

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2013-48

November 18, 2013

UNIVERSITY OF CALGARY

Case File Number F5999

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request for access to the University of Calgary (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for correspondence from a professor (the Third Party) about the Applicant's doctoral thesis, and letters or emails from the Third Party and FGS [the Faculty of Graduate Studies] after June 7, 2011, regarding the Applicant's thesis, and the Third Party's comments regarding the Applicant's thesis.

The Public Body decided to disclose the records to the Applicant. The Third Party objected to the Public Body's decision to disclose the records and requested review of this decision by the Commissioner.

The Commissioner's delegated adjudicator determined that neither section 16 (disclosure harmful to business interests) nor section 17 (disclosure harmful to personal privacy) applied to the information in the records. She confirmed the Public Body's decision to disclose the records to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 16, 17, 18, 24, 30, 72;

Authorities Cited: AB: Orders 99-032, F2005-011, F2009-026, F2009-028, F2010-036, F2011-002, and F2012-06

Cases Cited: *Mount Royal University v. Carter*, 2011 ABQB 28

I. BACKGROUND

[para 1] The Applicant made an access request to the University of Calgary (the Public Body). He requested correspondence written by the Third Party regarding the Applicant's thesis, and letters or emails from the Third Party and Faculty of Graduate Studies after June 7, 2011, regarding his thesis, and the Third Party's comments on his thesis.

[para 2] The Public Body identified responsive records. The Public Body provided notice to the Third Party under section 30 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) that it was considering disclosing the information in the records to the Applicant. The Third Party wrote the Public Body to object to disclosure of the records. The Public Body decided to disclose the records to the Applicant. The Third Party requested review by the Commissioner of the Public Body's decision to disclose the records to the Applicant.

[para 3] The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written review.

II. RECORDS AT ISSUE

[para 4] Four emails and 8 pages of comments made by the Third Party regarding the Applicant's thesis are at issue.

III. ISSUES

Issue A: Would disclosure of the information that the Public Body proposes to disclose to the Applicant be an unreasonable invasion of the Third Party's personal privacy under section 17 of the Act?

Issue B: Would disclosure of the information that the Public Body proposes to disclose to the Applicant be an unreasonable invasion of the Third Party's business interests under section 16 of the Act?

IV. DISCUSSION OF ISSUES

Issue A: Would disclosure of the information that the Public Body proposes to disclose to the Applicant be an unreasonable invasion of the Third Party's personal privacy under section 17 of the Act?

[para 5] Section 17 requires a public body to withhold the personal information of an identifiable individual when it would be an unreasonable invasion of the individual's personal privacy to disclose his or her personal information.

[para 6] The Public Body has decided that there is personal information about the Third Party in the records, but that it would not be an unreasonable invasion of the Third Party's personal privacy to disclose the information. The Public Body explains that it weighed the factors for and against disclosure under section 17(5) of the FOIP Act and determined that the personal information in the records was necessary for a fair determination of the Applicant's rights and that this outweighed the Third Party's interests in protecting her privacy.

[para 7] The Third Party argues that the information in the records at issue is confidential in nature and was written with the expectation that it would remain private.

[para 8] The Applicant agrees with the decision of the Public Body to release the records.

[para 9] Section 1(n) defines personal information under the Act:

I In this Act,

(n) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, home or business address or home or business telephone number,

(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,

(iii) the individual's age, sex, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,

(vi) information about the individual's health and health care history, including information about a physical or mental disability,

(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,

(viii) anyone else's opinions about the individual, and

(ix) the individual's personal views or opinions, except if they are about someone else [...]

[para 10] For the purposes of the FOIP Act, personal information is confined to information about an identifiable individual. As section 17 cannot be applied to information that is not the personal information of an identifiable individual, I will first consider whether the information that is the subject of this inquiry falls within the terms of section 1. If I find that it does, I will then consider whether section 17 requires the information to be withheld, or whether the information may be disclosed.

[para 11] In Order F2009-026, I said:

If information [contained in the record in issue] is about employees of a public body acting in a representative capacity the information is not personal information, as the employee is acting as an agent of a public body. In Order 99-032, the former Commissioner noted:

The Act applies to public bodies. However public bodies are comprised of members, employees or officers, who act on behalf of public bodies. A public body can act only through those persons.

In other words, the actions of employees acting as employees are the actions of a public body. Consequently, information about an employee acting on behalf of a public body is not information to which Section 17 applies, as it is not the personal information of a third party. If, however, there is information of a personal character about an employee of a public body, then the provisions of Section 17 may apply to the information. I must therefore consider whether the information about employees in the records of issue is about them acting on behalf of the public body, or is information conveying something personal about the employees.

[para 12] In *Mount Royal University v. Carter*, 2011 ABQB 28, the Court denied Mount Royal University's application for judicial review of Order F2009-026, finding the above analysis to be reasonable. I will therefore apply the approach set out in Orders 99-032 and F2009-026 and consider whether the information in the records at issue is about the Third Party acting as a representative of the Public Body, in which case section 17 would not apply, or conveys something about the Third Party as an identifiable individual, in which case, the provisions of section 17 may apply to information about the Third Party.

Do the records contain personal information about the Third Party?

[para 13] The Applicant, together with the Third Party and another party, both of whom had been the Applicant's thesis supervisors at one time, co-authored papers regarding research findings. From the submissions of the parties and the contents of the records at issue, I understand that the thesis contains references to, and relies on, these papers to a certain extent.

[para 14] The Third Party commented on the contents of the thesis and provided these comments to the Interim Dean of FGS. Her comments stated the position that the thesis was not sufficiently original because of its reliance on these papers and because it relied on research conducted by others.

[para 15] The Third Party submitted as an exhibit an email from counsel for the Public Body dated September 12, 2011. This email establishes the terms and conditions under which she was permitted to review and comment on the Applicant's thesis. This exhibit states:

In order to simplify matters, we are prepared to remove the requirement for a Non-Disclosure Agreement, on condition that [the Third Party] comply with all the other proposed conditions, specifically:

1. A copy of the thesis will be made available for a set period of time in a room [...] and a monitor will be present. Written notes are acceptable, but it will not be possible to take away any copy of the document.
2. Any comments or complaints must be limited to matters related to academic misconduct, specifically plagiarism and issues relating to ownership and protection of intellectual property. Written comments must be submitted to the Interim Dean of Graduate Studies (with a copy to the Dean of Schulich School of Engineering) within 5 days following review of the thesis.
3. Comments and complaints must be specific and supported by evidence, where possible.
4. No contact with the student is permitted prior to or following review of the thesis.

[para 16] I understand, from the foregoing, and from my review of the comments the Third Party made regarding the Applicant's thesis, that the Public Body permitted the Third Party to review the thesis for the purpose of stating her views regarding references in the work to studies she had coauthored, and her position as to whether the inclusion of this work in the thesis was permissible under the Public Body's regulations, or whether it constituted academic misconduct.

[para 17] The eight pages of comments address the contents of the thesis and express opinions regarding the research in the thesis and its relation to previously published works, some of which she coauthored, and others which she did not. The email proposes changes to the thesis and its publication that would address the Third Party's concerns about the originality of the research referred to in the thesis. Throughout the comments, the Third Party refers to herself as one of the Applicant's supervisors.

[para 18] In a document entitled Schedule "A", which was attached to the Third Party's request for an inquiry, the Third Party describes her comments in the following terms:

Generally, the suggestions that the Third Party's [...] personal information will be disclosed misses the point. The applicant already knows that [the Third Party] has provided a written commentary on his thesis – the October 30, 2011 [letter] from [the Dean of Graduate Studies] references the notes in its first sentence and is copied to the applicant. The issue here is whether the notes themselves should be released to the student. Those notes contain an assessment of the thesis[,] description of the IP in question and the genesis of that intellectual property and it was certainly not ever in the contemplation of [the Third Party] that the comments she made to the Dean would be released to the student.

From this I understand that the Third Party is not concerned that her personal information will be disclosed, but rather she objects to the Applicant receiving her comments, which she acknowledges assess the Applicant's thesis and discuss intellectual property issues.

[para 19] Once the Public Body received the eight pages of comments, it asked the Third Party what action she advocated the Public Body to take. The Third Party provided an email indicating the steps she thought the Public Body should take to address the concerns she had raised regarding the thesis. The Third Party objects to disclosure of the notes where they contain an assessment of the thesis, descriptions of intellectual property and the origins of the intellectual property.

[para 20] The Third Party described her comments as containing an “assessment of the Applicant’s thesis, a description of the intellectual property in question and the genesis of that intellectual property”. I agree with that description. I also agree with the Third Party that suggesting that the information in the comments is her personal information “misses the point”. In my view, the information in the records cannot be characterized as the personal information of the Third Party.

[para 21] Where the Third Party refers to herself in her comments, she refers to actions she took as the Applicant’s former thesis supervisor. I find that this is information about the Third Party acting as a representative of the Public Body. Where the Third Party expresses opinions about the Applicant’s work, I find that these opinions were submitted for the purpose of commenting on academic misconduct in her capacity as a faculty member.

[para 22] I note that a November 15, 2011 email prepared by counsel for the Third Party states:

We object to any disclosure of [the Third Party’s] comments on the student thesis and reject the analogy to examiner’s reports as misplaced. As the Faculty of Graduate Studies (FGS) has repeatedly stressed, [the Third Party] is no longer the student’s supervisor and further, is not commenting on the academic merit of the thesis. Rather, [the Third Party’s] only reason for reviewing the thesis was to ensure that the origin and evolution of intellectual property referred to in the thesis is accurately described and to protect her intellectual property interests from disclosure.

This comment could possibly be interpreted as implying that the Third Party wrote her comments for the purpose of protecting her own private interests, given that it suggests that she made comments in order to protect her own intellectual property interests. However, with the exception of her final comment, the Third Party’s comments do not assert intellectual property rights, but are restricted to the manner in which the ownership of work is acknowledged in the thesis.

[para 23] I acknowledge that the final comment in the records at issue does indicate that the Third Party and another Professor were seeking to protect intellectual property referred to in the Applicant’s thesis. However, the comments also establish that this intellectual property was derived from research conducted as part of the Third Party’s academic responsibilities.

[para 24] The proposals the Third Party emailed to the Public Body provide context for the comments. Although this email is among the records at issue, the contents of the email are referred to in a decision of the Dean of FGS. This decision was provided to the Applicant, who then supplied a copy of the decision for the inquiry. I will refer to the proposals as they appear in that decision.

[para 25] The Dean of FGS’s response of October 30, 2011 to the Third Party’s comments and emails was made to the Third Party in the Third Party’s capacity as a faculty member. That this is so is supported by the Dean of FGS’s references to the

Academic Regulations, which she refers to in order to resolve the issues raised by the Third Party. In the response, the Dean of FGS rejected the suggestion that FGS “keep the thesis closed for 3 – 4 years until [the Third Party] and [another faculty member] are comfortable with filing a patent on the technology with a new student”. The Dean of FGS did so for the reason that the Third Party’s proposal was contrary to the Public Body’s Conflict of Interest Policy for faculty members. The Dean of FGS’s response indicates that the Dean did not interpret the proposal as one from a private individual seeking to file a patent, but as a faculty member bound by the Public Body’s policies. Moreover, the proposal referred to in the Dean of FGS’s response indicates that the Third Party sought to keep the thesis closed so that she could file a patent with another student in the future. The email proposals from the Third Party clarify that she sought to protect intellectual property in order to make use of it as part of her responsibilities as a faculty member with another student at a later date.

[para 26] The information in the Third Party’s comments and emails is consistent with analyses and proposals prepared for the benefit of the Public Body by an employee within the terms of section 24(1)(a). Ultimately, the Dean of FGS did not agree with the Third Party’s analysis or act on all her proposals; however, this does not mean that the Third Party provided her opinions outside her capacity as a faculty member or acted outside this role in making the proposals. Even though a public body does not follow advice, it continues to have discretion to disclose or withhold it under section 24(1)(a). Advice or proposals, when developed for the benefit of a public body does not become personal information simply because the ultimate decision maker chooses not to follow it.

[para 27] To conclude, I find that to the extent that information about the Third Party appears in the records, it is information about the Third Party acting as a representative of the Public Body. To the extent that she has formed opinions about the Applicant’s work and the intellectual property referred to in his thesis, she has done so as a faculty member. To the extent that the comments refer to things she has done in the past, she refers to actions she took in her capacity as a faculty member. To the extent that the comments and email indicate the steps the Third Party intended or intends to take, they reveal steps she intended to take or will take in her capacity as a faculty member.

[para 28] In any event, the Third Party’s submissions from her request for inquiry establish that she does not view her comments and proposals as her personal information. Rather, in her view, the only personal dimension was the fact that she wrote the comments and proposals. The fact that she did so has already been disclosed to the Applicant, through the Dean of FGS’s response to her comments and email proposals.

[para 29] For the reasons above, I find that the records at issue (both the comments and the emails) do not contain the personal information of the Third Party. I therefore find that section 17 does not apply.

[para 30] Although it is unnecessary to address the factors set out in section 17(5), given that I have found that there is no personal information of the Third Party in the records, I have decided to address the Third Party’s arguments that harm may result from

disclosure of the information in the records. While the Third Party framed this argument in relation to section 17(5), it is consistent with an argument that section 18 of the FOIP Act applies to the information. In my view, when a party raises a concern that health or safety will be threatened by disclosure of information in records, this issue should be addressed prior to ordering the disclosure of information, even if the issue was not originally set down for the inquiry. In this case, the Public Body and the Applicant have also addressed the issue of harm, and so I need not seek further submissions from the parties.

[para 31] Unlike section 17, section 18 does not require information to be personal information before it may be applied. This provision states, in part:

18(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or

(b) interfere with public safety.

[...]

[para 32] The Third Party states:

As will be set forth in my submissions, [the Applicant's] behavior to date is most definitely a relevant factor in any balancing of interests, namely my safety and security as contrasted to [the Applicant's] curiosity.

Despite this stated intention to set forth in her submissions instances of the Applicant's behavior that she believes support consideration of it as a relevant factor weighing against disclosure, the Third Party did not describe or provide instances of the Applicant's behavior that would enable me to find that disclosing the information in the records would affect her safety or security.

[para 33] The Third Party does refer to the Dean of Engineering as having forbidden the Applicant access to the Engineering Building where her office is located; however, the Applicant, in his rebuttal submissions, denies this to be the case. The Third Party has not provided any evidence to support her contention that the Third Party has been banned from the building in which her office is located.

[para 34] The Public Body states in its rebuttal submissions:

As set out in the University's Initial Submission, section 17(4)(g) of the Act could apply to the Request, and therefore contextual circumstances were considered when the University initially considered the Request. The safety of any person, and whether or not the release would impact same, would always be a factor considered by the University as part of the determination whether or not to release records. However, no such issue was raised when the University initially conducted its analysis.

The Public Body states that it always considers safety to be in issue when making the decision to disclose records to an applicant; however, in this case, the evidence available to it did not raise the possibility that safety would be an issue if the records were disclosed.

[para 35] As the Third Party has not provided any evidence to support her contention that disclosing the information in the records at issue would affect her safety or security, and as the University confirms that it considered the possible application of this factor and determined that it was not present, I find that there is no basis to conclude that disclosure of the information in the records at issue could reasonably be expected to result in any of the harms set out in section 18. Moreover, were it necessary to consider the factors under section 17(5), I would find that the possibility of harm resulting from disclosure had not been established as relevant or applicable.

[para 36] To conclude, I find that the information in the records about the Third Party is not personal information, but information about her acting in a representative capacity as a faculty member of the Public Body. Moreover, I find that harm within the terms of section 18 has not been established as reasonably likely to result from disclosure of the information in the records to the Applicant.

Issue B: Would disclosure of the information that the Public Body proposes to disclose to the Applicant be an unreasonable invasion of the Third Party's business interests under section 16 of the Act?

[para 37] Section 16 is a mandatory exception to disclosure. It states:

16(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, explicitly or implicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

- (iii) *result in undue financial loss or gain to any person or organization, or*
- (iv) *reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[para 38] The purpose of mandatory exceptions to disclosure for the proprietary information of third parties in access to information legislation is set out in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* at page 313:

The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information.

[para 39] This statement of the purpose of section 16 has been adopted in Orders F2009-028, F2010-036, F2011-002, and F2012-06 and found to inform the rationale behind the mandatory exception to disclosure created by section 16 of the FOIP Act. In these orders, it was determined that section 16 is intended to protect specific types of proprietary information or “informational assets” of third parties from disclosure, so that businesses may be confident that they can continue to invest in this kind of information, and to encourage businesses to provide this kind of information to government when required.

[para 40] The foregoing interpretation is also consistent with the heading of section 16, “Disclosure harmful to business interests of a third party”. The heading of the provision supports the view that the information protected by section 16 is that which would be harmful to business interests if it is disclosed.

[para 41] In Order F2005-011, former Commissioner Work adopted the following approach to section 16 analysis:

Order F2004-013 held that to qualify for the exception in section 16(1), a record must satisfy the following three-part test:

Part 1: Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?

Part 2: Was the information supplied, explicitly or implicitly, in confidence?

Part 3: Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

[para 42] The issue of whether section 16 applies was added to the inquiry by this office, apparently based on the following argument (also reproduced above) from the Third Party’s request for an inquiry:

Generally, the suggestions that the Third Party's [...] personal information will be disclosed misses the point. The applicant already knows that [the Third Party] has provided written commentary on his thesis – the October 30, 2011 [letter] from [the Dean of Graduate Studies] references the notes in its first sentence and is copied to the applicant. The issue here is whether the notes themselves should be released to the student. Those notes contain an assessment of the thesis description of the IP in question and the genesis of that intellectual property and it was certainly not ever in the contemplation of [the Third Party] that the comments she made to the Dean would be released to the student.

[para 43] As section 16 requires a Public Body to withhold the intellectual property of a third party in certain circumstances and the Third Party referred to her comments as containing descriptions of intellectual property, it was thought that the Third Party considered section 16 to apply to her comments.

[para 44] The Public Body states that section 16 does not apply to the information in the records at issue.

[para 45] The Third Party made no arguments in relation to the application of section 16. Rather, her objections to disclosure are founded on her view that the Applicant poses an unspecified danger. I have already addressed this argument in my discussion of the application of sections 17 and 18, above.

[para 46] Having reviewed the records at issue, I am satisfied that they do not contain information that could be said to be the Third Party's intellectual property within the terms of section 16(1)(a). Rather, the intent of her comments was to present her views on the *ownership* of intellectual property contained in the thesis, and therefore the originality of the Applicant's research and findings, as opposed to presenting a discussion of her own intellectual property.

[para 47] As I find that section 16(1)(a) does not apply, it follows that I find that the information in the records is not subject to section 16.

V. ORDER

[para 48] I make this Order under section 72 of the Act.

[para 49] I confirm the Public Body's decision to disclose the records at issue to the Applicant and require it to do so.

[para 50] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Teresa Cunningham
Adjudicator