OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F10-42

# KWANTLEN POLYTECHNIC UNIVERSITY

Michael McEvoy, Adjudicator

December 17, 2010

Quicklaw Cite: [2010] B.C.I.P.C.D. No. 63
CanLII Cite: 2010 BCIPC No. 63
Document URL: http://www.oipc.bc.ca/orders/2010/OrderF10-42.pdf

**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 thus outside FIPPA's jurisdiction because of s. 3(1)(e). The adjudicator found that he had no authority over the records because FIPPA did not apply, even though the request for them came from the employee himself. The records contain the research information of a post-secondary employee and are therefore excluded from FIPPA under s. 3(1)(e).

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

**Authorities Considered: B.C.:** Order 00-36, [2000] B.C.I.P.C.D. No. 39; Order F10-43, [2010] B.C.I.P.C.D. No. 64. **Ont:** Ontario Order PO-2693, (*McMaster University*), [2008] OIPC No. 133.

## 1.0 INTRODUCTION

[1] This Order arises from a request of July 2, 2009 under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") by Greg Jenion[1] ("applicant"), an instructor at Kwantlen Polytechnic University ("University"). He asked for the University's Research Ethics Board ("REB") records pertaining to all of his research ethics applications commencing January 2008.

[2] On August 25, 2009, the University declined to release any of the records citing s. 3(1)(b) of FIPPA. It said FIPPA did not apply to records that are

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

personal notes, communications or draft decisions of a person acting in a judicial or quasi-judicial capacity.

[3] On September 8, 2009, the Office of the Information and Privacy Commissioner ("OIPC") received a request from the applicant to review the University's decision. Subsequently, the University added s. 3(1)(e) as a reason for withholding the records in dispute. This provision excludes teaching materials or records containing research information of employees of a post-secondary institution from FIPPA. Mediation did not assist the parties in resolving the matter and the OIPC issued a Notice of Inquiry under Part 5 of FIPPA on September 1, 2010.

[4] The University received a similar request to the applicant's by another of its instructor employees. I am issuing my decision in that case, Order F10-43,[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 ISSUE

[5] The Notice of Inquiry states that the issues here 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).

[6] The University's initial submission stated it no longer relied on s. 3(1)(b). Therefore, issue 2 is the only matter that I will consider.

[7] 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)(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.

## 3.0 DISCUSSION

[8] **3.1 Records in issue**—The records relate to applications made by the applicant in early 2008 to the REB for approval of his research proposals. What I can say about the records, without disclosing their disputed content, is that, among other things, they describe the purpose of the applicant's research, the question or hypothesis he intends to test and the methodologies he intends to employ in conducting the research.

[2] [2010] B.C.I.P.C.D. No. 64.

[9] **3.2 Background**—The parties describe 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 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 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 outline those submissions in detail here.

[10] **3.3 Events Leading to the Applicant's Access Request**—The parties offer slightly different, though not contradictory perspectives on events leading to the applicant's request. I distill from these submissions that the applicant made three different applications concerning approval of his research to the REB in early 2008. In each case, the applicant asked the REB to exempt him from its review process because another university's REB involved with his proposals had already given its approval. In two instances, the exemptions were granted. In the third case, the University deferred its decision because it needed to review the research protocol but shortly thereafter granted the exemption approval for the research for a one-year period. Subsequent to these events, the applicant requested the records connected with all three REB applications.

[11] **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.

[12] 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; …

[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.

[13] The University likens this case to Ontario Order PO-2693.[4] 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").[5] 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[6] 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 Act excluded the records at issue in that case. As the University notes, this included records connected to an REB application.[7]

[14] The University argues that novel research contains questions, techniques and procedures that represent valuable intellectual property to the researcher. The University says that:[8]

> 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.

[15] 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 perhaps novel approaches within it and achieve results prior to the applicant researcher.

[16] The University submits that in this case there can be[9]

> …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

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[4] See Ontario Order PO-2693, (*McMaster University*) [2008] OIPC No. 133.
[5] 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;"
[6] [2000] B.C.I.P.C.D. No. 39.
[7] University initial submission, para. 30.
[8] University initial submission, para. 33.
[9] University initial submission, para. 35.

> 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***

[17] 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."[10] 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.[11]

[18] 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] REB has been collecting information about me."[12] 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."[13]

***University's reply***

[19] 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.

***Analysis***

[20] It is helpful in applying s. 3(1)(e) to first consider its purpose. Commissioner Loukidelis did so in Order 00-36. The case concerned an applicant who sought a copy of research protocol for a publicly funded study of the possible human health effects of aerial spraying for European gypsy moth. Commissioner Loukidelis stated the following:[14]

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[10] Applicant's reply submission, para. R3.12.
[11] Applicant's reply submission, para. R3.13.
[12] Applicant's reply submission, para. 3.42.
[13] Applicant's reply submission, para. 3.42.
[14] Order 00-36, [2000] B.C.I.P.C.D. No. 39

> 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 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).

[21] 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 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.

[22] 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.

[23] The parties agree the applicant is an employee of a post-secondary institution (the University). Further, the applicant requested records "pertaining to my research ethics application." Both the University and the applicant concur that there can be "no doubt" that the responsive and now disputed records contain the research information of the applicant. Neither party describes the nature of the applicant's research nor can I do so without disclosing the records in dispute. 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 the disputed records contain the research information of the applicant. As I noted above the records describe among other things the purpose of the applicant's research, the question or hypothesis he intends to test and the methodologies he intends to employ in conducting the research.

[24] 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. If disputed records meet certain described criteria in s. 3 then FIPPA is ousted.

[25] As already noted, I agree with the parties that the records contain the research of the applicant. The records therefore meet the definition in s. 3(1)(e). This means the disputed records are outside of the scope of FIPPA and I have no authority over them in any respect. For this reason, it does not matter that these records relate to the applicant's own research and that he is the applicant here.

[26] I would make one additional comment here. A public body may of course, still disclose requested records even where FIPPA does not apply if the circumstances are appropriate. I observe that in this case, where both the parties and this Office have expended considerable time and resources, the dispute appears to be over records the applicant, in all likelihood, is already privy to.

## 4.0 CONCLUSION

[27] Having confirmed that s. 3(1)(e) of FIPPA excludes the records in dispute from FIPPA's application, it is not necessary that I make an order about them.

December 17, 2010

**ORIGINAL SIGNED BY**

Michael McEvoy
Adjudicator

OIPC File: F09-39527