

CLEA F. PARFITT LAWYER \*

407 - 825 Granville Street Vancouver, B.C. V6Z 1K9 604-689-7778 (Tel) 604-689-5572 (Fax)

June 5, 2019

**BY EMAIL**

B.C. Human Rights Tribunal  
1170 - 605 Robson Street  
Vancouver, B.C.  
V6B 5J3

**Attention: Daniel Varnals, Case Manager**

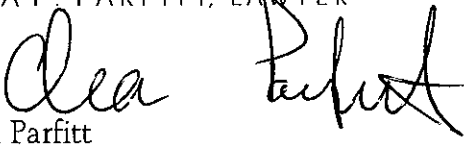
Dear Mesdames/Sirs:

**RE: Glynnis Kirchmeier - and - Glynnis Kirchmeier obo others v.  
University of British Columbia  
Case Number: 14965**

Please find enclosed the Complainant's Application for Disclosure of Documents from a third party, Paula Butler, together with the Application Form, supporting materials and a cover letter to Ms. Butler.

By copy of this letter, this application and associated materials are being provided to Counsel for the Respondent and to Ms. Butler.

Yours truly,  
CLEA F. PARFITT, LAWYER

  
Clea Parfitt

cc. Client

Roper Greyell, Attn: Michael Wagner/Jennifer Devins

Paula Butler

CLEA F. PARFITT LAWYER \*

407 - 825 Granville Street Vancouver, B.C. V6Z 1K9 604-689-7778 (Tel) 604-689-5572 (Fax)

June 5, 2019

**BY EMAIL**

**pbutler@butlerworkplacesolutions.com**

Butler Workplace Solutions  
Suite 200 – 100 Park Royal  
West Vancouver, BC  
V7T 1A2

Dear Mesdames/Sirs:

**RE: Glynnis Kirchmeier - and - Glynnis Kirchmeier obo others v.  
University of British Columbia  
Case Number: 14965**

We are counsel for the Complainants in this human rights matter currently before the BC Human Rights Tribunal. Michael Wagner and Jennifer Devins of Roper Greyell are acting for the University. The complaint relates to events at the University of British Columbia regarding Dmitry Mordvinov.

Please find enclosed for service on you the Complainant's Application for Third Party documents relating to documents in your possession or control regarding the report commissioned from you by the University. Attached to the application are some documents referred to in the application.

This application is governed by the Tribunal's rules. The Tribunal's case manager, Daniel Varnals, will be in touch with you regarding the next steps regarding this application.

Yours truly,

CLEA F. PARFITT, LAWYER



Clea Parfitt

cc. Client

Roper Greyell, Attn: Michael Wagner/Jennifer Devins

BC Human Rights Tribunal, Attn: Daniel Varnals

**BC Human Rights Tribunal**

1270 - 605 Robson Street  
Vancouver BC V6B 5J3

Phone: 604-775-2000

Fax: 604-775-2020

Toll Free: 1-888-440-8844

TTY: 604-775-2021

**WHEN TO USE THIS FORM**

Use this form to make any request requiring an application, except an application to dismiss a complaint without a hearing (Form 7.2 – Dismissal Application). See STEP 1 for a list of common general applications.

**The following requests do not require an application:**

- More time to file a complaint response (unless you are told you must file an application)
- More time to file a submission on an application (unless you are told you must file an application)
- Order a witness to attend a hearing
- Cancel an order for a witness to attend a hearing
- Interpreter or other needs for a hearing
- Technical correction to a decision
- Get a certified copy of an order
- Get directions about filing a reply to an expert report
- Schedule a settlement meeting or case conference

**GENERAL INSTRUCTIONS**

**If you are filling out online:** your information will NOT be automatically saved by the Tribunal

– Click on Save at any time to save your form to your computer

**If you are filling out by hand:** print this form and use a dark pen and print legibly

**File your application:**

- Email your form to [BCHumanRightsTribunal@gov.bc.ca](mailto:BCHumanRightsTribunal@gov.bc.ca) attaching all additional pages and documents together in ONE scanned PDF format document
- OR print your form and attach your additional pages and documents and fax, mail or hand deliver them to us
- **Keep a copy** of your Application and all of your documents
- **Send a copy** of your Application to all other participants

**Name of party or other participant making this application:**

GLYNNIS KIRCHMEIER – and – GLYNNIS KIRMEIER obo OTHERS

**Person completing this form (if different from above)**

FIRST NAME

Clea

LAST NAME

Parfitt

**Name of complaint this application is about**

COMPLAINANT'S NAME

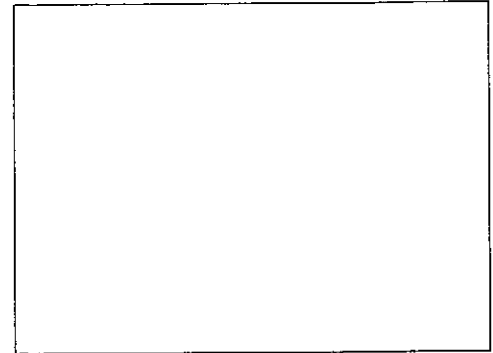
GLYNNIS KIRCHMEIER – and – GLYNNIS KIRMEIER obo OTHERS

RESPONDENT'S NAME

UNIVERSITY OF BRITISH COLUMBIA

**Tribunal Case Number**

14965



Tribunal Stamp

## STEP 1: WHAT IS THE PURPOSE OF YOUR APPLICATION?

For more information about applications, including those listed below, Information Sheets are available at [www.bchrt.bc.ca](http://www.bchrt.bc.ca) (by clicking on [Get Help with the Tribunal Process](#)) or by phoning or writing the Tribunal to request copies.

### Information

Sheet No.      **The purpose of the application is to (check one – use a separate Application for each request):**

- |      |   |                                     |
|------|---|-------------------------------------|
| GA1  | Limit publication of personal information in the complaint file (including the names of a party or witness in a decision) | <input type="checkbox"/>            |
| GA2  | Defer a complaint   | <input type="checkbox"/>            |
| GA3  | Extend the time to file a response to a complaint   | <input type="checkbox"/>            |
| GA4  | Amend a complaint to add a new allegation (Form 3 Amendment attached)   | <input type="checkbox"/>            |
| GA5  | Add a respondent to a complaint   | <input type="checkbox"/>            |
| GA6  | Amend a response to a complaint (Form 3 Amendment attached)   | <input type="checkbox"/>            |
| GA7  | Join two or more complaints.  | <input type="checkbox"/>            |
| GA8  | File a further submission on an application (Submission attached)   | <input type="checkbox"/>            |
| GA9  | Order another party to disclose documents   | <input type="checkbox"/>            |
| GA10 | Order someone else (a third party) to disclose documents  | <input checked="" type="checkbox"/> |
| GA11 | Suspend or limit disclosure   | <input type="checkbox"/>            |
| GA12 | Order another party to pay costs because of their improper conduct  | <input type="checkbox"/>            |
| GA13 | Intervene (participate as a non-party) in a complaint   | <input type="checkbox"/>            |
| GA14 | Adjourn a hearing   | <input type="checkbox"/>            |
| GA15 | Reconsider a decision   | <input type="checkbox"/>            |
| GA16 | Expedite or alter process   | <input type="checkbox"/>            |
| GA17 | Other general application: _____  | <input type="checkbox"/>            |

SPECIFY

## STEP 2: DETAILS OF APPLICATION (IF APPLICABLE)

If applying for any of the following, answer the question below:

- Limit publication of information in the complaint file (**What information?**)
- Add a respondent to the complaint (**Who?**)
- Order a party to pay costs for improper conduct (**Which party?**)
- Order a party or other person to disclose documents (**Who and what documents?**)

See attached.

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### STEP 3: DO THE OTHER APPLICANTS AGREE TO YOUR APPLICATION?

Except when applying to intervene in a complaint, or add a respondent to a complaint:

**List participants who agree to the application:**

**List participants who oppose:**

University of British Columbia

**List participants who take no position:**

**If you were not able to find out if the other participants agree, say what you did to find out:**

## STEP 4: LIST THE CONDITIONS FOR GRANTING THE APPLICATION

For each type of application, you need to show that certain conditions are met. For example:

The conditions for adjourning a hearing are that the request is reasonable and no other participants will be unduly prejudiced by the adjournment.

The condition for limiting publication of personal information is that the person's privacy interest outweighs the public interest in access to the Tribunal's proceeding.

Information Sheets list the conditions and explain what information to include. They are available at [www.bchrt.bc.ca](http://www.bchrt.bc.ca) (by clicking on Get Help with the Tribunal Process) or by phoning or writing the Tribunal to request copies.

### List what you need to show for the Tribunal to grant the application:

See attached.

☒ I have attached more information in **numbered paragraphs** on extra page(s) marked **STEP 4**.

## STEP 5: PROVIDE DOCUMENTS TO SUPPORT YOUR APPLICATION

The Tribunal can only make a decision based on the information provided. It is up to you to provide the information you consider important to your application.

The Tribunal will accept information in any form. You may attach notes, statements or other documents.

Affidavits are usually preferable, especially if there is disagreement about important facts. An affidavit is a written statement made under oath or affirmation before a commissioner of oaths such as a lawyer or notary. It also may have documents attached to it called "exhibits."

### List the documents you are attaching to this application:

1.	
2.	
3.	
4.	
5.	

☐ I have attached more information in **numbered paragraphs** on extra page(s) marked **STEP 5**.

## STEP 6: EXPLAIN WHY THE TRIBUNAL SHOULD GRANT THE APPLICATION

You must convince the Tribunal that it should make the decision you want (grant your application). Explain:

1. the facts (circumstances) that support your request
2. how your documents support your facts
3. how your facts meet the conditions for granting the application in **STEP 4**

### **Example: Request to Adjourn a Hearing**

**FACTS:** Yesterday, I was diagnosed with the flu. The hearing begins next Monday. I am too sick to prepare for the hearing and my doctor says I will not recover for two weeks.

**DOCUMENTS:** I have attached my doctor's note. It confirms I have the flu and my doctor's statement that I will not recover for two weeks.

**CONDITIONS FOR GRANTING APPLICATION MET:** My request is reasonable. I just found out I have the flu. I will not be able to prepare for the hearing and will be too sick to attend the hearing if the hearing is not adjourned. The other party will not be unduly prejudiced. This is the first time I have asked for the hearing to be adjourned. I only need the hearing delayed until I am recovered. This will only be a short delay.

### **Explain why the Tribunal should grant the application:**

See attached.



I have attached more information in **numbered paragraphs** on extra page(s) marked **STEP 6**.

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## STEP 7: COMPLETE THE APPLICATION FORM

Check the following boxes:

- ☒ I have attached more information in **numbered paragraphs** on extra page(s). Total number of extra pages: \_\_\_\_\_
- ☒ I am sending a copy of this form and attachments to the other participants (unless this is an application to intervene in a complaint).
- ☒ I confirm that the information in this form is true and accurate to the best of my knowledge and belief.
- ☒ I am keeping a copy of this form and attachments.
- ☐ I have attached a Form 3 Amendment (if applying to amend) or the Submission (if applying to file a further submission).
- ☒ For new participants only, I attach my contact information.  
Your postal address for delivery will be given to the other participants. The Tribunal will also give the participants your telephone, facsimile and cellular numbers, and email address, unless you tell it not to.
- ☒ For applications that affect a non-party (e.g. to add a respondent, to obtain documents from a third party), I have attached contact information for that person.

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## STEP 8: FILE THE APPLICATION FORM

File the application form and attached information and documents with the Tribunal by mail, fax, hand, courier, process server or email (with additional pages and documents together with ONE scanned PDF format document).

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### PRIVACY NOTICE

The personal information in this form may be disclosed to members of the public. This is because the Tribunal's process is public:

- The Tribunal publishes most decisions on its website
- The Tribunal publishes a hearing schedule (list of upcoming hearings) with the parties' names and the area and ground of a complaint
- After a complaint is on the hearing schedule, the public has access to information, including the complaint and response forms (except contact information)
- Hearings are open to the public.

You can ask the Tribunal to limit the information it makes public. However, the Tribunal will only do so if it decides that your privacy interests outweigh the public interest in access to the Tribunal's proceedings.

**IN THE MATTER OF THE *HUMAN RIGHTS CODE*  
R.S.B.C. 1996, c. 210 (as amended)**

**AND IN THE MATTER of a complaint before the  
British Columbia Human Rights Tribunal**

**BETWEEN:**

GLYNNIS KIRCHMEIER – and – GLYNNIS KIRMEIER obo OTHERS

**COMPLAINANTS**

**AND:**

UNIVERSITY OF BRITISH COLUMBIA

**RESPONDENT**

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**APPLICATION OF COMPLAINANT  
For disclosure from Paula Butler (a third party), STEP 7**

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**Contact information for Paula Butler:**

Suite 200-100 Park Royal  
West Vancouver, BC V7T 1A2  
Tel: 604 782 0373  
Email: pbutler@butlerworkplacesolutions.com

**Contact information for the Complainant:**

Clea Parfitt  
407-825 Granville Street  
Vancouver, BC V6Z 1K9  
Tel: 604 689 7778  
Email: cparfitt@axion.net

**IN THE MATTER OF THE *HUMAN RIGHTS CODE*  
R.S.B.C. 1996, c. 210 (as amended)**

**AND IN THE MATTER of a complaint before the  
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BETWEEN:

**GLYNNIS KIRCHMEIER – and – GLYNNIS KIRMEIER obo OTHERS**

COMPLAINANTS

AND:

**UNIVERSITY OF BRITISH COLUMBIA**

RESPONDENT

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**APPLICATION OF COMPLAINANT  
For Document Disclosure from Paula Butler (a Third Party)**

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**I. Relief sought**

1. This is an application for an order for disclosure of documents from a third party, Paula Butler, who was commissioned by the Respondent as an independent expert to investigate the University's response to concerns and reports that a number of female students had raised to the Respondent about the conduct of UBC graduate student Dmitry Mordvinov (DM).

**II. Materials relied upon**

2. Attached to this application are several documents attached as exhibits to the affidavit of Jennifer Cocke of June 5, 2019. Neither the full affidavit of Cocke nor the Respondent's application to dismiss and attached affidavits have been provided to the Third Party, Paula Butler.

**III. Facts**

3. Part of the complaint alleges that UBC breached the *Human Rights Code* when it failed to respond in an appropriate and timely manner to notifications it received about the behavior of DM.

4. In December 2015, following the release of a documentary prepared by CBC's program *"Fifth Estate"*, the Respondent hired Ms. Butler to review its handling of issues related to Dmitry Mordvinov. In a campus-wide broadcast email of December 16, 2015, Sara-Jane Finlay of the Equity Office stated that Ms. Butler was retained "as an independent reviewer to conduct a review of UBC's response to concerns of sexual harassment and sexual assault raised by some UBC students about a fellow student, which became the subject of media coverage".

5. The Respondents announced that Ms. Butler would be preparing a report to be presented to the President of UBC.

6. In at least December 2015 and January 2016, Ms. Butler interviewed a number of the individuals involved or implicated in this Complaint. Ms. Kirchmeier co-operated extensively with Ms. Butler's review. Ms. Butler also reviewed an unknown number of documents and materials from multiple sources.

7. In February 2016, the Respondent presented an Executive Summary of the Butler Report to the public.

8. At an unknown date, Ms. Butler is understood to have presented her full report to the President of UBC (the "Butler Report").

9. In these proceedings, the Respondent has provided no information or documents about the details of Ms. Butler's hiring, her investigation or her report other than as set out above. The Complainant understands that the University claims privilege over the Butler Report and the documents relating to it.

10. The Respondent seeks to rely on the fact of Ms. Butler's investigation and the conclusions in the Butler Report to support its application to dismiss this complaint.

11. In January 2018 the Complainant contacted Ms. Butler to obtain information about her retainer and report. Ms. Butler advised that she was unable to answer the Complainant's questions, and that all information requests should be directed to the University. For this reason, the Complainant has not contacted Ms. Butler to obtain copies of the documents requested. We assume that the terms of Ms. Butler's contract with UBC are such that she will not be able to disclose the documents the Complainant is seeking without an order from the Tribunal.

#### **IV. Application for disclosure of documents**

12. The Complainant makes an application, pursuant to s. 34(3)(b) of the *Administrative Tribunals Act*, for disclosure from Paula Butler of all documents related to her hiring by UBC to investigate and report, the investigation she conducted,

and the report she repaired, including the complete Butler Report itself. The Complainant seeks all documents of any kind in the possession or control of Ms. Butler related to the preparation of the Butler Report or otherwise related to the subject matter of this complaint.

13. The Tribunal recently summarized its test for ordering third-party disclosure:

The test for disclosure is the same whether it is sought from a party or a non-party to the dispute: whether the document is relevant or arguably relevant to a fact in issue in the complaint: *Metcalfe v. International Union of Operating Engineers, Local 882 and others* (No. 7), 2005 BCHRT 165 (CanLII) at paras. 8-11; *Preik v. Finning Canada*, 2017 BCHRT 47 (CanLII) at para. 27. The threshold is a low one, but the Tribunal's process should not be used as a fishing expedition: *Gichuru v. The Law Society of British Columbia* (No. 5), 2010 BCHRT 137 (CanLII) at para. 11. Disclosure should, like all aspects of the Tribunal's process, serve the goals of efficiency and fairness in the administration of justice.

*Employee v. Overwaitea Food Group* (No. 2), 2018 BCHRT 84 at para. 10.

14. The documents requested are relevant to the dispute. UBC hired Ms. Butler to investigate some of the key factual situations at issue in this dispute. The disclosure of these documents is required to understand the circumstances and terms under which the Respondent hired Ms. Butler, the information Ms. Butler relied on in producing the Butler Report, and the details of the Butler Report conclusions that the Respondent is currently seeking to rely on without the production of the report itself or its underlying materials.

15. The documents are not privileged.

16. Privilege does not attach to a document simply because it is prepared by a lawyer (*R v. Campbell*, [1999] 1 SCR 565 at pp. 668-669). The University has repeatedly, consistently and publicly stated that the Butler Report was obtained to review how the University handled the complaints against DM. The Complainant is not aware of any instance where the University has suggested that the Butler Report was commissioned to provide the University with legal advice.

17. In her interactions with interviewees, Ms. Butler said she had been "hired by UBC to conduct a review into UBC's response to sexual harassment and sexual assault concerns brought forward by some UBC students" (Email Butler to Glynnis Kirchmeier, December 30, 2015, Cocke Affidavit, Exhibit "P"). Ms. Butler did not in any way suggest that she was engaged to provide legal advice to UBC. As the report was not obtained as legal advice, solicitor client privilege does not apply to it.

18. The University itself repeatedly described Ms. Butler as an "independent expert" rather than as a lawyer, and used the Butler Report to respond to the criticisms against it in the *Fifth Estate* documentary (e.g. Simona Chiose: "UBC to

probe its response to sexual-harassment, assault complaints", *Globe and Mail*, December 16, 2015 (Cocke Affidavit, Exhibit "O"); Piper and Finlay, "Statement re: Release of the Paula Butler Review Executive Summary", February 15, 2016, Cocke Affidavit, Exhibit "R"). In this statement, the University president relied upon the Butler Report to claim that the CBC documentary was misleading. The position that Ms. Butler was an independent expert is inconsistent with the claim now that she was providing legal advice to the University. Counsel providing legal advice to a party cannot be independent of their client.

19. Further, at the time, the University stated that the full Butler Report would not be released in order to protect the complainants. In an email to Ms. Kirchmeier dated January 24, 2016, Ms. Butler stated that UBC had informed her that it would not be releasing the final report due to "privacy issues." (Cocke Affidavit, Exhibit "Q"). In a *Globe and Mail* article dated December 16, 2015, UBC is quoted as saying that the full Butler Report will not be released "to protect the women" (Cocke Affidavit, Exhibit "O"). There was no suggestion by UBC at the time that the report contained legal advice and therefore would not be released for that reason.

20. If there remains a question about the purpose for which the Butler Report was obtained, the terms the University established for Ms. Butler's services should be disclosed to the Complainant and the Tribunal for review.

21. Even if some form of privilege did apply to the Butler Report when it was commissioned, the University has waived its privilege in this document by publicly relying on its alleged outcomes, both here and in the public domain: *R v. Campbell*.

22. Halsbury's Laws of Canada clarifies that there is an express waiver of privilege where a party testifies about the content of a privileged communication (Halsbury's Laws of Canada (online), *Evidence*, "Privilege and Related Grounds of Exclusion, Solicitor-client Privilege, Waiver and Loss of Solicitor-client Privilege" (VII.2(3)) at HEV-183 "Express waiver" (2014 Reissue)).

23. *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471 states that an implied waiver of privilege can be found where "a party voluntarily [makes] its own understanding of the law, or its reliance on legal advice it received, a material issue" and that "a party may make a deliberate partial disclosure of a privileged communication and fairness and consistency will compel waiver of the entire communication" (at para. 28).

24. The University relies on the Butler Report in its application to dismiss, stating that the Butler Report concluded that the University was compliant with its own policies and that all staff acted in good faith (ATD, para. 25). In its ATD the University also notes that Butler's review "pointed to a need for clear direction and a more centralized, coordinated approach for students bringing forward complaints of sexual assault" (ATD, para. 26). The University further suggests that because Ms. Butler has already reviewed the University's response to the reports about DM, it would not further the purposes of the Code to proceed with this Complaint (ATD, para. 159, 160). Para. 160 says:

"As set out in the Affidavit of Sara-Jane Finlay, commencing in 2015, the Respondent undertook a comprehensive review of its policies and processes for dealing with claims of sexual harassment and assault. It retained an expert, Paula Butler, to review what occurred in the case of DM. It publicly released the executive summary of her report."

25. The affidavit of Sara-Jane Finlay claims that the Butler Report clears the University of any breach of their policies. The affidavit is a form of testimony about the content and effect of the Butler Report, and therefore acts as a form of waiver of any privilege attaching to that report.

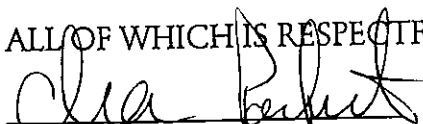
26. The University has widely circulated the Executive Summary of the Butler Report. It also refers to the Butler Report to claim that it has learned from its past errors. In an interview with the *Ubyyssey* on February 15, 2016, Ms. Finlay stated that the Butler Report was "illuminating" and "extremely helpful" for the organization, and something it will rely on as it develops its new sexual assault and harassment policy (Cocke Affidavit, Exhibit "S").

27. For the above reasons, we submit that the Butler Report is not subject to privilege. In the alternative, we submit that the University has waived any privilege it may have had in the Butler Report.

28. We therefore submit that all documents regarding the Butler report should be ordered produced by Ms. Butler, including but not limited to:

- a. The full, unredacted final report.
- b. The University's terms of reference for Butler's investigation.
- c. The full list of persons interviewed by Butler, and the records or notes of her interviews with them.
- d. Butler's communications with any person, including persons who refused to be interviewed.
- e. All evidence and information provided to Ms. Butler by any person or reviewed by her.
- f. Any drafts of the Reports provided by Ms. Butler to the University, together with any commentary on those drafts by the University to Ms. Butler.
- h. All communications between Ms. Butler and the University.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of June, 2019.

  
Clea Parfitt, Counsel for Complainant