

August 9, 2019

File No. 3540-005

VIA EMAIL

BC Human Rights Tribunal
1170 - 605 Robson Street
Vancouver, BC V6B 5J3

Attention: Daniel Varnals, Case Manager

Dear Sirs and Mesdames:

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

1. We write in response to the Complainant's application for document disclosure.
2. The Respondent consents to the disclosure of certain requested documents, to the extent that they exist within the Respondent's possession or control, and opposes the disclosure of other documents, as set out below.

A. Principles of Document Disclosure

3. In *Smith v. Provincial Health Services Authority*, 2015 BCHRT 112, the Tribunal set out the following principles with respect to document disclosure (at paragraphs 52-53):

The *Rules* provide for document disclosure to enable both parties to know the case they must meet and to provide them with access to evidence that is arguably relevant to the complaint, the response and the remedy sought. Rule 20(2) reads:

(2) Each party must deliver to any other party:

- (a) a list of all documents in their possession or control that may be relevant to the complaint, response to the complaint, or remedy sought, and, if privilege is claimed over any document, the party must describe the nature of the document and the reason for claiming privilege; and
- (b) a copy of each document contained on the list, excluding documents for which privilege is claimed.

The purpose of the *Rules* is to facilitate the just and timely resolution of complaints filed with the Tribunal under the *Human Rights Code*: Rule 1(1). Thus, proportionality is integral to Tribunal orders for disclosure. The *Rules* do not permit fishing expeditions.

Some documents can be logically connected to a complaint or response but be unnecessary to a just and timely resolution of the complaint. Document disclosure should aid the efficient exchange of documents between parties and hopefully an efficient resolution of the complaint through settlement, dismissal or hearing processes when parties can see whether the documentation corroborates or undermines their case.

4. Although the language of Rule 20 has changed slightly since the *Smith* decision, it remains the same in substance, and Rule 1(1) remains unchanged.
5. This is not a case where the Respondent has refused to provide disclosure; as acknowledged by the Complainant, the Respondent recognizes its obligation to disclose relevant documents and has to date provided approximately 5,000 pages of documents.
6. The Respondent submits that while it may be appropriate to order the disclosure of some further documents, to which the Respondent consents as set out below, the majority of the documents sought by the Complainant are unnecessary to the just and timely resolution of the Complaint, to the extent that they may be relevant at all. The Respondent submits that the majority of the Complainant's application for disclosure should be dismissed.

B. Redactions from Documents

7. This is not a matter in which the Complainant seeks disclosure of her own documents and personal information. The Complainant seeks the disclosure of documents related to other individuals, who may or may not be known to her. Further, the information that she seeks is highly personal, disclosing third party allegations of sexual misconduct.
8. That information was disclosed to the Respondent by those individuals for the purpose of making complaints or seeking help or support from the Respondent. There was no basis for those individuals, at a particularly vulnerable point in their lives, to believe that their personal information would be disclosed many years later to a stranger. The respondents to those complaints, who may not even be aware that complaints were made against them, similarly would have no expectation that stranger would ever learn of the allegations made against them.
9. While the Complainant was approved as a class representative and all known potential class members were contacted pursuant to the Tribunal's order and provided with an opportunity to opt out, the Respondent has no knowledge as to how many of those class members took any steps to contact the Complainant and identify themselves to her. The identities of many class members may remain unknown to the Complainant, by the choice of those class members.
10. In the Complainant's communication provided to class members through the Respondent, members of the class were given no indication that a failure to opt out

would result in their identities and records related to their allegations of sexual misconduct being disclosed to the Complainant.

11. A copy of the Complainant's initial communication to class members is enclosed.
12. That correspondence says that the purpose of the communication is to provide class members with the option of providing the Complainant their names and contact information and tells class members that they do not need to actively participate in the Complaint. The Complainant further stated specifically that she would only have the direct contact information of those people who advised her directly that she could be in touch with them.
13. The order that the Complainant seeks now for documents that would disclose class members' identities to the Complainant is in express contradiction to her communication to class members.
14. Those women who reported sexual misconduct to the Respondent have a right to maintain the privacy of their most sensitive personal information unless they knowingly choose to disclose that information.
15. The Respondent submits that unless individuals have identified themselves to the Complainant and have been made aware that their personal information, including records related to their complaints of sexual misconduct, will be disclosed to the Complainant, the Tribunal should not order the disclosure of third party identities.
16. Similarly, the Respondent submits that the Tribunal should not order the disclosure of the identities of respondents or those named in complaints as respondents or witnesses as doing so would allow the Complainant to discover the identities of third parties who made allegations of sexual misconduct.

C. Requests to which the Respondent Consents

17. After reviewing the Complainant's application, the Respondent consents to certain of the document requests made by the Complainant, subject to the limitations set out above regarding the redaction of the names and identifying information of third parties who were involved in complaints of sexual misconduct.
18. The Respondent consents to the provision of a revised list of documents that includes any documents exhibited to affidavits and a list of any privileged documents. The Respondent also agrees to remove all redactions from the previously disclosed documents, other than the names and identifying details of third parties who were involved in complaints of sexual misconduct.
19. Subject to that same limitation, the Respondent also agrees to disclose the report of Paula Butler and materials and correspondence related to her report.

20. Further, we have once again canvassed the UBC faculty and staff named in the Complainant's application for relevant documents. The Respondent will list and disclose any relevant documents received from those individuals.

D. Requests Opposed by the Respondent

21. The Respondent says that it has, and will continue to meet its obligation to provide relevant documents.
22. The Complainant's application for disclosure is overbroad and disproportionate, particularly in light of the thousands of pages of documents already disclosed by the Respondent. The Respondent submits that other than those documents set out above, the balance of the Complainant's application should be dismissed.
23. Many of the documents and classes of documents sought by the Complainant are outside of the scope of the Complaint that was established by the Tribunal in a series of decisions and directions.
24. In *Kirchmeier obo others v. University of British Columbia*, 2017 BCHRT 86, the Tribunal found that the Complaint alleged contraventions of the Code between January 8, 2014 and November 16, 2015.
25. In *Kirchmeier and others v. University of British Columbia (No. 2)*, 2017 BCHRT 186, the Complainant was directed to amend her proposed classes. The general class was, consistent with the Tribunal's first decision, restricted to allegations of sexual misconduct between January 8, 2014 and November 16, 2015.
26. In her requests and application for document disclosure, however, the Complainant has once again sought to broaden the scope of the Complaint, seeking a number of documents that are outside the temporal scope established by the Tribunal, including:
- (a) The request at paragraph 81 for documents related to an alleged "peeping tom" in 2012/2013;
 - (b) The request at paragraph 82 for documents related to Green College parties in 2011-2014; and
 - (c) The request at paragraph 85 for documents related to meetings allegedly held in the summer of 2013 at Green College.
27. Documents relating to alleged incidents that are outside of the temporal scope of the Complaint are not relevant and their production should not be ordered.
28. The Complainant also makes a number of requests that are plainly the kind of "fishing expeditions" that the Tribunal has stated are not permitted.

29. On a number of occasions in her application, the Complainant states that she should be able to “explore” the extent to which certain documents or classes of documents “might” have related to Mr. Mordvinov.
30. The Rules do not contemplate disclosure for the purposes of “exploration”. As set out in *Smith*, the Rules require the production of relevant documents, as is proportionate. The Respondent submits that the Complainant’s requests for documents for the purpose of exploring their potential relevance should be dismissed.
31. The Complainant further makes requests for documents that have no relevance to the issues in the Complaint, such as Mr. Mordvinov’s employment and funding records (at paragraphs 73-75).
32. The Complaint is about the Respondent’s policies and processes for responding to the allegations about Mr. Mordvinov’s conduct and other allegations of sexual misconduct. Mr. Mordvinov’s 2013 employment as a teaching assistant and his graduate funding are irrelevant to those issues, and the documents related to them should not be ordered disclosed.
33. The Complainant’s request for internal correspondence regarding Paul Krause (at paragraph 114) is similarly irrelevant and should be dismissed.
34. The fact that Mr. Krause may have been an “ally” of women raising issues about Mr. Mordvinov does not make all of the Respondent’s correspondence about Mr. Krause relevant to the issues in this Complaint. The Complainant has failed to identify any basis on which any documents related to Mr. Krause may be relevant to the issues in this Complaint.
35. With respect to a number of requests, the Complainant similarly fails to identify any basis for her claim that the documents are relevant, such as correspondence with or to Attorney General Eby (at paragraph 147), documents related to the hiring of Sally Campbell (at paragraph 150), correspondence from the public relating to “School of Secrets” (at paragraph 151), and documents related to the contract with Peak Resilience counselling (at paragraph 152).
36. The Respondent submits these documents are not relevant and their disclosure would not be proportionate to the issues in this Complaint. The Tribunal should dismiss the Complainant’s application in respect of these documents.
37. The Complainant’s application also includes a number of requests for documents that are not in UBC’s possession or control, including:
 - (a) Documents related to a Green Lantern program created by students in 2013 at Green College (paragraph 80);
 - (b) Documents related to the publication of GUTS Magazine (paragraphs 83-84); and

- (c) Documents created by or in the possession of individuals who are no longer employed by the Respondent, including Presidents Arvind Gupta and Martha Piper, Louise Cowin, and Monica Kay.
- 38. The Rules require parties to produce documents within their possession or control. If the Complainant seeks documents from individuals who are no longer employees of the Respondent such that their documents are not in the Respondent's possession or control, it is open to the Complainant to file an application for third party disclosure, as she did in respect of Ms. Butler's file.
- 39. The Respondent submits that the majority of the Complainant's application for disclosure should be dismissed. The Respondent has provided, and will continue to provide, disclosure of relevant documents in a proportionate manner as required by the Rules. The Complainant is not entitled to use the document disclosure process to expand the scope of her Complaint, obtain irrelevant documents, or go on a "fishing expedition" to "explore" potential relevance.
- 40. For the reasons set out herein, the Respondent submits that the only portion of the Complainant's application for disclosure that should be granted is that portion identified in Section C above.

Application for Costs

- 41. Along with her application for disclosure, the Complainant also makes an application for costs in the amount of \$10,000 under section 37(4) of the *Code*.
- 42. The bases for the Complainant's application for costs appear to be as follows:
 - (a) That unredacted documents have not yet been provided;
 - (b) That the Complainant incurred costs to travel to Vancouver to review documents;
 - (c) That the Complainant and her counsel were required to review documents to prepare the application for disclosure; and
 - (d) The Respondent has greater financial resources than the Complainant.
- 43. The Respondent submits that there is no legal or factual basis for the Complainant's application for costs and her application for an award of \$10,000 is, in any event, plainly excessive.
- 44. As set out above, the Respondent continues to maintain its objection to the provision of unredacted documents.
- 45. The Complainant has been well aware of the Respondent's consistent position on the issue of disclosing the identities of third parties who made allegations of sexual misconduct since long prior to this application. Indeed, the Respondent identified that

issue in its submissions to the Tribunal with respect to the appropriate class and class communication.

46. While the Complainant complains about the length of this process, it was open to the Complainant to make this application at an earlier date. She did not do so.
47. Further, there have been long delays at many stages of this Complaint at the hands of the Complainant, with many extensions granted to the Complainant. While the Complainant seeks to paint the Respondent's response on the issue of documents as untimely, it plainly is not in the scheme of this Complaint.
48. The Respondent also notes that the Complainant's demand for documents has changed. The documents sought by her in this application are different from those sought by her in May 2018. There has been no refusal to provide certain documents since May 2018, as many of the documents she now requests were not sought at that time. It cannot be improper for the Respondent to have failed to disclose documents not previously requested or identified by her.
49. The fact that the Complainant may have incurred costs to travel to Vancouver is irrelevant to her entitlement to costs. The Complainant filed her Complaint in this jurisdiction. Her personal choice to live elsewhere does not provide a basis for awarding costs for improper conduct.
50. The Complainant also complains that she was required to review documents to prepare this application for disclosure and will be required to review them again. Reviewing documents is part of prosecuting the litigation she has chosen to pursue.
51. This complaint is particularly ironic in the face of the Complainant's application for yet more documents. As set out above and as acknowledged by the Complainant, the Respondent has provided disclosure of 5,000 pages of documents, which the Complainant alleges is insufficient. It is because of the extent of the Respondent's disclosure to date, however, that the Complainant complains about the cost of reviewing those documents.
52. It is the Complainant that determined the scope of her Complaint. She cannot simultaneously complain about the extent of documents she is required to review and seek further documents.
53. Finally, the greater financial resources of the Respondent are irrelevant to the Complainant's entitlement to costs. As she notes, costs at the Tribunal are intended to have a punitive effect. The Respondent's status as an educational institution with an annual budget is not a fact worthy of condemnation such that costs are appropriate.
54. The Respondent has not engaged in any improper conduct that would warrant an award of costs. The Respondent has not refused to provide document disclosure or failed to comply with any orders of the Tribunal; it has provided significant document disclosure and the parties now have a legitimate dispute over the extent to which

further disclosure may be appropriate. It is not improper conduct for the Respondent to wait to have the Tribunal adjudicate that dispute in response to the Complainant's present application.

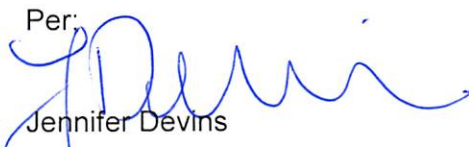
55. In the alternative, if the Tribunal is to award costs, which the Respondent says would be unwarranted, the amount sought by the Complainant is excessive.
56. As acknowledged by the Complainant, where the Tribunal has awarded costs for a "consistent failure to disclose documents" (which is not the case here), those awards have been "fairly low". None of those awards, even where there has been a consistent failure to disclose documents, approach the \$10,000 amount sought by the Complainant here.
57. In the circumstances, however, the Tribunal should deny the Complainant's application for costs as there has not been a consistent failure to disclose documents nor any other improper conduct that could support such an award.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Yours very truly,

Roper Greyell LLP

Per:



Jennifer Devins

JRD:JD

Encl.

cc. Clients

Clea Parfitt

Dear Recipient:

You are receiving this email as part of the litigation *Glynnis Kirchmeier - and - Glynnis Kirchmeier obo others v. University of British Columbia*, BC Human Rights Tribunal File No. 14965.

On 21 March 2016, I filed a Human Rights Complaint against the University of British Columbia ("UBC") both as an individual person and as a representative of a class of people. The complaint relates to UBC's alleged systemic failures to respond appropriately to disclosures of alleged sexual misconduct by one graduate student in the History Department, who also resided at Green College on campus, Dmitry Mordvinov ("DM").

The Tribunal has required UBC to send this email to potential members of the classes. You are receiving this email from UBC because you may be a member of one of the classes of people covered by the complaint. The purpose of this email is to introduce the complaint to you, and to give you the option of providing me your name and contact information so that I can continue providing information to you directly about the complaint.

I. BRIEF SUMMARY OF EVENTS PRIOR TO THE COMPLAINT

I was a graduate student in the History Department from 2011 to 2013. I observed DM touch a female graduate student on several occasions in 2011 in a manner that I believed to be non-consensual, which I communicated to UBC in January 2014 immediately after I learned he had allegedly physically assaulted another female graduate student until she slapped him. I unsuccessfully sought to have UBC include my observations of DM's conduct in its disciplinary process against DM.

My human rights complaint alleges the first disclosure about DM was transmitted to UBC in January 2011, with fairly regular reports from multiple victims and/or witnesses until DM physically left Canada in the course of his studies. He was expelled by UBC in November 2015. His alleged actions include sexual harassment of colleagues, inappropriate and/or sexual touching, violence leading to injuries, attempted sexual assault, and sexual assault against several female UBC students in the History Department and Green College.

DM is not a party to the complaint. The complaint is not about DM's conduct, but rather UBC's response to disclosures about his conduct. I allege UBC's handling of the disclosures regarding DM is systemic discrimination by UBC against female students based on their sex.

II. COPY OF THE COMPLAINT

The Amended Complaint can be found here: <https://kirchmeiervubc.com/>. The

names of the alleged victims have been redacted in the filing and submissions, except for Caitlin Cunningham, who has chosen to use her name publicly.

III. A DEFINITION OF THE ROLE OF MEMBERS OF THE CLASS - or, what does this have to do with you?

The Amended Complaint has two classes of people I represent for the purposes of this litigation. Members of the classes need not actively participate in the case. Members of the classes may also opt out of participation in the complaint if they wish. An opt out form is included in these materials.

Ultimately it is my obligation to act in the best interests of the members of both classes and to represent those who do not choose to opt out of the complaint. I will bear all legal and financial costs of the litigation.

The first class the Tribunal has called the "Mordvinov Class." The definition is:

"Any female student who at least once reported, disclosed or communicated to a faculty member or administrative staff member of UBC by any means, including telephone, fax, e-mail or in person in a formal, informal, scheduled or unscheduled interaction, a concern about the sexual misconduct of Dmitry Mordvinov towards women."

The above definition does not require that you have been a victim of the alleged misconduct by DM. I myself was not.

The second class is called the "General Class." The definition is:

"Any female student of UBC who at least once reported, disclosed or communicated to a faculty member or administrative staff member of UBC by any means, including telephone, fax, e-mail or in person in a formal, informal, scheduled or unscheduled interaction, a concern about sexual misconduct between January 8, 2014 and November 16, 2015 by a male student studying or employed at UBC towards a female student enrolled at UBC."

IV. MY GOALS FOR THE COMPLAINT

I filed this human rights complaint because I believe UBC should act to protect the safety of students, especially vulnerable students. I filed this complaint because I believe, and I am prepared to prove, that UBC's actions with respect to DM arise from UBC's policies and practices and were not simply accidental - that is, that what I say is UBC's failure to act effectively to protect vulnerable students was not a series of unfortunate events, but rather a systemic failure. In this case, the adverse impact of DM's actions was borne by female students, and I allege UBC privileged DM's interests over those of female students, including me. I filed the complaint because I want the educational services UBC provides to be safe,

harassment-free and discrimination-free.

The remedies I am seeking through this complaint are set out in the complaint itself.

V. PROGRESS OF THE CASE SINCE IT WAS FILED

After filing my complaint in March 2016, UBC and I agreed to an early mediation to attempt to resolve the matter. This took place 24 October 2016 and we did not reach agreement. Neither party is permitted to disclose any of the discussions that took place at that mediation.

Subsequently the Tribunal requested several rounds of submissions from the parties regarding a few different questions. Based on the first set of submissions, the Tribunal issued a decision dated 13 April 2017, which stated that I had filed in time (the BC Human Rights Code requires complaints to be filed within 6 months of the alleged contravention of the Human Rights Code, and there are several exceptions to this rule - see the decision for details). It also stated that the complaint had been accepted for filing with respect to the individual portion of the complaint - that is, for myself as an individual complainant. No decision was made by the Tribunal on the merits of my complaint.

The Tribunal then requested submissions with respect to the representative portion of the complaint, which is the part of the complaint where I filed on behalf of a group of other people. After UBC and I made these submissions, the Tribunal issued a decision dated 30 August 2017, which allowed me to proceed with the representative portion of the complaint, if I amended the definition of the groups I represented. The Tribunal ordered a communication plan with the members of the two classes. This email is the first step in the communication plan the Tribunal ordered.

The Tribunal agreed with UBC that UBC was not required to provide me with contact information for the members of the classes, and so this email is being sent by UBC to the members of the classes on my behalf.

As directed by the Tribunal, I filed amendments to the complaint on 7 September 2017.

On 17 October 2017, UBC filed a response to the complaint.

The decisions of the Tribunal are publicly available by date here: <http://www.bchrt.bc.ca/law-library/decisions/index.htm>

VI. KEY COMMUNICATIONS WITH THE TRIBUNAL

The key communications with the Tribunal, including those described in Part V,

can be found here: <https://kirchmeiervubc.com/>.

VII. SUBMISSIONS TO DATE

All of the submissions in this matter can be found here: <https://kirchmeiervubc.com/>. The submissions posted on the website have been redacted to remove the names of current or former students, except for Caitlin Cunningham, as mentioned above.

VIII. THE COMMUNICATION PLAN

As a member of one of the representative classes, you have the right to know what is going on with the case and I have the obligation to communicate with you. The Tribunal has approved the following plan moving forward:

Who will do it? I will handle direct communications with each member of the classes that I have already met, or who sends me their communication details. You can send your communication details to: gjkirchmeier@gmail.com. You may call me at (206) 775-6012. Or you may write c/o my lawyer, Clea Parfitt, 407 – 825 Granville Street, Vancouver, BC V6Z 1K9, or by fax to (604) 689-5572.

How often? I will give case progress updates by email regularly, approximately once per month, or more frequently if there is more to report. At the end of the case I will send a closing report.

Who will see your name? For those class members I have not yet met and communicated with, I will only have the direct contact information of those people who advise me directly that I may be in touch with them. I will share your name with my lawyer but suppress your name and information in the communications I send out to the members of the class unless you request to be known to or to communicate with the group, in which case I will facilitate that. You should be aware that my emails are not privileged, and anyone may share them.

Can you opt out of communications or the case? Yes to both. You can choose not to receive any communications from me by not giving me your contact information or by telling me that you do not want communications from me. If you do this, you can still be a member of the representative class. You can also opt out of the representative class completely by completing the enclosed form and providing it to the Tribunal.

Do you have to respond or engage with the case or the communications? No. As your representative, I make legal decisions. I am required to act in your best interest, but I do not need your authorization to make specific choices. You are not required to engage with me, though I hope you will so I can better understand how to make the complaint as representative as possible. Any concerns you express will be taken seriously.

What if you don't like this plan? I will honour all communication requests, including no communication, less frequent communication, having my lawyer communicate with you, or by using another method such as by post. My door is always open and I am happy to hear from you, even if you had previously told me you did not want information.

IX. WHAT HAPPENS NEXT?

I am in the process of sending UBC all relevant and non-privileged documents in my possession or control.

Following my disclosure, UBC must provide me with all relevant and non-privileged documents in its possession or control. UBC may also choose to file an application to dismiss the complaint without a hearing by that date.

If you want me to be able to update you directly about the complaint, please send your name and communication details to me at: gjkirchmeier@gmail.com or (206) 775-6012. Or you may write to me c/o Clea Parfitt, 407 – 825 Granville Street, Vancouver, BC V6Z 1K9, or by fax to (604) 689-5572.

If you do not want to be a member of either class, please complete the enclosed form and send it to the Tribunal letting them know you want to be excluded from the class. Please do not send the opt out form to me or Ms. Parfitt.