

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2022-34

August 17, 2022

UNIVERSITY OF CALGARY

Case File Number 014803

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access to information request to the University of Calgary (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the Act). The Public Body determined that all responsive records were exempt from the Act as either teaching materials under section 4(1)(h), or research information under section 4(1)(i).

The Adjudicator found that “teaching materials” includes materials the substance of which imparts knowledge, skill, or instruction.

The Adjudicator found that the Public Body had incorrectly identified some records as teaching materials or research information. The Adjudicator ordered the Public Body to process the access request with regard to those records.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4(1)(h), 4(1)(i), 72.

Authorities Cited: **AB:** Order F2020-31 **ONT:** PO-2693

I. BACKGROUND

[para 1] On February 2, 2019, the Applicant made an access to information request under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25

(the Act) to the University of Calgary (the Public Body). The Applicant sought the following information:

I am requesting all documents from, to, by, or about [Employee 1], and from, to, by, or about [Employee 2], and any other documents held by the institution, that relate to the complaint about former Judge Robin Camp and the process of his removal from judicial office and all associated events and aftermath.

Documents could include emails, internal reports, meeting minutes, memos, posts to email listservs or online forums, letters, submissions, or other. Relevant direct messages on Twitter and text messages are also requested.

[para 2] The access request also contained a list of suggested keyword searches for the Public Body to use to search for responsive records.

[para 3] The complaint referred to in the access request is a complaint made to the Canadian Judicial Council (CJC).

[para 4] On June 17, 2019, the Public Body responded to the access request. The Public Body informed the Applicant that the information requested was outside of the scope of the scope of the Act, per sections 4(1)(h) and (i). The Applicant then filed a request for review of the Public Body's response to this Office. Mediation and investigation did not resolve the issues, and the matter proceeded to inquiry.

II. RECORDS AT ISSUE

[para 5] The records at issue are 261 pages that the Public Body argues are outside the scope of the Act.

III. ISSUES

Issue A: Are the record(s) excluded from the application of the Act by section 4(1)(h) and (i)?

IV. DISCUSSION OF ISSUES

Issue A: Are the record(s) excluded from the application of the Act by section 4(1)(h) and (i)?

[para 6] Both parties made arguments regarding the role that sections 4(1)(h) and (i) play in preserving academic freedom. The Applicant, in particular, provided extensive comments on that matter in her rebuttal submission. The Public Body objected to the length of that submission. The Applicant also argued that there is a public interest in disclosing the requested information. However, the question before me is simply whether the records at issue fall within the categories of "teaching materials" or "research information" as those terms are used in the Act. There is no indication in the Act that

these categories are determined via balancing interests in disclosure versus academic freedom.

[para 7] Sections 4(1)(h) and (i) of the Act state,

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 categorized the records at issue as either teaching materials or research materials into five files: 1A, 1B, 1C, 2, and 3. File 1A contains 25 pages, all of which the Public Body asserts are teaching materials under section 4(1)(h) of the Act. I consider those pages first.

[para 9] Previous orders of this Office have not delved into what constitutes “teaching materials.” Neither does the Act define that term.

[para 10] The Public Body refers to the FOIP Guidelines and Practices document¹ which describes “teaching materials” as follows:

Teaching materials include records produced or compiled for the purpose of providing systematic instruction to a person about a subject or skill and include records created or compiled to aid the instructor in imparting information or for distribution to students.

[para 11] I note that the above description is suggestion only. For the purposes of this decision it is sufficient to observe the ordinary meaning of the word “teach” which generally refers to imparting knowledge or skill, or providing instruction in something to someone. “Teaching materials” are thus materials the substance of which imparts knowledge, skill, or instruction.

[para 12] Pages 1 to 13 of File 1A are teaching materials. They consist of reading lists of academic articles and other sources for students enrolled in a course in the Public

¹ Government of Alberta. Service Alberta. FOIP Guidelines and Practices. (Edmonton: Alberta Queen’s Printer, 2009.) pg. 11

Body's faculty of law. The reading lists indicate sources of information and critical theory that serve as a foundation for the theories and practices taught in the course.

[para 13] Page 14 of File 1A is blank.

[para 14] Pages 15 to 23 of File 1A are not teaching materials. These pages consist of e-mail correspondence between the two employees mentioned in the access request. The e-mails contain discussion about what one of the employees *might* teach in a particular course, but there is no evidence that these e-mails constitute materials which impart knowledge, skill, or instruction to anyone.

[para 15] Page 24 of File 1A contains a list of bullet points listing a variety of perspectives on an inquiry into the conduct of Judge Robin Camp. Again, there is no indication that the information on this page constitutes material which imparts knowledge, skill, or instruction. At most, it is musing about what may be taught, but is not teaching materials.

[para 16] Page 25 of File 1A is blank.

[para 17] The Public Body identified the pages in Files 1B, 1C, and 3 as research materials of Public Body Employee 1 under section 4(h)(i) of the Act. Public Body Employee 1 was an employee of the Public Body at the time of the access request, and remains an employee to date.

[para 18] The precise scope of what constitutes "research information" has not been determined in previous orders of this Office. However, the Adjudicator in Order F2020-31 found guidance in Order PO-2693 from the Office of the Ontario Information and Privacy Commissioner (F2020-31 at para. 16). Ontario IPC Order PO-2693 described "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.

[para 19] I also find the description of "research" from Order PO-2693 helpful in interpreting section 4(h)(i) of the Act.

[para 20] I further consider the discussion from Order F2020-31 at paras. 17 to 24 that section 4(1)(i) contemplates circumstances where an employee of a post-secondary institution conducts *their own* research. Section 4(1)(i) stands apart from section 4(1)(h) in that regard. Whereas section 4(1)(h) contemplates that teaching materials may be that of a public body, or of a public body and an employee of a public body jointly, in addition to only being that of an employee, section 4(1)(i) only considers research of an employee. The result is that research information is only exempted from the Act under

section 4(1)(i), if it is that of an employee, in contrast to that of both the Public Body and an employee.

[para 21] I observe here that the Complainant argues that the information identified by the Public Body is not research, but rather, is activism. I disagree that anything that constitutes activism could not also be research. Legal research, as is the case here, is often carried out with a view to promoting one interpretation or application of law as opposed to another. The fact that research may be geared toward, and used in the context of, activism or advocating a particular position does not strip it of its status as research.

[para 22] I consider the information in each file below in light of the above.

[para 23] File 1B contains 70 pages.

[para 24] I find that the information on pages 1 - 11 of File 1B is research information. These pages contain a draft research proposal required to apply for funding, and correspondence about it shared between the applying researchers. The material contains the research used to prepare the draft proposal. It appears to be part of a systematic investigation into the research issues to be considered in the event that funding is received. The proposal is clearly that of the employees of the Public Body, and not of the Public Body itself. It is something that the employees did while employed by the Public Body, but not in conjunction with the Public Body.

[para 25] For similar reasons, I also find that pages 30 - 38 and 39 - 70 of File 1B constitute research information. Pages 39 - 70 contain various drafts of the complaint ultimately submitted to the CJC; pages 30 - 38 contain correspondence among those making the complaint discussing the draft and edits to it. The drafts contain ample legal research used to provide a foundation for the complaint, while the correspondence centers on how to best present it. The drafts and correspondence represent the final stages of a systematic investigation into principles, facts, and legal knowledge that indicate grounds to make a complaint.

[para 26] Aside from the above, I find that the remainder of the information in File 1B is not research information by reason that it is not part of any sort of designed or developed systematic investigation into anything.

[para 27] Pages 12 - 29 of File 1B contain discussion on whether to publish various proposed posts, Op-Eds, and comments on the U of C Faculty of Law Blog, called "ABlawg." The information represents a hodge-podge of discussion that does not resemble a systematic investigation into anything.

[para 28] File 1C contains 43 pages. The information in the pages consists of e-mails discussing whether or not someone should respond to an invitation to appear at a public speaking event, a government committee, and to meet with a politician. Drafts of speaking notes and discussion of possible topics for speaking events are also included; their content consists of opinions and/or anecdotes. Again the information is not

indicative of any systematic investigation. While the information in these pages indicates that the matter of whether to speak on a given topic, and the content of any such speech required thinking or musing about, and involved bouncing ideas off of colleagues, such activities do not constitute research. They are the regular, every-day thought processes that anyone might engage in when deciding whether and how to participate in an event. In that regard they are distinct from a “systematic investigation” “designed” to develop or establish principles, facts or generalizable knowledge.

[para 29] File 3 contains 120 pages. Pages 3 - 13 contain the final draft of the complaint submitted to the CJC. Pages 30 - 33 contain an abbreviated version of the complaint. The information on these pages is research information for the same reasons the drafts of the complaint from File 1B are research information.

[para 30] I find that none of the other information in File 3 is research information.

[para 31] Pages 1, 2, 14, and 15 of File 3 are e-mails distributing the complaint, and cover letters to the complaint, that do not contain any research information themselves.

[para 32] Pages 16 - 29 contain e-mails discussing formatting an excerpt of the complaint and request for a license to use the content of the complaint.

[para 33] Pages 34 - 49, 60 - 64, and 73 - 114 of File 3 contain e-mails exchanging chatter about legal decisions, media inquiries, the CJC complaint, and content for blog posts. None of the information constitutes a systematic investigation.

[para 34] Page 50 of File 3 is a timeline of events related to a decision of the Alberta Court of Appeal, related blog posts, and actions of the federal court and the CJC. While it is organized information, it does not appear to be part of a systematic investigation into anything.

[para 35] Pages 51 - 59 of File 3 consist of e-mails sent to employees of the Public Body by others, seeking information. Neither the inquiries, nor any responses to them contain any information that is research information. The inquiries are the regular sort of topical discussion that might take place between any people interested in the same topic, but does not appear to be part of a designed, systematic investigation.

[para 36] Pages 65 - 72 of File 3 contain notice of a third party application to intervene, distributed by the third party. It is not research information of an employee of the Public Body.

[para 37] Pages 115 - 117 of File 3 contain e-mails describing reactions to an op-ed piece. Neither the op-ed piece nor anything resembling research is included.

[para 38] Pages 118 - 120 of File 3 contain e-mails discussing the pros and cons of having a speaker appear at an event. As with the information in File 1C, the information consists of every-day sorts of deliberation that does not constitute research.

[para 39] Lastly, I turn to File 2.

[para 40] File 2 consists of three pages which the Public Body describes as “Private Correspondence.” The information in these pages is a narrative describing a third party’s experiences with the Canadian court system sent to employees of the Public Body, unsolicited. It is not research information of an employee of the Public Body.

Scope of Order

[para 41] Below, I order the Public Body to process the access request in relation to the records that are not research information, and hence not exempt from the Act.

[para 42] I recognize, however, that the Public Body argues that some of the records at issue are not in its custody or under its control, even if they are not exempt as research information. Given that the issue of custody or control was neither included in the Notice of Inquiry, nor added as an issue in this Inquiry, I do not make any decision on custody or control here. Thus, it is for the Public Body to determine whether any requested records are not in its custody and control when responding to the access request.

V. ORDER

[para 43] I make this Order under section 72 of the Act.

[para 44] I order the Public Body to process the Applicant’s access request with regard to the records that I have found are not exempt from the Act as research information or teaching materials as described in this Order.

[para 45] I order the Public Body to confirm to me in writing that it has complied with this Order within 50 days of receiving it.

John Gabriele
Adjudicator