Order F10-43

KWANTLEN POLYTECHNIC UNIVERSITY

Michael McEvoy, Adjudicator

December 17, 2010

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Summary: The applicant requested records connected with research proposals he made to the University's Research Ethics Board. The University argued the records contained the research information of a post-secondary employee and were outside of FIPPA's jurisdiction because of s. 3(1)(e). Even though the request for the records came from the employee himself, the adjudicator found, with the exception of two legal opinions, he had no authority over them because FIPPA did not apply. The records contained the research information of a post-secondary employee and were therefore excluded from FIPPA under s. 3(1)(e). The Ministry properly withheld the two legal opinions at issue under s. 14 of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 3(1)(b), (e) and s. 14.

Authorities Considered: B.C.: Order F10-42, [2010] B.C.I.P.C.D. No. 63; Order 00-36, [2000] B.C.I.P.C.D. No. 39. **Ont:** Ontario Order PO-2693, [2008] OIPC No. 133.

Cases Considered: *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC).

1.0 INTRODUCTION

[1] This Order arises from a request of March 28, 2009, under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") by Russel Ogden ("applicant"), an instructor at Kwantlen Polytechnic University ("University").[1] He asked for all of the University's Research Ethics Board ("REB") records

[1] It is the Office of the Information and Privacy Commissioner's usual practice not to disclose an applicant's identity. However, Russel Ogden specifically asks me to do so here and I have accommodated his wishes accordingly.

pertaining to two of his research ethics applications. This included three legal opinions the REB commissioned from its lawyer concerning his research.

[2] The University declined to disclose the responsive records on June 29, 2009, citing s. 3(1)(b) and s. 14 of FIPPA. On July 2, 2009, the applicant wrote to the Office of the Information and Privacy Commissioner ("OIPC") requesting a review of the University's decision. Just prior to the commencement of this inquiry, the University added s. 3(1)(e) as a further basis for refusing to disclose the withheld records.

[3] Mediation did not resolve the issues in dispute and an inquiry was held under Part 5 of FIPPA.

[4] The University received a similar request to the applicants from another of its instructor employees. I am issuing my decision in that case, Order F10-42,[2] concurrently. The issue and arguments in that case concerning s. 3(1)(e) closely parallel those here. I have therefore applied much of the same analysis and reasoning with respect to s. 3(1)(e) in each Order.

2.0 ISSUES

[5] The issues in this inquiry are whether:

1. The withheld records are excluded from the scope of FIPPA under s. 3(1)(b).

2. The withheld records are excluded from the scope of FIPPA under s. 3(1)(e).

3. The University was authorized to withhold some records under s. 14 of FIPPA.

[6] Section 57 of FIPPA, which sets out the burden of proof in inquiries, is silent regarding the issue of whether records are excluded from the scope of FIPPA under s. 3(1)(b) and (e) of FIPPA. Past orders state that in such cases it is in the interests of the parties to provide argument and evidence to support their positions. Section 57(1) of FIPPA provides that the Ministry must prove that the applicant has no right of access under s. 14.

3.0 DISCUSSION

[7] **3.1 Records in Issue**—The records relate to two applications the applicant made to the REB for approval of his research proposals. What I can say about the records, without disclosing their contents, is that, among other things, they describe the purpose of the applicant's research, the question or

[2] [2010] B.C.I.P.C.D. No. 63.

hypothesis he intends to test and the methodologies he intends to employ in conducting the research.

[8] **3.2 Background**—The parties described in considerable detail how, and in what context, an REB operates. All I need say here is that the University's REB vets any research proposal undertaken by a University employee involving human subjects. The applicant's research concerned assisted suicide. The University's Policy G.27 guides the REB's processes. The University described in detail how and why Policy G.27 is consistent with the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* ("TCPS") that primarily governs research involving human subjects at Canadian universities.[3] The applicant took issue with whether the University has properly implemented the TCPS. However, that issue and the parties' lengthy description of the TCPS do not ultimately bear on the outcome of this case and therefore it is not necessary that I describe those submissions in detail here.

[9] **3.3 Events Leading to the Applicant's Access Request**—The University said that the REB initially gave approval to the applicant's two research proposals.[4] However, in April 2007, the REB decided to revisit the approval of one of those decisions, largely as the result of receiving a legal opinion from the University that questioned the legality of the research.[5] The applicant submitted an amendment to the disputed proposal in December 2007 involving a change in the research procedure, though it is not clear from the submissions before me whether he did this because of the University's legal opinion. The REB in turn required the applicant to provide a rationale for the change.[6] The REB also asked for and received a further legal opinion from its own lawyer, separate from that of the University, in February 2008, concerning the applicant's research ("February 2008 opinion"). The applicant asked to see that opinion, but the REB declined. Subsequently the REB's legal counsel wrote two further legal opinions (the "June and July opinions") concerning the validity of the REB's decision to withhold the February 2008 opinion from the applicant. The February 2008 and the June and July opinions are records in dispute here while the University's legal opinion is not.

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[3] "Tri-Council" refers to three granting agencies that fund, in part, research at Canadian universities. These three are the Canadian Institutes of Health Research, the Social Sciences and Humanities Research Council and the Natural Sciences and Engineering Research Council. The three granting agencies are established by Parliament of Canada under the *Canadian Institutes of Health Research Act*, S.C. 2000 c. 6, *Natural Science and Engineering Research Council Act*, RSC, 1985, c. N-21 and *Social Sciences and Humanities Research Council Act*, RSC, 1985, c. S-12. Additionally, the Interagency Advisory Panel on Research Ethics (PRE) is a body of external experts established in November 2001 by the three granting agencies, referred to in footnote 3, to support the development and evolution of the TCPS and to advise the granting agencies on the implementation, interpretation and educational needs of the TCPS; University initial submission, para. 5.

[4] University's initial submission, para. 24. Neither party identified a date on which this occurred nor do they describe what the proposals entailed.

[5] University's initial submission, para. 24.

[6] University's initial submission, para. 26.

[10] A meeting between the REB and the applicant in August 2008, to discuss the applicant's research modifications, ended after the applicant said he had already concluded his research and felt no need to answer the REB's queries. At about the same time, the applicant complained to the University's Associate Vice-President of Research about the REB's decision to refuse him access to the February 2008 opinion.

[11] Following these events, the applicant asked the University, under FIPPA, for the records connected with his two research applications.

[12] **3.4 Does Section 3(1)(e) Apply to the Records?**—The University argues that s. 3(1)(e) extends to all the records in dispute. For some of the records, the University adds s. 3(1)(b) and s. 14 as a further basis for withholding them. The University's s. 3(1)(e) claim is the most expansive and therefore I will deal with it first.

[13] Section 3(1)(e) reads as follows:

> 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following: …
>
> (e) a record containing teaching materials or research information of employees of a post-secondary educational body; …

The University's initial argument

[14] The University likens this case to Ontario Order PO-2693.[7] In that case Senior Adjudicator Higgins considered a similar provision to s. 3(1)(e) of FIPPA in the *Ontario Freedom of Information and Protection of Privacy Act* ("Ontario Act").[8] In the course of doing so, he defined "research" to mean "a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research." He concluded that this interpretation is in keeping with a legislative intention to protect the academic freedom and competitiveness of educational institutions. Senior Adjudicator Higgins also concurred with the conclusion of Commissioner Loukidelis in Order 00-36 that FIPPA's s. 3(1)(e) is "intended to protect individual academic endeavour". Senior Adjudicator Higgins found that, notwithstanding the different wording in the Ontario and BC statutes, the approach to Ontario's provision should be the same. Ultimately, the Senior Adjudicator concluded the Ontario

[7] See Ontario Order PO-2693, [2008] OIPC No. 133.

[8] Section 65(8.1(a)) of the Act states that "This Act does not apply… to a record respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution;"

Act excluded the records at issue in that case. As the University notes, this included records connected to an REB application.[9]

[15] The University argues that novel research contains questions, techniques and procedures that represent valuable intellectual property to the researcher. The University says that:[10]

> The value of such novel information comes in an academic setting from the need to assert and verify priority when publishing or otherwise disseminating the research results or when commercializing the research results. In the former case, the first reporting of a novel methodology or result often brings substantial rewards to the innovator in terms of professional recognition and advancement; being second to report or confirm a result does not. In the latter case, patent, copyright and trademark legislation and regulations again bring rewards to the innovator and none to the second to report.

[16] The University argues that the disclosure of a research project at the proposal stage could severely jeopardize the interests of the researcher by giving others an opportunity to apply the novel approaches within it and achieve results prior to the applicant researcher.

[17] The University submits that in this case there can be:[11]

> no doubt that the requested records contain "research information" of an "employee of a post-secondary educational body" for section 3(1)(e) purposes. As former Commissioner Loukidelis found, and as buttressed by the Ontario *McMaster* decision, section 3(1)(e) of FIPPA is intended to protect the individual academic endeavour by protecting the academic freedom and competitiveness of educational institutions. Research proposals and information about such proposals as contained in REB records are thus exempt from FIPPA's application.

The applicant's initial argument and reply

[18] The applicant argues that the University misconstrues the meaning of s. 3(1)(e) when it states that the provision is intended to protect the individual academic endeavour "by protecting the academic freedom and competitiveness of educational institutions."[12] The applicant submits the intent of s. 3(1)(e) is only about individual academic endeavour and nothing about the academic freedom and competitiveness of educational institutions. To this end, he states "[t]here can be no doubt that the research information contained in the disputed records is my individual research information." He contends that, by denying him access to his own research information, the University is infringing his academic endeavour. He argues he is not a third party to his own research.[13]

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[9] University initial submission, para. 54.
[10] University initial submission, para. 57.
[11] University initial submission, para. 59.
[12] Applicant's reply submission, para. 93.
[13] Applicant's reply submission, para. 96.

[19] The applicant also submits that the University is acting with a "double standard regarding the research information contained in the disputed records" because it has "voluntarily" given the records to a number of third parties and at least discussed his research with others.

[20] The applicant's submission postulates that the withheld records also contain research the REB may have done about him. The applicant says "it is not clear how the [University] has been collecting information about me."[14] If it has, he argues, it has done so without his consent and this would violate the REB's own policy. The applicant says that, if he is "a participant in REB research, then the REB should release to me my personal information so that I may make a decision about continued participation in its study."[15]

University's reply

[21] The University replies the applicant's suggestion that the records in dispute concern the REB's research about the applicant is incorrect. The University states that the REB is not engaged in any research about the applicant.

[22] The University also says, if the applicant's argument were to succeed, it would mean his research would be available to the world at large—something he does not want. The University says this is because outside of ss. 3(1)(b),(e) and 14, the sections it invokes here, there are no other "obvious" FIPPA exceptions that would apply to prevent disclosure of the applicant's research to outside third parties.[16]

Analysis

[23] It is helpful in applying s. 3(1)(e) to first consider its purpose. Commissioner Loukidelis did this in Order 00-36. That case concerned an applicant who sought a copy of a research protocol for a publicly funded study of the possible human health effects of ærial spraying for European gypsy moth. Commissioner Loukidelis stated the following:[17]

> It should be said that s. 3(1)(e) will not apply simply because someone who happens to be employed by a post-secondary educational body is engaged, under contract or otherwise, to do research for or with a public body such as the CHR [Capital Health Region]. Section 3(1)(e) is intended to protect individual academic endeavour. It will protect the intellectual value in teaching materials or research information developed by an employee of a post-secondary educational body, for her professional

[14] Applicant's initial submission, para. 83.
[15] Applicant's initial submission, para. 83
[16] This type of information is not Mr. Ogden's "personal information" for s. 22 purposes.
[17] Order 00-36, [2000] B.C.I.P.C.D. No. 39.

> purposes, by protecting it from disclosure to those who might exploit it to her disadvantage.
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> I will give an example of information that would likely not be excluded from the Act under s. 3(1)(e). If an expert on water quality, who happens to be employed by a university, is retained by a local government to conduct water quality tests, the results of those tests will not be "research information of" that person. If the person is retained to develop new methods for water testing (or does so in the course of conducting tests for a public body) and has or retains no intellectual property in the methods she devises, the methods - assuming they truly qualify as "research information" within the meaning of s. 3(1)(e) - will not be research information "of" that person. They will, at best, be research information of the public body and thus will not be excluded from the Act by s. 3(1)(e).

[24] I concur with Commissioner Loukidelis that the rationale underlying s. 3(1)(e) is the protection of the intellectual value in research information developed by an employee of a post-secondary educational body. Placing this research outside FIPPA's ambit protects it from disclosure to third parties who may seek to exploit it for their own advantage and/or to the disadvantage of the researcher. There is no question that there are substantial rewards, as the University puts it, for employees of a post-secondary institution who are first to report a novel methodology or result. What s. 3(1)(e) does, in part, is preserve and enhance this incentive, thereby encouraging research that may benefit society as a whole.

[25] Having underlined the rationale for s. 3(1)(e), I must now determine whether the records in issue contain the research information of "an employee of a post-secondary educational body" thereby excluding them from FIPPA's reach.

[26] The parties agree the applicant is an employee of a post-secondary institution (the University). Both the University and the applicant also state that there can be "no doubt" that the disputed records contain the research information of the applicant. Indeed, the applicant requested records "about his research proposals," whether emails of REB members, communications with persons external to the University or the REB's legal counsel. As noted above, the applicant's research relates to assisted suicide, though I cannot describe it beyond this without disclosing the content of the records in issue. What I am able to say is that I have reviewed the records through the lens of the definition of research set out by Senior Adjudicator Higgins in Ontario Order PO-2693. In the result, I agree with the applicant and the University that, with the exception of the June and July opinions that I consider separately below, the disputed records contain the research information of the applicant.

[27] For example, the applicant's research information is contained in records of email threads between members of the REB and between the REB and the applicant. This includes details of the applicant's research proposal and issues of concern the REB identifies with respect to the applicant's proposed research methodology. The class of records containing the research information of the

applicant also includes the February 2008 opinion. The University provided me a sealed copy of it (along with the June and July opinions) in pursuance of the Office of the Information and Privacy Commissioner's Policies and Procedures governing solicitor-client privilege reviews. It did so on the stated understanding I "will only have to resort to reviewing those records if it is felt necessary for the purpose of verifying the privilege."[18] It is however not necessary that I view the February 2008 opinion. There is considerable detail and description about the content of the February 2008 opinion in the disputed records otherwise available to me. I thus have no difficulty concluding the sealed February 2008 record contains information about the applicant's research. It is evident that this record the University asserts is a legal opinion is also exclusively about the applicant's research.

[27] Although the applicant agrees the records in dispute contain his research information, he nonetheless asserts a right of access to them under FIPPA because it is his own research. As a general principle, individuals are entitled to access their own information. However, a person's potential access rights only have relevance if FIPPA itself applies to the records in the first place. Section 3 is determinative in this regard. It describes records over which the Commissioner has no authority, whether to make an order of disclosure or otherwise, because they are excluded from the scope of FIPPA. If disputed records meet certain criteria in s. 3 then FIPPA is ousted.

[28] As already noted, with the exception of the June and July opinions, I agree with the parties that all of the records at issue contain the research information of the applicant. For this reason I find that, with the exception of the June and July opinions, s. 3(1)(e) excludes the disputed records in this case, including the February 2008 opinion. This means they are outside of the scope of FIPPA and I have no authority over them in any respect. It does not matter that these records relate to the applicant's own research and that he is the employee in question.

[29] With respect to the June and July opinions, the University states those two records are legal opinions about whether the University properly withheld the February 2008 opinion. It does not follow from this that they also contain the applicant's research information. Based on the submissions and affidavit evidence, I cannot conclude the June and July opinions are excluded from FIPPA under s. 3(1)(e). However, I did not view the sealed June and July opinions to make a determinative ruling about s. 3(1)(e) because they were provided to me only for the purpose of possibly verifying the University's solicitor-client privilege claim. I will therefore consider below whether the June and July opinions meet the solicitor-client privilege test and whether I need to view those opinions in order to adjudicate that issue.

[18] The University added, "i.e., if the Adjudicator is not satisfied the Affidavit evidence is sufficient for this purpose."

[30] **3.5 Solicitor-Client Privilege—**Section 14 of FIPPA reads as follows:

> The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[31] Section 14 of FIPPA encompasses two kinds of privilege recognized at law: legal advice privilege and litigation privilege. The University argues that legal advice privilege applies to the June and July opinions.

[32] Decisions of this office have consistently applied the test for legal advice privilege at common law. Thackray J. (as he then was) put the test this way:[19]

> [T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
>
> 1. there must be a communication, whether oral or written;
> 2. the communication must be of a confidential character;
> 3. the communication must be between a client (or his agent) and a legal advisor; and
> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
>
> If these four conditions are satisfied then the communication (and papers relating to it) are privileged.

[33] The University submits the opinions at issue contain legal advice and are addressed to the REB Chair for the benefit of the REB and no one else. It asserts further that they contain confidential communications entailing the giving of legal advice between the lawyer and the client (the REB).

[34] The applicant, while not denying the disputed records are legal opinions, argues those opinions are about his research and he is therefore entitled to see them. He argues that disclosure of those opinions "would help him as a researcher."[20] He also submits it is the University's past practice to share legal opinions about his research. He cites two instances in 2007 and 2008 where the University provided him opinions "with a specific expectation" that he would take guidance from them.[21]

[35] The University acknowledges that an exception to privilege is client waiver. However, the University submits the evidence is clear the REB expressly declined to waive such privilege in relation to the records when requested to do so by the applicant.[22]

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[19] *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC).
[20] Applicant's reply submission, para. 99.
[21] Applicant's reply submission, para.100.
[22] University's initial submission, para. 65.

Findings

[36] I have no need to examine the sealed records the University provided me. The University describes the June and July opinions in sufficient detail to allow me, without difficulty, to conclude they meet the above test for legal advice privilege. The opinion letters consisted of confidential legal advice to the REB to assist it with determining whether they should disclose the February 2008 opinion requested by the applicant. Indeed, as noted above, the applicant does not dispute their status as legal opinions. It is also clear that, whatever actions the University may have taken with regard to past legal opinions, it expressly refused to waive any privilege in respect of the particular records in dispute here.

[37] For the reasons given, I find the University properly applied solicitor-client privilege to the June and July opinions.

[38] Given the conclusions I have reached concerning s. 3(1)(e) and s. 14, it is not necessary that I deal with the University's argument concerning the application of s. 3(1)(b) to the records in this case.

4.0 CONCLUSION

[39] For all of the reasons given above, I find the following:

1. Having confirmed that s. 3(1)(e) of FIPPA excludes the records in dispute, except those in paragraph 2 below, from FIPPA's application, it is not necessary that I make an order about them.

2. Under s. 58 of FIPPA, I confirm that the Ministry is authorized by s. 14 of FIPPA to withhold the June and July opinions.

December 17, 2010

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

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