ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-45

December 6, 2023

UNIVERSITY OF CALGARY

Case File Number 018145

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Summary: The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for a copy of a Final Report in which her complaint that her research contributions to four scholarly articles had not been acknowledged, was dismissed.

The Public Body refused to provide the Final Report on the basis that the Final Report was a "communication" by a person acting in a "quasi-judicial capacity" within the terms of section 4(1)(b) of the FOIP Act.

The Applicant requested review by the Commissioner.

The Adjudicator determined the Final Report did not fall within the terms of section 4(1)(b), as it was the final decision of a decision maker that was not acting in a quasi-judicial capacity. Having found that the Final Report was not exempt from the FOIP Act, the Adjudicator directed the Public Body to include the Final Report in its response to the Applicant.

Statutes Cited: AB: F*reedom of Information and Protection of Privacy Act* (the FOIP Act), R.S.A. 2000, c. F-25, ss. 4, 7, 72; **BC:** *Freedom of Information and Protection Act,* RSBC 1996, c 165, s. 3(3)(e); **NL:** *Access to Information and Protection of Privacy Act,* SNL 2015, c A-1.2

Authorities Cited: AB: Orders F2010-012, F2010-016; **BC:** Order F11-16; **NL:** Report 2006-014

Cases Cited: *Communities Economic Development Fund v. Canadian Pickles Corp*., 1991 CanLII 48 (SCC), [1991] 3 SCR 388; *Minister of National Revenue v Coopers and Lybrand,* 1978 CanLII 13 (SCC); *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 (CanLII), [2016] 1 SCR 29

I. BACKGROUND

[para 1] The Applicant complained to the University of Calgary (the Public Body) that her research contributions had not been acknowledged in four scholarly articles.

[para 2] A committee was struck to investigate whether there had been a breach of "academic integrity" by a professor. The committee found there had been no breach of academic integrity and that the complaint was not supported. The committee issued a Final Report containing its decision and reasons. The Applicant was not provided a copy of the Final Report.

[para 3] The Applicant, through her legal counsel, then made the following access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the University of Calgary:

> Pursuant to the *Freedom of Information and Protection of Privacy Act,* RSA 2000, c F-25 (the "Act") we request that the University of Calgary and the Cummings School of Medicine produce copies of all records in their possession regarding the complaint submitted by [the Applicant] in September 2016 for a breach of research integrity.
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> We expect the records to conclude in February 2018 with the issued decision of the University. Specifically, and without limiting the foregoing request, we seek the "Final Report" as contemplated by Articles 4.20-4.22 of the Investigating a Breach of Research Integrity University Procedure document.

[para 4] The University of Calgary did not provide the Final Report of the investigation into the Applicant's complaint on the basis that it consisted of "the personal notes, communications or draft decisions created by or for a person who is acting in a judicial or quasi-judicial capacity" within the terms of section 4(1)(b).

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

> I had filed a complaint with the University of Calgary which initiated an investigation of a breach of research integrity. The basis of the complaint was that the physician researcher with whom I worked took full credit for my work without allotting authorship to me. My legal counsel and I had established four full sections of the University's policies which had been clearly breached by his actions. In the end, however, we were informed that my claim was not substantiated, with no reason provided. I requested the report that had been prepared by the committee and received no reply. I filed a FOIP request for the specific 1-2 page report that would have been submitted by the

> committee. This report would contain the reason for their decision. I want no personal information, just the report containing the reason that they found the claim to be unsubstantiated. I reject the idea that because the committee served in a "quasi-judicial" role that I am not entitled to the specific report outlining the decision.
>
> Please, I am requesting that you investigate this claim.

[para 6] As the Applicant is clear that her requests for access and inquiry were made to obtain the Final Report, I will consider whether the FOIP Act applies to the final report.

II. ISSUE: Is the report at issue excluded from the application of the Act by section 4(1)(b)?

[para 7] Section 4(1)(b) 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:*
>
> > *(b) a personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity including any authority designated by the Lieutenant Governor in Council to which the Administrative Procedures Act applies […]*

Section 4(1)(b) excludes a personal note, communication or draft decision created by or on behalf of a decision maker acting in a judicial or quasi-judicial capacity from the application of the FOIP Act. In other words, a requestor has no right of access to information falling under section 4(1)(b) even though the information may be contained in a record in the custody or control of a public body.

[para 8] The position of the Public Body is that the report at issue may be characterized as a "communication" by a "quasi-judicial" decision maker. It argues:

> For exclusion under section 4(1)(b), the record at issue must first be a "personal note, communication, or draft decision". The Final Report of the Investigation Committee is a "communication" because it was communicated from the Investigation Committee to the Protected Disclosure Advisor and from the Protected Disclosure Advisor to the Secretariat for the Responsible Conduct of Research.
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> In Order F2010-016, the OIPC confirmed a decision by the University of Calgary to withhold a decision of an Investigation Committee under section 4(1)(b). In that case, the applicant sought an Investigation Committee's Final Report to the Provost on the results of the investigation. The Adjudicator found that the report constituted a "communication" and that the Investigation Committee was acting in a quasi-judicial capacity, and so confirmed the decision to withhold the report. The report to the Provost was a "communication" because, citing Black's Law Dictionary, it was "the expression or exchange of information by speech, writing, or gestures": para 13.
>
> The facts in this case are indistinguishable from those in Order F2010-016. The Final Report in this case is a communication. The Final Report was sent from the Investigation Committee to the Protected Disclosure Advisor, and the Final Report on pages 305-310 was sent from the Protected Disclosure Advisor to the Secretariat for the Responsible Conduct of Research. This is an

> "exchange of information by speech, writing or gestures" as contemplated in Black's Law Dictionary and applied in Order F2010-016. The Final Report is an exchange or expression of information from the Investigation Committee communicated in writing to the Protected Disclosure Advisor.

[para 9] I will first consider whether the Final Report can be construed as a "communication" within the terms of section 4(1)(b) as the Public Body argues. I will then consider whether the decision at issue is "judicial or quasi-judicial". If the report is not a "communication" within the terms of section 4(1)(b) or the panel that created it is not a "quasi-judicial tribunal" then section 4(1)(b) does not apply.

Is the report at issue a "communication" within the terms of section 4(1)(b)?

[para 10] I wrote the Public Body and asked it to provide further submissions regarding its position that the final report could be construed as a "communication" within the terms of section 4(1)(b). In that letter, I said:

> Section 4(1)(b) appears intended to exclude information revealing steps taken in arriving at a decision that may not be reflected in a final decision, such as communications of panel members, their notes, and a draft of a decision. That is, section 4(1)(b) preserves deliberative secrecy in quasi-judicial decision making.
>
> It is not clear to me that the final report of panel could be considered a "communication" within the terms of this provision. I accept that in a general sense, a report may communicate the findings of a panel; however, it is unclear to me that the Legislature would use the word "communication" to describe a final report of a decision, given its express reference to a "draft decision". It appears possible that the reference to a draft decision is intended to exclude final decisions from the ambit of section 4(1)(b). As the report before me reflects the investigation, findings, and final conclusions of the investigation committee, and as the Dean does not appear to have any ability to alter the report under the Public Body's policy, it would seem that the report is a final decision […]

[para 11] In the foregoing letter, I expressed the view that the Final Report at issue is a "final decision". This view is based on the content of the Final Report, which details a hearing and the reasons and findings of a panel. The Final Report explains how the issues the committee was struck to decide were decided. As noted in my letter to the Public Body, a final report, such as the one before me, is then provided to the Dean who must then distribute the report to various persons depending on the panel's conclusions. There appears to be no mechanism for the Final Report to be altered once it is provided to the Dean, including by the Dean.

[para 12] From my review of the relevant policy, which the Public Body provided for my review, as well as my review of the Final Report and the evidence before me, I find that the Final Report is a final decision.

[para 13] In response to my question regarding the meaning of "communications", the Public Body stated:

> It remains the Public Body's position that OIPC Orders have interpreted "communication" in a broad manner that would include the communication of the Report from the Investigation Committee to the Protected Disclosure Advisor.

[para 14] The Public Body's position is that even though the Final Report is a final decision and not a draft decision, it is a "communication". The Public Body relies on Order F2010-016, in which an adjudicator found that a four page final report disposing of a complaint was a "communication" within the terms of section 4(1)(b), with the result that the applicant could not request the report under the FOIP Act.

[para 15] The Adjudicator said:

> After a review of the submissions before me, I find that this first requirement under section 4(1)(b) is fulfilled. I find that the record at issue consists of a "communication" from the Committee to the Provost. In coming to this conclusion, I accepted the Public Body's definition of "communication" as found in *Black's Law Dictionary*. *Black's Law Dictionary* defines a "communication" as "the expression or exchange of information by speech, writing, or gestures". I find that the record fulfills this definition. I find that the record consists of an expression or exchange of information from the Committee that was communicated in writing to the Provost.

The Adjudicator did not explain why she found the definition provided by *Black's Law Dictionary* to be determinative of the meaning of "communications" where it appears in section 4(1)(b) of the FOIP Act.

[para 16] I agree that a "communication" is ordinarily understood to be "the expression or exchange of information by speech, writing, or gestures". The question is whether the *context* in which the Legislature placed the word "communication" permits such a broad interpretation.

[para 17] Section 4(1)(b) applies to the "personal note, communication, or draft decision written by, or on behalf of, a person acting in a judicial or quasi-judicial capacity. The inclusion of the word "personal" to modify "note" indicates that only personal notes by or for persons acting in a judicial or quasi-judicial capacity are to be included. That is, only notes created for the personal use of the decision maker are included, but not other kinds of notes.

[para 18] The use of the word "draft" to modify the word "decision" indicates that the only types of decisions contemplated are drafts, rather than final decisions.

[para 19] If the word "communication" is interpreted in the broad manner accepted by the adjudicator in Order F2010-016, the restriction of "notes" to "personal notes," and the restriction of "decisions" to "draft decisions", would serve little purpose, as notes and decisions that have been communicated would be included by virtue of the word "communication", despite the note not being personal or the decision not being a draft. In my view, the specific reference to "draft decision" in section 4(1)(b) is intended to exclude a final decision from the ambit of the section and the word "communication" should not be interpreted so as to nullify this legislative choice.

[para 20] In *Communities Economic Development Fund v. Canadian Pickles Corp*., 1991 CanLII 48 (SCC), [1991] 3 SCR 388 the Supreme Court of Canada explained the principle that all the words in a statute should be given effect:

> Section 9(7) prohibits, using mandatory language, the making of loans in contravention of the Act. In my opinion, the section can only be interpreted as evidence of the intention of the legislature to limit the wide grant of powers made in s. 26(2) of the Act. I am bolstered in my conclusion by the fact that the Act provides no sanction or remedy for a loan made in contravention of the Act and in violation of s. 9(7). If section 9(7) were interpreted to mean only that the appellant should not make loans in contravention of the Act, the section would be superfluous: the conclusion that the appellant should not make loans in contravention of the Act follows from the most basic of interpretive law principles. It is a principle of statutory interpretation that every word of a statute must be given meaning: "A construction which would leave without effect any part of the language of a statute will normally be rejected" (*Maxwell on the Interpretation of Statutes* (12th ed. 1969), at p. 36). Accordingly, the prohibition in s. 9(7) of the Act should be interpreted so as to create a limit on the powers of the appellant. [my emphasis]

[para 21] Section 4(1)(b) is intended to exclude communications and deliberations made by judicial or quasi-judicial decision makers prior to issuing a final decision. If it were possible to obtain drafts of decisions, or the discussion of decision makers regarding the decision they are to make, it could undermine the status of the final decision, or allow parties to attack the final decision even though the ideas initially under consideration are not reflected in the final decision and may not have formed part of it, ultimately. If a public body were to provide such information to requestors, the personal notes, communications, and draft decisions of the decision maker might appear to be as authoritative as the final decision, given that the records would be obtained from a government entity. A right of access to such records would create uncertainty as to whether the final decision is binding or "official".

[para 22] In my view, the context in which the word "communications" appears in section 4(1)(b) requires exclusion of notes that are not personal, and decisions that are not drafts. As set out in my letter to the Public Body, I interpret section 4(1)(b) as excluding information revealing steps taken in arriving at a decision, such as communications of panel members, their notes, and a draft of a decision. In other words, section 4(1)(b) preserves deliberative secrecy in judicial and quasi-judicial decision making.

[para 23] I note that "FOIP Guidelines and Practices 2009", published by Service Alberta (now Service Alberta and Red Tape Reduction), provides the following interpretation of section 4(1)(b):

> Section 4(1)(b)
>
> A personal note of a member of a judicial or quasi-judicial tribunal is one intended solely for the use of the person who wrote it (see IPC Order 99-025).
>
> A person who is acting in a judicial or quasi-judicial capacity includes any authority designated by the Lieutenant Governor in Council that is subject to the Administrative Procedures Act.

> This exclusion also applies to communications between the members of the judicial or quasi-judicial body themselves, and between members and support staff, when these communications relate to the judicial or quasi-judicial functions of the body.
>
> Section 4(1)(b) does not apply to final decisions or reasons for decision of the judicial or quasi-judicial body, although another exclusion or exception may apply to these records. [My emphasis]

[para 24] While "FOIP Guidelines and Practices 2009" is not binding, it documents how section 4(1)(b) has been interpreted and applied by public bodies historically. This resource is clear that final decisions were not considered to fall within the terms of section 4(1)(b). Finding that final decisions fall within the terms of section 4(1)(b) would be a departure from the manner in which this provision has been interpreted and applied, without a clear policy reason for doing so.

[para 25] I also take note of Order F11-16, a decision of the Office of the Information and Privacy of British Columbia that comments on the history of what is now section 3(3)(e) (then 3(1)(b) of *British Columbia's Freedom of Information and Protection Act* RSBC 1996, c 165, which is a provision substantially similar to section 4(1)(b) of Alberta's FOIP Act.

> The BC Supreme Court commented on the purpose of s. 3(1)(b) [now 3(3)(e)] in British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner):
>
> > All are agreed that the purpose of s. 3(1)(b) [now 3(3)(e)] is the protection of deliberative secrecy. One aspect of that is the need to protect the ability of those exercising judicial or quasi-judicial functions to express preliminary and tentative remarks and conclusions that might later have to be changed. The risk of their being published could have a constraining effect on the creative process. That consideration would apply to commissions of inquiry reviewing the propriety of conduct of individuals.
>
> Pitfield J. also commented on the purpose of this provision:
>
> > The purpose of s. 3(1)(b) of FIPPA is to protect deliberative secrecy. Deliberation encompasses the gathering of information, its assessment, and the formulation of an opinion or conclusion in respect of it.
> >
> > …
> >
> > … Because of the process which has been created for the purpose of addressing human rights and privilege issues, all deliberative steps must be protected. In that way, those charged with the responsibility of formulating opinions which are essential to the eventual disposition of a complaint will be able to formulate their opinions free from concerns about inquiries into their thought-making processes.
>
> *What types of records does s. 3(1)(b) cover?*
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> Previous orders have recognized that s. 3(1)(b) does not capture every record that a person acting in a quasi judicial capacity creates. Commissioner Loukidelis discussed this in Order 00-16:
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> > I stress that s. 3(1)(b) is only triggered when a person is actually "acting" in a judicial or quasi judicial capacity in respect of the record in issue. The section recognizes that employees of public bodies - including members of administrative tribunals - may

> discharge multiple functions, only some of which could be termed functions of a judicial or quasi judicial nature. …]
>
> The Commissioner went on to find that s. 3(1)(b) applied to certain records, such as panel members' comments and thoughts about issues raised in the application, as well as their comments on the evidence before them. He found that certain other communications, such as those concerning the scheduling of meetings and the constitution of the panel—records relating to the exercise [of] administrative functions—did not fall under s. 3(1)(b) because they "did not engage the deliberative processes that are protected by s. 3(1)(b)".

The foregoing order is clear that the exemption for personal notes, communications, and draft decisions is intended to protect the deliberative processes of judicial and quasi-judicial decision makers.

[para 26] For the reasons above, I find that a final decision does not fall within the terms of section 4(1)(b).

Was the Committee that created the Final Report acting in a "quasi-judicial" capacity?

[para 27] Section 4(1)(b) applies to persons acting in a judicial or quasi-judicial capacity. (It also applies to an authority designated by the Lieutenant Governor in Council to which the *Administrative Procedures and Jurisdiction Act* applies.)

[para 28] The Public Body relies on Order F2010-016 as authority for the position that the decision of the panel that wrote the Final Report was acting in a "quasi-judicial" capacity within the terms of section 4(1)(b) of the FOIP Act. As set out above, in that Order, the Adjudicator determined that the final report of a panel struck to review a complaint of misconduct was subject to section 4(1)(b).

[para 29] The Public Body argues:

> In OIPC Order F2010-012, the Public Body relied on the Supreme Court of Canada's decision in *Minister of [National] Revenue v Coopers and Lybrand*, 1978 CanLII 13 (SCC) [Coopers and 4 Lybrand]. There, the Supreme Court found that to determine whether a body was acting in a judicial or quasi-judicial capacity, four factors were to be weighed and evaluated:
>
> > 1. Is there anything in the language in which the function is conferred of in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
> >
> > 2. Does the decision or order directly or indirectly affect the rights and obligations of persons?
> >
> > 3. Is the adversary process involved?
> >
> > 4. Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

[para 30] In *Minister of National Revenue v Coopers and Lybrand,* 1978 CanLII 13 (SCC), the Supreme Court of Canada was tasked with determining whether the Federal Court of Appeal had jurisdiction to review a decision of the Minister. If the Minister's

decision was quasi-judicial in nature, the Federal Court of Appeal would have jurisdiction. If the decision were administrative, then the Federal Court of Appeal would lack jurisdiction over the decision. The Court determined that it was necessary to review the constating statute of the decision maker to determine whether Parliament intended for the decision to be made quasi-judicially. Speaking for the Court, Dickson J. (as he then was) said:

> Whether an administrative decision or order is one required by law to be made on a judicial or non-judicial basis will depend in large measure upon the legislative intention. If Parliament has made it clear that the person or body is required to act judicially, in the sense of being required to afford an opportunity to be heard, the courts must give effect to that intention. But silence in this respect is not conclusive. At common law the courts have supplied the legislative omission—see Byles J. in *Cooper v. Wandsworth Board of Works,* at p. 194—in order to give such procedural protection as will achieve justice and equity without frustrating parliamentary will as reflected in the legislation.
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> As Tucker L.J. observed in *Russell v. Duke of Norfolk* at p. 118:
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> > There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.
>
> It is possible, I think, to formulate several criteria for determining whether a decision or order is one required by law to be made on a judicial or quasi-judicial basis. The list is not intended to be exhaustive.
>
> (1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
>
> (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
>
> (3) Is the adversary process involved?
>
> (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?
>
> These are all factors to be weighed and evaluated, no one of which is necessarily determinative. Thus, as to (1), the absence of express language mandating a hearing does not necessarily preclude a duty to afford a hearing at common law. As to (2), the nature and severity of the manner, if any, in which individual rights are affected, and whether or not the decision or order is final, will be important, but the fact that rights are affected does not necessarily carry with it an obligation to act judicially. In *Howarth v. National Parole Board*, a majority of this Court rejected the notion of a right to natural justice in a parole suspension and revocation situation. See also *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board*.
>
> In more general terms, one must have regard to the subject matter of the power, the nature of the issue to be decided, and the importance of the determination upon those directly or indirectly affected thereby: see *Durayappah v. Fernando.* The more important the issue and the more serious the sanctions, the stronger the claim that the power be subject in its exercise to judicial or quasi-judicial process.

[para 31] "Quasi-judicial decisions" are decisions made by a tribunal in the same or a similar manner as the Court. In *Coopers and Lybrand*, supra, the Supreme Court of

Canada held that to determine whether a decision maker is acting in a quasi-judicial capacity, it is necessary to review the statute under which the decision maker operates and to consider a non-exhaustive list of factors. In general terms, the analysis requires consideration of the subject matter of the power, the nature of the issue and the importance of the issue to affected persons.

[para 32] The Public Body argued that the power to conduct the hearing arose from the *Post-Secondary Learning Act*:

> It must be noted that in relation to the matters involving the investigation and Final Report, the University is exercising statutory powers delegated pursuant to the *Post-Secondary Learning Act*. The powers to investigate research integrity are therefore delegated statutory powers which may result in serious penalties if a complaint is determined to be founded.
>
> First, the language surrounding the Investigation Committee and the general context contemplate a hearing before a decision. The Public Body's Investigating a Breach of Research Integrity procedure outlines the formalized University process for investigating breaches of research integrity. A copy of the procedure been attached as Appendix B. When a complaint is received, the Protected Disclosure Advisor has a duty to make an initial determination if the complaint constitutes a responsible allegation. If they determine that further action is required, section 4.12 gives them the authority to develop Terms of Reference and to appoint an Investigation Committee to carry out an investigation into the allegation. The investigation must comply with, and be completed within the reporting timeframes set out in, section 4.4 of the Tri-Agency Framework: Responsible Conduct of Research. This is a formal procedure with well-defined processes.
>
> Second, a decision of an Investigation Committee could impact the rights of the Applicant and Respondent, particularly the professor who was the subject of the complaint. Although a final resolution, disciplinary or not, is not the responsibility of an Investigation Committee, when the investigation is complete the Investigation Committee is required to communicate a written report to the Protected Disclosure Advisor. This report must include the complete allegation, each party's statements from the process, and the Investigation Committee's findings including a determination of the seriousness of the breach and recommendations for disciplinary or other actions in accordance with section 4.22. If the complaint was determined by the Investigation Committee to be a responsible allegation related to activities funded by one of the Tri-Agency, a report is communicated by the Protected Disclosure Advisor to the Secretariat on Responsible Conduct of Research in accordance with section 4.29. This can result in a harm to the Respondent's personal and professional reputations, ability to pursue further work, and funding as the Secretariat on Responsible Conduct of Research communicates the report with additional ethics and funding positions within the Tri-Agency.

[para 33] As it appeared to me that the Final Report that is the subject of the access request was not made under a statute, but policy, making the factors set out in *Coopers and Lybrand* potentially inapplicable, I asked the Public Body for further argument. In my letter, I pointed to case law in which decisions made under a contract or collective agreement were held to be private, rather than public. I stated:

> More recently, the Supreme Court of Canada issued *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 (CanLII), [2016] 1 SCR 29 (Commission scolaire de Laval), which appears to contradict the conclusion of the adjudicator in Order F2010-012[1]. The SCC stated:

[1] This is an error. It should state Orders F2010-012 and F2010-016.

> But when the executive committee decided to dismiss B after deliberating *in camera*, it was not performing an adjudicative function and was not acting as a quasi-judicial decision maker. Rather, it was acting as an employer dismissing an employee. Its decision was therefore one of a private nature that falls under employment law, not one of a public nature to which the constitutional principles of judicial independence and separation of powers would apply. No valid analogy can be drawn between the administrative tribunal in *Tremblay*, whose quasi-judicial decision was final and could not be appealed, and the decision-making authority of a public employer — even where the authority in question is the employer's executive committee — that decides to resiliate an employee's employment contract.

> When I review the report before me, and note that the source of the panel's authority appears to be a collective agreement, it appears to me that the panel was responsible for making a decision on behalf of the Public Body as employer under a collective agreement. A collective agreement is a contract. Decisions made by an employer under a contract, such as whether to discipline an employee, are "private", not public. As a result, these decisions are not quasi-judicial, even when they are made by a panel. If that is so, then the analysis in *Commission scolaire de Laval* would hold that the decision is not quasi-judicial. If the report is not quasi-judicial in nature, section 4(1)(b) cannot apply to it.

[para 34] In response, the Public Body argued:

> The University is required by the Agreement on the Administration of Agency Grants and Awards (the "Agreement") with the Federal Government Tri-Agencies to comply with the requirements of the Tri-Agency Framework: Responsible Conduct of Research. The Agreement applicable at all relevant times is attached as Appendix "A".
>
> The Tri-Agencies are the Canadian Institute of Health Research, the Natural Sciences and Engineering Research Council of Canada, and the Social Sciences and Humanities Research Council of Canada. They are governed by their respective constating enactments: Canadian Institutes of Health Research Act, SC 2000, c 6; Natural Sciences and Engineering Research Council Act, RSC 1985, c N-21; and Social Sciences and Humanities Research Council Act, RSC 1985, c S-12. Together, these Federal-Government bodies support and promote research and are the primary way the Government of Canada funds research and training at post-secondary institutions

[para 35] The Public Body provided a copy of the relevant policy under which the final report was made. Article 4.28 of the policy states:

> 4.28 A Respondent who is found to have committed a Breach of the Research Integrity Policy may be subject to disciplinary action up to and including termination of employment or other relationship with the University. Disciplinary action will be taken in accordance with the provisions of any applicable collective agreement or applicable policy relating to Student conduct".

[para 36] The Public Body argues that the panel that made the decision at issue was not making a decision under a collective agreement. The collective agreement only becomes relevant once an employee has been found to have committed a breach of the Research Integrity Policy. The Public Body does not cite a provision of the *Post-Secondary Learning Act* or another enactment that it believes authorizes the process that was followed in making the decision or that would support its position that the decision is "quasi-judicial".

[para 37] I am unable to identify a provision of the *Post-Secondary Learning Act* or another enactment that authorizes or requires striking a panel to conduct a hearing or to conclude the hearing with a report. I was also unable to identify a provision that would set out the rights of a respondent or a complainant in relation to such a hearing. In the absence of such provisions, I find the factors set out in *Coopers and Lybrand* have no application in the case before me, given that the factors assist in the determination of Legislative intent and the role of a decision maker within a *statutory* framework.

[para 38] I note the Information and Privacy Commissioner of Newfoundland said the following in Report 2006-014:

> I indicated in my Report 2005-007, and I reiterate, that I am not bound by this particular definition. While I find it useful, I am inclined to first focus on a point raised in the first two examples above. In paragraph 14 of *Minister of National Revenue v. Coopers and Lybrand*, it appears that an integral part of the consideration in determining whether or not a matter qualifies as quasi-judicial involves "determining whether a decision or order is one required by law to be made on a judicial or quasi-judicial basis" (emphasis added). Even in the opinion of authors Jones and de Villars quoted above, when discussing whether a matter can be considered quasi-judicial or not, the discussion appears to be predicated on the fact that it involves "the exercise of a statutory power delegated to someone who is not a judge" (emphasis added). Aside from the other criteria set out in Minister of National Revenue and the criteria set out in the B.C. Policy and Procedures Manual, I believe it is essential to consider whether the procedure which resulted in the responsive records in this case was a procedure which was undertaken by CNA under a statutory mandate.
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> Generally speaking, in researching the use of equivalent provisions to 5(1)(b), the cases in other jurisdictions often involve boards and tribunals whose specific function is established by statute and involves duties such as holding hearings, weighing evidence, determining facts, and rendering decisions. Some educational bodies may exercise this type of function, when such functions are conferred by statute. For example, legislation establishing a university may confer a quasi-judicial function relating to an academic appeals process (see, for example *Polten v. University of Toronto* 8 O. R. (2d.) 749, 59 D.L.R. (3d.) 197). Clearly, such a function is quite central to the role and purpose of the university. Also, in *Burke v. Canada (Immigration & Employment Commission)* 1990 CarswellNat 165, a decision of the Immigration and Employment Commission in relation to an application for benefits was determined to have been a decision made on a judicial or quasi-judicial basis because the Commission made such decisions under the authority of the *Labour Adjustment Benefits Act*, which conferred the authority to decide such matters. Again, the role of the Immigration and Employment Commission in determining such matters was clearly established in that Act, and the process for an individual to apply for benefits to the Commission is clearly set out therein as well. The statutory obligation of the Commission to decide such matters, as well as all of the characteristics of the process followed by the Commission appear to have assisted the learned judge in issuing his decision in that case.
>
> While I do not completely discount the notion that a person acting as an adjudicator might in certain circumstances be acting in a quasi-judicial capacity, CNA has not presented convincing evidence of this. Even if I were to agree that this particular Adjudicator was indeed acting in a quasi-judicial capacity, there is only one page among all of the records which involves the Adjudicator, and it is a signed letter from him to the CNA President indicating his final decision. The record is not exempted from the ATIPPA under section 5(1)(b), because that section exempts draft decisions of persons acting in a judicial or quasi-judicial capacity rather than final decisions.

[para 39] In the foregoing case, the Commissioner reviewed section 5(1)(b) of Newfoundland's *Access to Information and Protection of Privacy Act* -- the equivalent

provision of section 4(1)(b) of Alberta's FOIP Act – and determined that, in most cases, a person performing quasi-judicial functions is granted that authority through statute. The Commissioner also determined that the exemption applies to draft decisions and not final decisions.

[para 40] The Public Body's policies and processes for investigating complaints regarding breaches of research policy align with the "Tri-Agency Research Integrity Policy" (the Policy). The Public Body provided the Policy for my review. The Policy is developed by the Canadian Institutes of Health Research (CIHR), the Natural Sciences and Engineering Research Council of Canada (NSERC), and the Social Sciences and Humanities Research Council of Canada (SSHRC). These three agencies fund Canadian academic research and the Policy is intended to assist them in fulfilling this function. Researchers at member institutions receive funding from the three agencies, while institutions administer funds, and investigate breaches of the Policy.

[para 41] The Policy requires institutions, such as the Public Body, to create policies regarding academic integrity and to investigate breaches of academic integrity. The policy created by the Public Body establishes that if a breach of academic integrity is found, discipline will be subject to the terms of an applicable collective agreement. The hearing in this case was done in accordance with policy developed by the Public Body to comply with the Policy.

[para 42] I accept that a University, such as the Public Body in this case, has the authority to enter the Tri-Agency Agreement and to align its academic and workplace policies in accordance with it. The Policy and the policies the Public Body has developed to comply with the Policy are critical to the funding of research and to the functioning of the Public Body; at the same time, I am unable to say that a hearing conducted in compliance with the Policy and the Public Body's policies is "quasi-judicial" in nature.

[para 43] As it has been presented to me, the Policy is binding on the Public Body through an agreement, rather than legislation. As discussed in *Commission Scolaire de Laval, (supra)* when the power to decide a matter comes from a contract or collective agreement, the matter is private and is not public for that reason.

[para 44] I note, too, that some of the procedures followed by the Public Body do not support finding that the decision was intended to be quasi-judicial. While this point is not determinative, as a tribunal may be quasi-judicial but fail to follow quasi-judicial processes, it is also true that decision makers that are not intended to act quasi-judicially may follow procedures that are not judicial or quasi-judicial.

[para 45] The hearing in question was conducted in private and was not open to the public. The complainant's counsel was not permitted to make submissions on the complainant's behalf. Only the respondent was provided a copy of the Final Report containing the decision and the reasons for it. The panel deciding the matter was not limited to accepting the evidence of the parties, but obtained its own evidence without

notice to the parties and based its decision, in part, on that evidence (lines 358 – 363 of the Final Report).

[para 46] The Legislature has not spoken to the subject matter of the Final Report or the processes the Public Body is required to follow when making decisions. The panel that authored the Final Report conducted the hearing as would an inquisitorial decision maker. The hearing was held in private and not subject to the "open Court principle". The panel's view of its role does not accord with a quasi-judicial decision (lines 284 – 286 of the Final Report). The foregoing are all indicia that the Final Report is not a report of a person acting in a quasi-judicial capacity.

Conclusion

[para 47] On the evidence and submissions before me, I cannot conclude that the panel that authored the Final Report was a quasi-judicial decision maker. For all the reasons above, I find that the Final Report does not fall within the terms of section 4(1)(b). As a result, I find that the Final Report is subject to the FOIP Act and the Applicant has a right to make an access request for this report under section 7 of the FOIP Act. I will therefore direct the Public Body to include the Final Report in its response to the Applicant as the Final Report is subject to the FOIP Act.

III. ORDER

[para 48] I make the following order under section 72 of the FOIP Act.

[para 49] I order the Public Body to include the Final Report in its response to the Applicant. The Public Body is not precluded from applying exceptions to disclosure if any exceptions apply.

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

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Teresa Cunningham
Adjudicator