

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2020-31

October 22, 2020

UNIVERSITY OF CALGARY

Case File Number 005837

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request for access to the University of Calgary (the Public Body) for survey results. The Public Body refused access on the basis that the records constitute research within the terms of section 4(1)(i) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act), which exempts the research of an employee of a post-secondary educational body from the scope of the FOIP Act.

The Adjudicator accepted that the records were research. However, she found that the research was used by both the employee and the Public Body, rather than only by the employee. As a result, the research at issue did not fall within the exception created by section 4(1)(i). The Adjudicator directed the Public Body to respond to the access request with reference to the requested survey results.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 16, 72

Authorities Cited: **AB:** F2018-32 **ON:** Orders PO-2693, PO-3576

I. BACKGROUND

[para 1] On February 27, 2017, the Faculty Association of the University of Calgary (the Applicant) made a request for access to the University of Calgary (the Public Body). The following information was requested:

All results from the Energizing Eyes High surveys which report the views of academic staff members, individually or collectively. This would be including, but not limited to, individual responses (with names or other identifying information redacted), group responses from focus groups, summaries or compilations of the views of academic staff, and any statistical analyses by group which identify academic staff as an identified group.

[para 2] On March 31, 2017, the Public Body's FOIP Coordinator informed the Applicant that more time was required to process the access request. She stated:

I need the extra time because I have not finished the analysis of the records. There are over 100 individual records to look at, and I am very conscious of respecting the privacy and confidentiality that was promised to individual respondents.

[para 3] On April 28, 2017, the Public Body responded to the access request, stating:

The following records that you requested - "results from the Energizing Eyes High surveys which report the views of academic staff members individually or collectively" - are excluded from the scope of the *Freedom of Information and Protection of Privacy Act* (the Act) under section 4(1)(i) which states:

4(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:

(i) research information of an employee of a post-secondary educational body;
Therefore, we are not disclosing these records to you because they are outside the scope of the Act.

In 2016, the University's Conjoint Faculties Research Ethics Board (CFREB) reviewed and approved the research study titled "Energizing Eyes High - Community Consultation". All survey and focus group data was collected in compliance with the CFREB approval for the research study. The Principal Investigator for the study was [...]. Among other factors, the CFREB approval specified that all participants in the study be guaranteed confidentiality.

As to your request for statistical analyses by group which identify academic staff as an identified group, no such records exist.

[para 4] The Applicant requested review of the Public Body's reliance on section 4(1)(i) of the FOIP Act.

[para 5] The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter. At the conclusion of this process, the Applicant requested an inquiry.

II. Issue: Are the records requested by the Applicant excluded from the application of the Act by section 4(1)(i)?

[para 6] Sections 4(1)(h) and (i) of the FOIP Act excludes certain categories of records that may be located at post-secondary educational bodies from the scope of the Act. The Public Body is a post-secondary educational body and takes the position that

section 4(1)(i) applies to the requested records in this case, with the result that it has no duty to respond to the Applicant under the FOIP Act.

[para 7] Section 4(1) states, in part:

4(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:

[...]

(h) teaching materials

(i) of an employee of a post-secondary educational body,

(ii) of a post-secondary educational body, or

(iii) of both an employee of a post-secondary educational body and the post-secondary educational body

(i) research information of an employee of a post-secondary educational body [...]

[...]

[para 8] The Public Body in this case is a post-secondary educational body. If the evidence establishes that the records at issue are the “research information of an employee of the Public Body”, then the records are exempt from the application of the FOIP Act by application of section 4(1)(i). If information consists of the teaching materials of an employee, the Public Body, or both, then the information is exempt from the application of the FOIP Act by application of section 4(1)(h).

[para 9] In this case, the requested records are not teaching materials, but research. As section 4(1)(i) does not state that it applies to research that is “of a post-secondary institution”, or “of both a post-secondary institution and an employee”, the question becomes, in addition to whether the records consist of research information, whether the records consist of the research information “of an employee of the Public Body”.

“Research”

[para 10] The Applicant argues that the records it has requested do not constitute “research” within the terms of section 4(1)(i):

The Applicant submits that the University's Eyes High strategy and the associated information is neither academic research nor of an employee of the University. That is, the Eyes High strategy and information is about evaluating and improving on the University's performance as an institution, not developing or establishing principles, facts or generalizable knowledge; the Eyes High strategy was conceived by the University President, an officer of the University; and, the

information is information of the University not an employee. For these reasons, section 4(1)(i) is inapplicable.

[para 11] The Applicant points to orders PO-2693 and PO-3576 of the Office of the Information and Privacy Commissioner of Ontario as assisting in the interpretation the term “research” where it appears in section 4(1)(i) of the FOIP Act:

Like section 4(1)(i) of the Act, section 65(8.1)(a) of the FOIPPA-ON, excludes research information from access: "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" (s 65(8.1)(a)).

Consistent with the wording of section 65(8.1)(a), to apply the exclusion, the ON IPC requires an educational institution to demonstrate the information is both academic research and of an employee or person associated with the educational institution. That is, the information must be about “a systematic investigation designed to develop or establish principles, facts or generalizable knowledge” and be “referable to a specific, identifiable research projects that have been conceived by a specific faculty member, employee or associate of the University” (McMaster University (Re), pp 9, 16 [...] and University of Western Ontario (Re), pp 14-15, 20 [...])

[para 12] The Applicant argues that the test set out in the cases it cites are not met:

Applying the above test, the University cannot deny access to the information at issue based on section 4(1)(i). Indeed, academic staff members' feedback gathered through surveys and focus groups was not gathered to establish principles, facts or generalizable knowledge. Rather, the information was gathered to evaluate and develop the University's institutional vision (see: Energizing Eyes High Strategy 2017-22 Survey Working Paper dated January 2017, Affidavit of [...], Exhibit A, p 5 ; Energizing Eyes High Strategy 2017-22 Focus Group Working Paper dated January 2017, Affidavit of [...], Exhibit B, p 7).

[para 13] The Public Body argues:

For the purposes of this Inquiry, the University has no argument with the definition most often cited by the Applicant, that of Ontario IPC Order PO-2693 which defined research as:

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. The research must refer to specific, identifiable research projects that have been conceived by a specific faculty member, employee or associate of an educational institution.

As evidenced by the CFREB application and approval, the research was indeed systematic and designed to develop or establish principles. Otherwise, there would have been nothing concrete for evaluation by CFREB. See Appendix 1 for the certification of ethics review.

The CFREB research proposal identified a specific and distinct research undertaking, led by a Principal Investigator (the “PI”) who met all the requirements of a PI, as laid out in the Tri-Council Policy Statement - Ethical Conduct for Research Involving Humans (“TCPS2”) which is the guiding document for ethical conduct of research involving humans in Canada. The methodology of the survey, including its CFREB approval was explained in a Survey Working Paper posted on the University’s website in 2017. The working paper also shared aggregated information gathered in the survey, and analysis of the data.

[para 14] The Public Body asserts that although the research was undertaken for the Public Body's strategic planning, the research also had a secondary purpose:

Unlike the scenario in Ontario IPC Order PO-3576, the EEH survey data was not strictly used for assessing satisfaction levels of university community members. In Order PO-3576, the data was collected at Carleton University was strictly for the purpose of assessing student satisfaction. There was no secondary use of the data being considered. In the current Inquiry, the survey data requested by the Applicant was used both for strategic planning purposes of EEH, and to inform a research project.

Similarly, Ontario IPC Order PO-3464 found that records associated with a particular University of Ottawa Professor did not qualify as research information because the records were not clearly linked to any specific, identifiable research project. In the current Inquiry, the records at issue are clearly associated with the PI's research, ultimately leading to the publication of a book.

[para 15] The Public Body argues that the research at issue was not collected for the sole purpose of strategic planning, but is also associated with an identifiable research project.

[para 16] I agree with the parties that the definition of “research” developed by the Ontario Information and Privacy Commissioner is helpful in interpreting the use of this term in section 4(1)(i). I also agree with the Public Body that the research at issue in this case may be considered to be linked to a specific, identifiable research project. There is nothing in the nature of the research that argues against this conclusion. Instead, the difficulty for the Public Body's position lies in the requirement that the research be “of an employee”.

“Of an employee”

[para 17] The Applicant argues:

Moreover, the information is not "of" an employee in the sense that it relates to academic research conceived and developed by an academic staff member for his or her own professional purposes. On the contrary, the Eyes High strategy was conceived by the University President, an officer of the University, for the University's business purposes [...]

[para 18] As noted above, the Public Body agrees that the research was conducted for more than one purpose:

The University of Calgary (the “University”) acknowledges that the survey and focus group data at issue was collected for use in the Energizing Eyes High (“EEH”) strategic planning process. However, the same data was also collected for a research purpose, namely to inform the content and conclusions of an as yet unpublished book, co-authored by Professor [...] who was the Principal Investigator whose Research Ethics submission on this matter was approved by the University's Research Ethics Board.

[para 19] The Public Body notes:

The University submits that while the overall EEH project was focused on evaluation and improvement of the University's overall strategic direction, the data collected for EEH was also used for academic research purposes. Furthermore, this secondary use of the data was already

conceived of in 2016 when the EEH methodology was being developed, hence the need for Conjoint Faculties Research Ethics Board (“CFREB”) approval at the time. Specifically, a book was in the planning stages as early as 2016, conceived of by an academic staff member of the University.

[para 20] When the FOIP Act uses the word “of” it means that the entity the record is “of” possesses or has custody or control over the record. For example, section 4(1)(a) refers to “a record of a judge of the Court of Appeal of Alberta, the Court of Queen’s Bench of Alberta or The Provincial Court of Alberta”. While some of the records included in the ambit of section 4(1)(a) will be records created by the Court, many of them are in the possession of the Court as they are received or used by the Court in the course of hearing matters.

[para 21] Similarly, section 16 refers to information “of a third party”, such as trade secrets or other information that a third party has interests in or uses in its business. For example, in F2018-32, Adjudicator Barker noted that the phrase “of a third party” suggested that information be proprietary or an informational asset of a third party

Section 16(1) is intended to protect the informational assets, or proprietary information, of third parties that might be exploited by competitors in the marketplace if disclosed. It is not sufficient that the information is commercial or financial in a general sense. The information must be proprietary and “of” the third party before s. 16(1)(a) can apply.

In essence, information that is “of” an entity, is information that the entity possesses, or is entitled to use for its own purposes, or has in its custody or control.

[para 22] I find that the research in this case is “of both an employee of a post-secondary educational body and the post-secondary educational body” to use the terminology of section 4(1)(h)(iii) of the FOIP Act, given that both the Public Body and its researcher are using the research at issue for their own distinct purposes. However, section 4(1)(i) does not encompass research over which both a post-secondary institution and an employee both have a claim and use for their own purposes.

[para 23] If section 4(1)(h) did not establish distinctions between records “of an employee”, information “of a post-secondary educational body” and “information of an employee of a post-secondary educational body and a post-secondary educational body” then it could be argued that section 4(1)(i) contemplated research that is used or possessed by both an employee and a post-secondary educational body. However, the specificity of section 4(1)(h) makes it clear that the Legislature turned its mind to the relationships between employees and post-secondary institutions, and to the question of when it would exempt records used by both the post-secondary institution and the employee, and when it would not.

[para 24] To conclude, I find that section 4(1)(i) does not apply to the research at issue so as to exempt it from the application of the FOIP Act because the research is not “of an employee”, but “of an employee and a post-secondary educational body”. To be clear, a finding that section 4(1)(i) does not apply to the research at issue means only that the Public Body must respond to the Applicant’s access request with reference to the

research at issue. The Public Body is not precluded from applying exceptions to disclosure should any apply.

III. ORDER

[para 25] I make this order under section 72 of the Act.

[para 26] I order the Public Body to respond to the Applicant with reference to the records at issue, without reliance on section 4. The Public Body is not precluded from applying exceptions to disclosure to the records if any are applicable.

[para 27] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

Teresa Cunningham
Adjudicator
/bah