ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2025-02

January 23, 2025

UNIVERSITY OF CALGARY

Case File Number 018793

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Summary: The Applicant, a former student who had made a complaint of misconduct about a professor of the University of Calgary (the Public Body), made an access request to the Public Body under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for access to the following:

> 1) the final investigation report produced for the protected disclosure investigation into the conduct of [professor ….]; and
> 2) records related to corrective action taken

The Public Body refused to provide the investigation report on the ground that it was exempt from the FOIP Act by application of section 4(1)(b) of the FOIP Act. Section 4(1)(b) establishes that a record that is a "personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity" is exempt from the application of the FOIP Act.

The Adjudicator determined that the investigation report was not subject to section 4(1)(b) as the author of the investigation report was not acting in a judicial or quasi-judicial capacity.

The Adjudicator ordered the head of the Public Body to include the investigation report in the response; however, she determined that the head was not precluded from applying exceptions to disclosure in making the new response.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act,* R.S.A. 2000, c. F-25, ss. 4, 17, 72; *Public Interest Disclosure (Whistleblower Protection) Act* SA 2012, c P-39.5, ss. 2, 3

Authorities Cited: AB: Order F2023-45

Cases Cited: *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 (CanLII), [2016] 1 SCR 29; *Eksteen v. University of Calgary* 2019 ABQB 881 (CanLII)

I. BACKGROUND

[para 1] The Applicant, a former student who made a complaint of misconduct regarding a professor at the University of Calgary (the Public Body), made an access request to the head of the Public Body under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for access to the following:

> 1) the final investigation report produced for the protected disclosure investigation into the conduct of [professor …]; and
> 2) records related to corrective action taken

[para 2] The head of the Public Body decided to break the access request into two parts: the first for the investigation report and the second for records relating to corrective action.

[para 3] The head of the Public Body applied section 4(1)(b) of the FOIP Act to the investigation report. Section 4(1)(b) establishes that a record that is a "personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity" is exempt from the application of the FOIP Act.

[para 4] The Applicant requested review by the Commissioner of the head of the Public Body's determination that the investigation report was subject to section 4(1)(b) of the FOIP Act.

[para 5] The Commissioner referred the matter to inquiry. At the outset of the inquiry, the head of the Public Body asked me to recuse myself on the basis that it considered that it had a reasonable apprehension that I am biased. In Decision F2024-D-01, I found that the head of the Public Body had not established that it had a reasonable apprehension of bias and I decided that the inquiry would continue. The parties provided submissions regarding the issue for inquiry.

II. ISSUE: Does section 4(1)(b) of the FOIP Act exempt the investigation report from the application of the FOIP Act?

[para 6] Section 4(1)(b) of the FOIP Act 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 and Jurisdiction Act applies* […]

[para 7] Quasi-judicial decisions are those made by decision makers other than the Court in the exercise of state authority and which affect individual rights. Such decisions are subject to judicial review and are required to be made in accordance with principles of fairness and natural justice. Quasi-judicial decisions are public law decisions and are in contrast to decisions that are *not* made in the exercise of state authority, such as decisions made by an employer under the authority of a contract or collective agreement.

[para 8] In Order F2023-45 I said:

> 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.
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> 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.
>
> 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.
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> 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 9] In the foregoing order, I found that a final report of a committee struck to hear a complaint regarding academic integrity did not fall within the terms of section 4(1)(b). I found that the report was a final decision and not a draft decision, and that the panel that issued it was not acting judicially or quasi-judicially. I determined that when the authority for an employer to conduct an investigation and make a decision comes from contract or collective agreement, rather than legislation, the investigations and decisions are not quasi-judicial in nature.

[para 10] I turn now to the question of whether the investigation report in this case falls within the terms of section 4(1)(b). I will address the question of whether the author of the investigation report or the recipient was acting in a quasi-judicial or judicial capacity as the answer to this question will determine the outcome of the inquiry.

Was the investigator who authored the investigation report acting in a quasi-judicial or judicial capacity?

[para 11] The Public Body argues:

> The University submits that the Investigation Report is a communication made by and for persons acting in a judicial or quasi-judicial capacity pursuant to the Procedure and the Public Interest Disclosure (Whistleblower Protection) Act. Both the investigator who created the Investigation Report and the recipient of the Investigation Report were acting in a quasi-judicial capacity. As such, the Investigation Report is exempt from disclosure under the FOIPP Act pursuant to section 4(1)(b).
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> B. The Protected Disclosure, Procedure For [sic]
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> To assess whether a particular record falls within the ambit of section 4(1)(b) of the FOIPP Act, it is important to have reference to the policies and legislation which provide the authority for the investigation and creation of the Investigation Report. The Investigation Report was created pursuant to the terms of the University's Protected Disclosure, Procedure for [sic] (the "Procedure"). The Procedure outlines the process by which individuals may make a Protected Disclosure, as defined in the Procedure, and the process which the University will follow in responding to that Protected Disclosure.
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> The Procedure was created pursuant to the *Public Interest Disclosure (Whistleblower Protection) Act*, which provides:
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> > 5(1) Every chief officer must establish and maintain, in accordance with this Act, written procedures, including time periods, for managing and investigating disclosures by employees for whom the chief officer is responsible.
> >
> > (2) The procedures established under subsection (1) must include, at a minimum, the following:
> >
> > > (a) procedures for receiving and reviewing disclosures, including setting time periods for making recommendations to the department, public entity or office of the Legislature respecting any corrective measures that should be taken;
> > > …
> > > (d) procedures for reviewing and investigating disclosures in accordance with the principles of procedural fairness and natural justice;
> > > …
> > > (i) procedures for reporting the outcomes of investigations of disclosures;
> > > …
> > > (j) procedures for enforcement and follow-up of any disciplinary action or corrective measures taken or directed pursuant to this Act;
>
> Pursuant to the *Public Interest Disclosure (Whistleblower Protection) Act*, the University is obliged to put a procedure in place for receiving complaints of alleged wrongdoing, investigating those complaints, and taking disciplinary action or other corrective measures. In accordance with that statutory obligation, the University created the Procedure.

> A Protected Disclosure is defined in the Procedure to mean any disclosure made pursuant to the *Public Interest Disclosure (Whistleblower Protection) Act*, involving an allegation of a breach of the Code of Conduct, or involving an allegation of a breach of any other University policy where the respondent is an Academic Staff Member, Appointee, Contractor, Volunteer or Postdoctoral Scholar.
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> In this case, the complaint alleged that a Professor had engaged in behaviour that, if substantiated, would constitute a breach of the University's Code of Conduct, Sexual Violence Policy, Harassment Policy, and Article 8 of the Collective Agreement between the Board of Governors and the University of Calgary Faculty Association.

[para 12] Section 2(2) of the *Public Interest Disclosure (Whistleblower Protection) Act* (PIDA) sets out the purposes of PIDA. It states:

> *2(2) The purposes of this Act are*
>
> *(a) to facilitate the disclosure and investigation of significant and serious matters in or relating to departments, public entities, offices or prescribed service providers, that an employee believes may be unlawful, dangerous to the public or injurious to the public interest,*
>
> *(b) to protect employees who make those disclosures,*
>
> *(c) to manage, investigate and make recommendations respecting disclosures of wrongdoings and reprisals,*
>
> *(c.1) to provide for the determination of appropriate remedies concerning reprisals,*
>
> *(d) to promote public confidence in the administration of or services provided by departments, public entities, offices and prescribed service providers, and*
>
> *(e) any other purpose prescribed in the regulations.*

[para 13] A "disclosure" is defined in PIDA as a disclosure of wrongdoing made in good faith by an employee in accordance with PIDA. Section 3 of PIDA establishes the activities that are considered "wrongdoing" for the purposes of PIDA.

[para 14] In its submissions, cited above, the Public Body argues that the author of the investigation report and the report's recipient acted in quasi-judicial capacities as the complaint was investigated under the Public Body's Protected Disclosure Policy. Because the investigation was under the Protected Disclosure Policy, the Public Body reasons that the investigation was pursuant to PIDA. As it considers PIDA to be engaged, the head of the Public Body claims the investigator who wrote the report was acting in a quasi-judicial capacity – that is, the investigator was required to comply with the rules of administrative fairness when conducting the investigation and the investigation report

would be subject to judicial review. Its arguments extend to the recipient of the report who would make employment decisions based on the report.

[para 15] The Applicant argues:

> It is well established law that administrative bodies only enjoy authority expressly or implicitly granted.
>
> The University failed to establish either an express or implied grant of statutory jurisdiction with respect to the Public Interest Disclosure (Whistleblower Protection) Act, despite improperly submitting that the Investigator and Dean enjoyed authority pursuant to it.
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> Notably, the University itself acknowledged its lack of jurisdiction by confirming that the wrongdoing alleged by the Applicant does not fall under section 3 of PIDA, which would be necessary to invoke statutory authority.
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> PIDA applies to wrongdoing such as gross mismanagement, health or safety risks, or misuse of public funds.
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> As noted in the University's submissions at paragraph 15, the Applicant's complaint did not involve these types of wrongdoing. Instead, the Applicant's complaint pertained to a Professor breaching the University's internal policies and contracts—specifically the Code of Conduct, Sexual Violence Policy, Harassment Policy—and the Collective Agreement between the Board of Governors and the University of Calgary Faculty Association. As such, the University did not have jurisdiction under PIDA, or exerted authority under PIDA.

[para 16] I agree with the Applicant that the investigation was not conducted under the authority of PIDA. The head of the Public Body's arguments in relation to PIDA lack merit. The complaint that gave rise to the investigation in this case is not one that may be made under PIDA, as PIDA applies only to reports of wrongdoing made by *employees*. I have no evidence before me on which to find that the Applicant was an employee of the Public Body when the complaint was made or that the complaint was made in relation to any such employment. I note, too, that the investigation report indicates that the investigator was asked to investigate whether the Professor breached the Public Body's Code of Conduct; PIDA does not apply to complaints regarding compliance with a university's code of conduct. The investigation in this case was regarding a professor's compliance with the Public Body's policy and the collective agreement, rather than legislation. The Public Body itself argues that the investigation was in relation to the collective agreement.

[para 17] The Public Body also argues:

> The Investigator's decision directly or indirectly affected the rights and obligations of persons and, in particular, the individual who was the subject of the complaint. The Procedure states that if misconduct is found during the investigatory process, it could result in a variety of remedies and sanctions being imposed. In the present case, the Investigator was given the authority to make and investigate factual findings which were then provided to the Dean who had the authority to impose a resolution, which could include disciplinary or non-disciplinary corrective action.

[para 18] Without question, the investigation and the report affect the professor's *contractual* rights; the relationship between the Public Body and the professor is contractual and the Public Body's role in the investigation is that of employer and not that of an emanation of the state.

[para 19] I note that the head of the Public Body's arguments and assertions conflict with its arguments and assertions in *Eksteen v. University of Calgary* 2019 ABQB 881 (CanLII) (*Eksteen*). *Eksteen* dealt with a decision made by the Public Body regarding a complaint of harassment against a professor. The decision was made under the Protected Disclosure Policy as well as policy aligning with the Tri-Agencies Agreement to which the Public Body is a signatory.

[para 20] In *Eksteen*, the Court agreed with the Public Body and held that decisions made under the policies to which the head of the Public Body refers are not public law decisions, but private decisions made in relation to a contract:

> The University states that the Advisor was merely an employee of the University and her authority was solely derived from the internal policies of the University, not the *PIDA*. The University states that the Advisor has a dual role to accept complaints by University faculty, staff and students relating to conduct breaches and breaches of other policies on a range of topics, as well as fulfill the role of the University's designated officer under the *PIDA*.
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> The University argues that simply because the Advisor administers the *PIDA* as well as fulfilling her role in the Investigation Policy process, does not mean that the Investigation Policy process is grounded through statutory authority. Conflating these two roles would be wrong, as there is no evidence whatsoever that this investigation was done pursuant to that legislation.
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> […]
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> The University submits that the University itself is not the state; rather it is an independent body and any decisions related to faculty and employees remain internal, autonomous decisions: *McKinney v University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 SCR 229 at 273-274.
>
> […]
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> There may be circumstances where a decision of the University to discontinue a relationship with an individual providing instructional or other services could be found to be an exercise of state authority. However, the legal relationship in this case is contractual. Many corporations and institutions created by statute provide for some type of internal management and decision making structure within their constituent legislation. It would state the test too broadly to find that any actions and decisions made by the various agents of the University are all exercises of state authority.

[para 21] In the foregoing case, the Public Body successfully argued that an investigation under the Public Body's Protected Disclosure Policy and its research integrity policies and the subsequent termination of a professor were actions taken by the Public Body as employer in relation to the employment contract. It argued that decisions made under the Protected Disclosure Policy are not made under PIDA. It also argued that its employment decisions are not exercises of state authority. As a result, it reasoned that public law principles were not engaged, only contractual rights. Ashcroft J. accepted the Public Body's arguments and dismissed the judicial review application. To summarize,

Ashcroft J. determined that investigations and decisions conducted under the Protected Disclosure Policy in relation to breaches of policy are not quasi-judicial when they are conducted by the Public Body as employer.

[para 22] In finding that the Protected Disclosure Policy did not necessarily ground investigations in statute, Ashcroft J. held that the Protected Disclosure Policy was far broader than PIDA contemplates, as the policy also pertains to complaints of breaches of the Public Body's Code of Conduct. The Court held that the investigation and decision to terminate the professor's employment related to matters outside the scope of PIDA. As in *Eksteen*, the purpose of the investigation in the case before me was to determine whether the professor contravened the Public Body's Code of Conduct and what action, if any should be taken by the Public Body as employer, if such a contravention were found.

[para 23] In *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 (CanLII), [2016] 1 SCR 29 the Supreme Court of Canada distinguished between quasi-judicial decisions, which are subject to judicial review and decisions made by an employer under employment law which are not:

> 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.

[para 24] In the foregoing case, the Court determined that employment decisions made by an employer under contract or collective agreement are not public law decisions and are not required to be decided judicially or quasi-judicially. This conclusion is consistent with *Eksteen*, *supra*. In the case before me, the investigation was conducted to determine whether the professor had violated the Public Body's Code of Conduct, and if so, what action the Public Body should take as an employer. The investigation contains the conclusions of the investigator as to whether the professor breached the Code of Conduct and the collective agreement, based on the investigation. It also contains recommendations based on those conclusions. The investigator was not responsible for making decisions. Rather, the investigator appears to have been hired because of the investigator's expertise in labour relations. The investigation report was intended to assist the Public Body as employer to make decisions regarding the employment relationship with the professor.

[para 25] For the reasons above, I find that the investigation report of the kind before me is not a communication by a quasi-judicial decision maker and is not subject to section 4(1)(b) of the FOIP Act. Moreover, I find that it is settled law that the Public Body's investigations and decisions under its Protected Disclosure policy with regard to compliance with its Code of Conduct are not quasi-judicial, given the Court's decision in *Eksteen*.

[para 26] The Applicant has argued that in the event I find section 4(1)(b) does not apply, I should order the head of the Public Body to disclose the records in their entirety. The Applicant argues:

> The Ministerial Statement on Quality Assurance of Degree Education in Canada mandates full disclosure in dispute resolution between faculty and community member, including student workers, such as the Applicant. Where statutory authority is being exercised, the application and interpretation of these minimum standards must also be considered. This means that the Final Investigation Report must be shared with all parties involved, and deliberative secrecy would not exempt these records from being produced.
>
> Common law procedural fairness principles also apply and, in this case, should be Stinchcombe-like due to the rights at stake for. The Dispute Resolution affected the Applicant's human rights and, although the Applicant was not the one being investigated for wrongdoing, the findings of the Final Investigation Report would have a substantive adverse impact on her professional and education pursuits, including the conditions of her academic and work environment, making procedural fairness critical. Full disclosure was required to ensure she could meet her case in establishing remedy and accuracy of her account.

[para 27] The Applicant argues that she is entitled to full disclosure, as the investigation relates to dispute resolution between faculty and community member and affects her human rights.

[para 28] The investigation report is not part of a dispute resolution between the Applicant and the faculty member. Rather, the investigation report documents an investigation into the conduct of a professor and the findings of the investigator. The Applicant was not a party, but a witness. The report was not intended to provide a remedy to the Applicant or to determine entitlement to one. The report did not adjudicate the Applicant's rights or affect them. Instead, it was intended to provide evidence and advice regarding a professor's compliance with the Public Body's Code of Conduct to his employer. While there may be remedies available to the Applicant regarding the conduct that was the subject of her complaint, it was not the purpose of the investigation report to determine or address any such rights.

[para 29] The report contains the personal information of individuals other than the Applicant. As a result, the head of the Public Body must consider whether section 17(1) applies to information in the report prior to giving the Applicant access. There may also be discretionary exceptions that apply to information in the report.

III. ORDER

[para 30] I make this Order under section 72 of the Act. As I find that the final investigation report is not exempt from the application of the FOIP Act, I order the head of the Public Body to include the final investigation report at issue in the response to the Applicant. The head of the Public Body is not precluded from applying exceptions to disclosure if any such apply.

[para 31] I order the head of the Public Body to inform me within fifty days of receiving this order that the head has complied with it.

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Teresa Cunningham
Adjudicator
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