination and Harassment had been shredded.)

[8] As I indicated above, UVic found some 1,137 pages of records in searching for responsive material. It determined that some of these were outside the scope of the request. Because of the large number of records that were responsive, however, UVic extended the time for responding. In its response, UVic disclosed records found in the offices of the Administrative Registrar, Associate Vice-President Legal Affairs, Campus Security, President, Senate Committee on Appeals and Dean of the relevant faculty. As I noted above, UVic has withheld some 124 pages of records or portions of pages.

[9] During mediation, the applicant took the position that two categories of responsive records were still outstanding. The first category of records the applicant identified related to a psychiatric exam the applicant said had been conducted by a doctor employed by or associated with UVic. The second category related to communications between UVic faculty and the UVic student newspaper. UVic agreed to conduct an additional search for records.

[10] UVic asked its Health Services department to search its medical records and psychiatric files for any records relating to the applicant. It did not find any and said that records older than seven years were destroyed by confidential means. (The applicant was a student at UVic over 10 years ago.) Nor did UVic find any records relating to correspondence between the applicant and the UVic student newspaper. UVic says the student newspaper is not part of UVic, so it could not search in the newspaper's files.

[11] The standards required of a public body in searching for records are well established. See, for example, Order 01-10, [2001] B.C.I.P.C.D. No. 11. I do not propose to recite those principles here. I am satisfied, based on the affidavit evidence UVic has provided to me, that it conducted a thorough search of all probable sources of requested records. I note that, when the applicant identified possible kinds or sources of records, UVic conducted a further search during mediation. It is clear to me that UVic's searches for records were thorough and comprehensive and met the standard required under s. 6(1). I therefore find that UVic has discharged its duty to the applicant under that section.

[12] **3.3 Advice or Recommendations** – Section 13(1) of the Act authorizes a public body to refuse to disclose "advice or recommendations" developed by or for the public body. UVic says the information it withheld under this section sets out internal deliberations of UVic staff and faculty "as to how to manage a series of specific issues" respecting the applicant's behaviour at UVic generally and, specifically, his behaviour

towards particular UVic staff and faculty. It argues the information would, if disclosed, either reveal advice that influenced UVic's decision and actions respecting the applicant or would allow a reader like the applicant, who is familiar with the circumstances, to infer advice that was given. UVic says it is particularly concerned to protect the advice and recommendations that permitted its President "to make a reasoned decision" respecting the applicant's "continued presence within the University community" (para. 53, initial submission). UVic relies particularly on Order 00-17, [2000] B.C.I.P.C.D. No. 20.

[13] I have no doubt that s. 13(1) authorizes UVic to refuse to disclose the information it withheld under that section. This is particularly clear in the case of the memorandum from the Vice-President, Administration to the President about the applicant. UVic has also withheld minor portions of other records under s. 13(1), usually in the order of a few lines here or there, and I am satisfied that s. 13(1) authorizes it to do so.

[14] In making this finding, however, I have not considered whether the 17-page legal opinion provided to UVic is covered by s. 13(1). Two copies of this opinion are found amongst the records, at pp. AVPLA-53 through AVPLA-69 and pp. PO-14 through PO-30. I need not consider the application of s. 13(1) to this opinion because, as is discussed below, the opinion is entirely protected by solicitor client privilege under s. 14 of the Act. The same holds for p. PO-13, an internal UVic memorandum that communicates legal advice given to UVic.

[15] **3.4 Solicitor Client Privilege** – Section 14 of the Act authorizes a public body to refuse to disclose information that is "subject to solicitor client privilege". In this case, UVic relies on only one of the two kinds of privilege recognized under s. 14, *i.e.*, confidential solicitor-client communications related to the seeking or giving of legal advice. This is also known as legal professional privilege. The principles that apply to this kind of privilege are well-recognized and I will not repeat them here. See, for example, Order 01-10 and Order 01-53, [2001] B.C.I.P.C.D. No. 56.

[16] As I indicated above, UVic has applied s. 14 to two copies of the above-described legal opinion from its lawyer. It is plain on the face of that record, and from the other material before me (including the disputed records), that the lawyer was retained by UVic to provide legal advice relating to UVic's dealings with the applicant and relating to the applicant's behaviour towards UVic staff and faculty. The opinion is labelled "confidential" and is clearly a confidential communication of legal advice. It is not severable – the entire record is privileged. This finding applies to both copies of the opinion mentioned above.

[17] I also find that the hand-written note on page PO-14 is privileged. It is a confidential communication relating to the seeking of legal advice and is clearly privileged.

[18] Record PO-13 is an internal UVic memorandum which communicates advice received from UVic's lawyer to other UVic staff. This record is privileged because its disclosure would reveal the legal advice that had been given to UVic. I am similarly

satisfied that pages AVPLA-48 through AVPLA-50 are privileged, since they summarize the legal opinion described above and disclosure of that summary would reveal the legal advice given in that opinion.

[19] **3.5 Endangering Life or Safety** – Section 15(1)(f) authorizes a public body to refuse to disclose information if disclosure could reasonably be expected to “endanger the life or physical safety of a law enforcement officer or any other person.” According to UVic, the information it has withheld under s. 15(1)(f) “forms part of a larger picture, the cumulative effect of which satisfies the test for harm under this section” (para. 69, initial submission). In all but a few instances, UVic has applied both s. 15(1)(f) and s. 19(1) to portions of the records. For reasons given below, I have concluded that s. 19(1) authorizes UVic to refuse to disclose information that it has also withheld under s. 15(1)(f). UVic has applied s. 15(1)(f) alone to records AVPLA-118, 133, 157 and 158; CS-13, 16, 23, 39 and 42-45; DFA-174, 246; and PO-01 and 02. I have only considered UVic’s s. 15(1)(f) case in relation to these records and make no finding as to whether s. 15(1)(f) applies to the records it has also withheld under s. 19(1).

[20] Section 15(1)(f) is plainly intended to protect the life or physical safety of persons other than law enforcement officers. These could include UVic staff, students or faculty. See, for, example, Order No. 197-1997, [1997] B.C.I.P.C.D. No. 58. The section imposes a reasonable expectation of harm test. I said the following about the standard of proof contemplated by the s. 17(1) reasonable expectation of harm test in Order 02-50, [2002] B.C.I.P.C.D. No. 51, at para. 137:

[137] Taking all of this into account, I have assessed the Ministry’s claim under s. 17(1) by considering whether there is a confident, objective basis for concluding that disclosure of the disputed information could reasonably be expected to harm British Columbia’s financial or economic interests. General, speculative or subjective evidence is not adequate to establish that disclosure could reasonably be expected to result in harm under s. 17(1). That exception must be applied on the basis of real grounds that are connected to the specific case. This means establishing a clear and direct connection between the disclosure of withheld information and the harm alleged. The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information. ...

[21] I have applied these comments in approaching UVic’s s. 15(1)(f) case. Without altering the standard of proof, I have kept in mind that vital third-party interests are engaged by s. 15(1)(f), making it important to approach the evidence with care and deliberation.

[22] In this matter, it is appropriate for me to say only that I am satisfied that s. 15(1)(f) authorizes UVic to refuse to disclose the information to which it has applied only that exception. I have arrived at this finding in light of contents of the relevant records, UVic’s *in camera* affidavit evidence and the parties’ submissions. The necessary reasonable expectation of harm under s. 15(1)(f) has been established and UVic is authorized to withhold the information described above.

[23] **3.6 Threat to Health or Safety** – UVic has withheld portions of various records under s. 19(1) of the Act. Section 19(1) reads as follows:

Disclosure harmful to individual or public safety

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

- (a) threaten anyone else’s safety or mental or physical health, or
- (b) interfere with public safety.

[24] I have acknowledged that the s. 19(1)(a) reference to mental “health” goes beyond mental illness; s. 19(1)(a) may be triggered where disclosure could reasonably be expected to cause serious mental distress or anguish. See, for example, Order 00-02, [2000] B.C.I.P.C.D. No. 2; Order 00-28, [2000] B.C.I.P.C.D. No. 31, Order 00-40, [2000] B.C.I.P.C.D. No. 43, Order 01-01 and Order 01-15, [2001] B.C.I.P.C.D. No. 16. I have also said that “inconvenience, upset or unpleasantness of dealing with a difficult or unreasonable person” is not sufficient to trigger s. 19(1)(a) of the Act. See Order 01-15 at para. 74.

[25] I have approached the s. 19(1) issue bearing in mind my comments in Order 02-50 about the standard of proof where a test of reasonable expectation of harm is involved. As with s. 15(1)(f), I have also kept in mind the nature of this exception, namely the fact that important third-party interests are involved. As I have noted before, the s. 19(1) exception should be approached with care and deliberation, by public bodies and in an inquiry under Part 5. See, for example, Order 01-01, [2001] B.C.I.P.C.D. No. 1.

[26] Some of UVic’s s. 19(1) arguments have, appropriately in my view, been made *in camera*. UVic has also, again appropriately, submitted five *in camera* affidavits sworn by various knowledgeable individuals. The thrust of its s. 19(1) argument is that, because the applicant has a “well-documented history of threatening violence” at UVic and because he is known to have a resentment towards those he “perceives as his enemies or those he perceives having somehow done him wrong”, it is reasonable to expect that disclosure of this information would pose a real threat to the mental and or physical health of the third parties and to interfere with the public safety of members of the UVic community (para. 8, initial submission). It argues that the applicant’s past behaviour “creates a reasonable fear of retaliation” in individuals currently protected by the withholding of the information UVic says is protected by s. 19(1).

[27] UVic has provided evidence that, where he has in the past become aware of comments made about him, the applicant has reacted in a disproportionate and threatening manner. It says it is reasonable for the third parties involved, both those known to the applicant and those who are not known to the applicant, to “expect the disclosure of the severed information could result in a threat of similar kinds of behaviour” from the applicant (para. 81, initial submission). Citing Order 02-17, [2002] B.C.I.P.C.D. No. 17, UVic says there is evidence of a pattern of behaviour on the

applicant's part that strongly supports the finding that the necessary reasonable expectation under s. 19(1)(a) has been established. The applicant vigorously disputes this, arguing that he is, in fact, a victim of aggression and anger exhibited by others whose behaviour is either questionable or downright unlawful.

[28] I have reviewed UVic's *in camera* affidavit material, and the disputed records, with great care. I am persuaded the evidence establishes a pattern of behaviour on the applicant's part, involving threats of violence or death against those whom the applicant believes are his enemies or whom he believes have done him some harm. Despite my having carefully considered the applicant's perspective on his behaviour while at UVic, and his explanations for various incidents, I am persuaded that disclosure of the information to which UVic has applied s. 19(1) could reasonably be expected to, within the meaning of s. 19(1)(a), threaten the safety or mental or physical health of third parties. In the circumstances, I do not need to make any finding under s. 19(1)(b).

[29] **3.7 Third-Party Personal Privacy** – UVic has applied s. 22 of the Act to third-party personal information in a number of the records. It has cited s. 22(1) in relation to records AVPLA-20, 92, 111, 133 and 148; CS-16, 45 and 56; DFA-179, 241-242, 246 and 259; and PO-71 and 101. It has cited s. 22(3)(h) in relation to records AVPLA-53-69 and 157; CS-23 and 55; and PO-14-30. In all cases where UVic has applied s. 22(3)(h), it has withheld the same information under s. 13(1), s. 14, s. 15(1)(f) or s. 19(1). In the case of records to which it has applied s. 22(1), only records AVPLA-20, 92, 111 (which is a copy of AVPLA-92) and 148; CS-56; DFA-179 (a copy of AVPLA-148), 241-242 and 259; and PO-101 have been withheld under that section alone. The following discussion, and findings, relate only to these records. I have not considered the application of s. 22(1) or s. 22(3)(h) to information that I have found can be withheld under other exceptions UVic has applied.

[30] 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

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

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

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

[32] The principles to be applied in addressing s. 22 are also well-known. See, for example, Order 01-53, at paras. 22-24.

[33] UVic says s. 22(2)(c) does not favour disclosure, since there are no legal rights of the applicant to which the disputed information could be relevant. I agree. Nothing in the applicant's submissions or the other material before me suggests that s. 22(2)(c) applies and favours disclosure.

[34] Section 22(2)(e) is, as UVic contends, a relevant circumstance. It favours the conclusion that UVic must refuse disclosure on the basis that it is likely the third parties whose personal information is in issue will be exposed to "other harm". UVic's s. 19(1) evidence and arguments are relevant here, despite the fact that UVic did not, for whatever reason, actually apply s. 19(1) to the information under discussion here.

[35] Last, the material before me, including in several cases the records themselves, supports the conclusion that some of the information withheld under s. 22(1) was supplied to UVic in confidence. This factor favours the view that s. 22(1) requires UVic to refuse disclosure.

[36] In all the circumstances, and having carefully considered all of the applicant's submissions in this case, I am satisfied that that s. 22(1) requires UVic to refuse to disclose the personal information it has withheld under that section, as described above.

4.0 CONCLUSION

[37] For the reasons given above, under s. 58 of the Act:

1. I confirm that UVic is authorized to refuse to disclose information it has withheld under s. 13(1) (in relation to the records so identified in the s. 13(1) discussion above), s. 14, s. 15(1)(f) (in relation to the records so identified in the s. 15(1)(f) discussion above) and s. 19(1)(a);
2. I require UVic to refuse to disclose the personal information that I have found UVic is required to withhold under s. 22(1) (as so identified in the discussion above); and
3. I confirm that UVic has performed its s. 6(1) duty in searching for records responsive to the applicant's request.

March 3, 2003

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia