

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2007-015**

November 15, 2007

**UNIVERSITY OF ALBERTA**

Case File Number 3675

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Complainant, an employee of the University of Alberta (the Public Body) complained to the Commissioner that the Public Body had disclosed confidential employment information when it had posted a statistical summary.

During the inquiry, the Complainant made a second complaint about another incident in which information was disclosed.

The Adjudicator decided that posting the statistical summary contravened Part 2 of the *Freedom of Information and Protection of Privacy Act* (the Act). The Adjudicator determined that she did not have jurisdiction to make a decision regarding the second incident.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 17, 40

**Authorities Cited: AB:** Orders 2001-020, F2005-016

**I. BACKGROUND**

[para 1] As part of its collective agreement, the Public Body grants salary increments to its staff each year. Each department is assigned a certain number of increments, which are then distributed among qualified employees on the basis of merit.

The chair of a department has the ability to determine the amount of the increment, which may be a single increment, a multiple increment, a partial increment, or no increment. A department of the Public Body decided to post statistics regarding the awarding of increments. The Public Body did not post the names of recipients, but did post the number of articles published by recipients in a specific time frame, the rank held by recipients, and the amounts of the increment received.

[para 2] On May 8, 2006, the Complainant requested review of the Public Body's decision to post increment statistics, on the basis that this practice disclosed his personal salary information without his consent.

[para 3] Mediation was authorized but did not resolve the issue. The matter was scheduled for a written inquiry.

[para 4] The parties provided initial submissions and rebuttal submissions. In his initial submission, received by this office on April 17, 2007, the Complainant made allegations about another disclosure of information by the Public Body which took place on June 29, 2006.

[para 5] In its rebuttal submissions, the Public Body objected to the addition of the issue, but made representations regarding it.

[para 6] The Adjudicator who was originally delegated to hear the inquiry decided that both issues should be heard and decided together. When that Adjudicator retired before hearing the inquiry, the Commissioner delegated the inquiry to me.

## **II. ISSUE**

**Issue A: Did the Public Body use and / or disclose the Complainant's personal information in contravention of Part 2 of the Act?**

## **III. DISCUSSION OF ISSUES**

**Issue A: Did the Public Body use and / or disclose the Complainant's personal information in contravention of Part 2 of the Act?**

### Department of Electrical and Computer Engineering 2005 FEC Statistics

[para 7] The issue is stated as "Did the Public Body use and / or disclose the Complainant's personal information in contravention of Part 2 of the Act?" However, having reviewed the parties' submissions, I find that this issue is limited to disclosure. I will therefore consider the following question: "Did the Public Body disclose the Complainant's personal information in contravention of Part 2 of the Act?"

[para 8] The Complainant argues that by posting statistical summaries about increments, the Public Body disclosed his salary information without his consent. He

advises that a colleague was able to identify correctly the salary increments he was awarded because of the number of publications associated with that increment on the statistical summary. Because his colleagues were able to identify him by his number of publications, he argues that the Public Body disclosed his salary information.

[para 9] The Public Body argues that the analysis was an exclusively numerical analysis and that the Record at issue does not contain personal information, just statistical information. It explains:

The information from which the statistics are derived comes initially from faculty members themselves, including the Complainant, who provide the information in their individual annual reports to the Departmental Chair whose task it is to evaluate the performance of departmental academic staff for purposes of awarding the discretionary benefit of salary increments.

[para 10] The Public Body also submits that the salary increment is a discretionary benefit for the purposes of section 17(2)(e) of the Act and so disclosing this information would not be in violation of Part 2 of the Act. It relies on Orders 2001-020, F2005-016 of this office in support of this position. It also argues that the number of articles in the statistical summary was inaccurate and therefore could not identify the Complainant.

[para 11] Finally, the Public Body argues that the Act does not apply to the research information of an employee of a post-secondary educational body.

[para 12] Section 40 establishes the situations in which a public body may disclose personal information. It states in part:

*40(1) A public body may disclose personal information only*

- (a) in accordance with Part 1,*
- (b) if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17,*
- (c) for the purpose for which the information was collected or compiled or for a use consistent with that purpose,*
- (d) if the individual the information is about has identified the information and consented, in the prescribed manner, to the disclosure...*

[para 13] Section 1(1)(n) defines personal information for the purposes of the Act. It is a non-exhaustive definition and states in part:

*“personal information” means recorded information about an identifiable individual, including*

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

- (ii) *the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
- (iii) *the individual's age, sex, marital status or family status,*
- (iv) *an identifying number, symbol or other particular assigned to the individual,*
- (v) *the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
- (vi) *information about the individual's health and health care history, including information about a physical or mental disability,*
- (vii) *information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
- (viii) *anyone else's opinions about the individual, and*
- (ix) *the individual's personal views or opinions, except if they are about someone else...*

[para 14] Section 17 of the Act explains the circumstances in which a public body must not disclose personal information. It also contains the factors that must be weighed when deciding whether disclosing personal information would be an unreasonable invasion of a third party's personal privacy. It states in part:

*17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*

*(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*

*(e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council...*

*(h) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body...*

*(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*

*(d) the personal information relates to employment or educational history,*

*(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations...*

*5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal*

*privacy, the head of a public body must consider all the relevant circumstances, including whether*

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
- (b) the disclosure is likely to promote public health and safety or the protection of the environment,*
- (c) the personal information is relevant to a fair determination of the applicant's rights,*
- (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*
- (e) the third party will be exposed unfairly to financial or other harm,*
- (f) the personal information has been supplied in confidence,*
- (g) the personal information is likely to be inaccurate or unreliable,*
- (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*
- (i) the personal information was originally provided by the applicant.*

[para 15] The statistical summary is comprised of a number of tables. On the first page, the table sets out the correlation between increments received by employees, employee rank and overall teaching effectiveness. On the second page, the table correlates the increment received, the rank of employees, and the number of publications taken into consideration when awarding the increment.

[para 16] The University argues that by disclosing the number of publications published by the Complainant, it has not disclosed personal information. I disagree. The number of publications associated with the Complainant is a personal characteristic and is information about the Complainant's publication and academic history.

[para 17] It is important to note that the definition of personal information in the Act is not exhaustive and may include information that is analogous to the information enumerated in section 1(n). I find that academic history is similar to employment history for the purposes of section 1(n)(vii) and is personal information under the Act.

[para 18] I agree that disclosing this information would not be an unreasonable invasion of personal privacy in and of itself, as section 40(1)(bb) permits a Public Body to disclose personal information that is available to the public. However, disclosing this information in the context of other information and in particular circumstances could amount to an unreasonable invasion of personal privacy, even if disclosing the number of an employee's publications in isolation would not be.

[para 19] Disclosing the number of publications in this instance has the effect of identifying the Complainant because of the relatively small number of persons to whom the statistics apply. Collating the information by employee rank, as was done in this case, narrows the pool even further. The Complainant has provided anecdotal evidence that

some of his colleagues were able to identify him once the statistics were posted, and therefore the amount of the increment he would receive. I accept the evidence of the Complainant that his colleagues were able to identify the increment amount he received on the basis of the statistical summary.

[para 20] The Public Body argues that the number of publications is inaccurate and that it is only chance that a colleague was able to identify the increment received by the Complainant. In cases where there is overlap between the ranges, and the number of publications are similar, I agree that it is not possible to correlate increments with particular individuals. However, I find that it is easy enough to identify who has the most and least publications, regardless of the precise number, and to correlate that information to the increment amount awarded. For example, the identity of the employee who produced no publications in the period and received a .5 increment was presumably as identifiable to colleagues as the Complainant, who apparently produced the most articles of anyone in the department.

[para 21] In order to determine whether the increment is in fact a benefit for the purposes of section 17(2)(e) of the Act, as argued by the Public Body, or whether disclosure of the increment amount is a disclosure of personal information amounting to an invasion of personal privacy under 17(1), as argued by the Complainant, it is important to review the terms of the collective agreement.

[para 22] The collective agreement between the Public Body and its academic employees explains the nature of the increment and on what basis a department chair may award an increment to a qualified employee. "Increment" is defined in the collective agreements as "the basic unit by which salary is increased in accordance with the salary schedule negotiated in 19.01 of the agreement."

[para 23] Provision 13.02 of the collective agreement states: "The review of a staff member(s) performance shall be based on consideration of the performance of the responsibilities of the staff member as outlined in Article 7."

[para 24] Provision 13.05 stipulates: "The award of increments and promotions shall be based on merit and not on length of service."

[para 25] Review of the collective agreement indicates that the salary increment is an annual increase to an employee's salary which the chair of the department awards if he or she considers that the employee's performance, in particular, academic performance, merits the increase.

[para 26] Under the collective agreement, the amount of the increment reflects the chair's evaluation of an employee's performance and the employee's place in the salary grid. If the chair decides to award zero, for example, under the collective agreement, this decision would reflect either that the employee is at the top of the salary grid and has performed satisfactorily, or is not at the top of the salary grid and has performed

employment responsibilities unsatisfactorily. An award of two increments would indicate a highly positive evaluation of an employee's performance.

[para 27] I disagree with the Public Body's characterization of the salary increment as a discretionary benefit. Employment benefits, whether monetary or non-monetary, are distinct from salary. The increment is in fact a discretionary increase to salary, with the exercise of discretion dependent on a satisfactory evaluation of the employee's academic performance. The *Oxford Canadian Dictionary* 2<sup>nd</sup> Edition offers the following definition of "benefit" in the employment sense: "an advantage other than salary associated with a job, e.g. dental coverage, life insurance etc." In my view, the Act intends a similar distinction between salary and benefits. I draw support for this interpretation from section 17(2)(e) of the Act, which distinguishes between "discretionary benefits" and "salary range". There would be no need to establish that "salary range" information may be disclosed if the term "discretionary benefits" already permitted disclosure of salary amounts. I therefore find that any disclosure of the increment amount is not the disclosure of a discretionary benefit for the purposes of section 17(2)(e) of the Act. I do not interpret Orders 2001-020 or F2005-016, cited by the Public Body, as standing for the proposition that the term "benefits" includes salary amounts for the purposes of the Act.

[para 28] Although the Complainant argued that by disclosing the increment he received the Public Body disclosed his personal salary information, I find that the information is not detailed enough to identify the Complainant's salary. While the award of an increment has the effect of moving an employee ahead on the salary grid, the statistical summary did not provide information about base salaries, and so it would not be possible to identify exact salaries or the financial amount of the increments from the information disclosed.

[para 29] I do not find that the salary increment is a "salary range," as it is an increase of a specific amount on a salary grid. Instead, as the increment is awarded for performance and is based on the chair's assessment of performance, I find that the increment is more properly considered an evaluation for the purposes of section 17(4)(f).

[para 30] Section 17(4) creates a rebuttable presumption that disclosing evaluations is an unreasonable invasion of personal privacy. In this case, there are no factors under section 17(5) that would argue in favor of disclosing the Complainant's performance evaluation. The Public Body provided an affidavit to the effect that the purpose of the statistical summary was to "clarify for the Department's faculty members the two metrics of performance review" and to "inform them about the use and application of evaluative criteria in the faculty evaluation process of recommending the awarding of salary merit increments..." While I accept that this is a reasonable goal, it could have been achieved by presenting statistics and criteria in more general terms so that employees could not be identified as having received a specific merit increment amount.

[para 31] I therefore do not find that the Public Body can rely on section 40(1)(b) as a basis for disclosing the Complainant's personal information without his consent. I also do not find that subsections 40(1)(c) and (d) provide the necessary authority. In addition,

I do not find that any other provision of section 40 of the Act authorizes the disclosure of employees' evaluation information in the particular circumstances.

[para 32] For these reasons, I find that Public Body disclosed the Complainant's personal information in contravention of Part 2 of the Act when it posted the statistical summaries.

Email of June 29, 2006

[para 33] The Complainant submitted his initial brief to this office on April 17, 2007. In this brief, the Complainant alleged another violation of Division 2, Part 2 of the Act by the Public Body which apparently took place on June 29, 2006.

[para 34] The Adjudicator who was previously assigned to this matter decided that this issue should be heard with the first issue.

[para 35] The Public Body objected to the addition of this issue for the following reasons:

... While the University appreciates the extension, we do object to the practice of permitting such insertion of a new issue into the process at this late point. The effect is to permit an applicant or complainant to circumvent the process laid out in the ... Act; in this case, in particular, sections 65(3), 66, 67(1) and the discretionary provisions for investigation and mediation in sections 53(1) and (2)(c) and 68, and to jump right into the inquiry state with new issues which the Commissioner's officers have not had opportunity previously to investigate or mediate...

Normal principles of procedural fairness, such as the *audi alteram partem* ("hear the other side") rule, impose obligations on a disputing party to disclose its case to the other party rather than taking the other party by surprise. No judge would permit a trial to proceed where the plaintiff or prosecutor raises a new issue or proceeds on a new charge not previously disclosed to the defendant or accused, as the case may be.

[para 36] I am not bound by the decision of the previous Adjudicator and will determine whether I have jurisdiction to hear the second issue.

[para 37] Section 65 explains the circumstances in which a complainant may request review. It states in part:

*65(3) A person who believes that the person's own personal information has been collected, used or disclosed in contravention of Part 2 may ask the Commissioner to review that matter.*

[para 38] Section 66 explains how and when a complainant may request review. It states in part:

*66(1) To ask for a review under this Division, a written request must be delivered to the Commissioner.*



*(2) A request for a review of a decision of the head of a public body must be delivered to the Commissioner*

- (a) if the request is pursuant to section 65(1), (3) or (4), within*
  - (i) 60 days after the person asking for the review is notified of the decision, or*
  - (ii) any longer period allowed by the Commissioner,*

*or*

- (b) if the request is pursuant to section 65(2), within 20 days after the person asking for the review is notified of the decision.*

[para 39] Section 66 is ambiguous. It refers to a request for review of the decision of a Public Body in relation to section 65(3); however, Part 2, Division 2 of the Act does not contain any provisions referring to a decision of the head of a public body in relation to disclosure of personal information.

[para 40] If any disclosure of information by a public body amounts to a decision of the head of a public body to disclose the information, then the Complainant had 60 days from June 29, 2006 to submit his request for review and his request for review on April 17, 2007 is out of time, unless the Commissioner chooses to allow a longer period.

[para 41] If section 66(2)(a) creates a requirement for the head of a public body to make a decision regarding complaints about improper disclosure of personal information before a request for review may be submitted, then the Complainant's request for review was premature, as the head of the public body has not yet made a decision.

[para 42] It may also be the case that section 66(2)(a) contains a drafting error and is not intended to refer to a decision of the head of a public body in relation to complaints under section 65(3).

[para 43] Given the ambiguity of section 66(2)(a), I make no decision as to whether the complaint was filed in time. Instead, the issue may be decided by reviewing other provisions of the Act.

[para 44] The Commissioner has several powers once a complaint is received. Section 53(2) states in part:

*(2) Without limiting subsection (1), the Commissioner may investigate and attempt to resolve complaints that...*

- (e) personal information has been collected, used or disclosed by a public body in contravention of Part 2.*

In addition to these powers, the Commissioner may authorize mediation under section 68 and may refuse to conduct an inquiry under section 70. The Commissioner may also extend the time frame for making complaints or requests for review, as discussed above.

[para 45] If an Adjudicator accepts a new complaint during an inquiry, the Adjudicator effectively takes away the right of the Commissioner to exercise the powers and duties given to him under sections 53, 66, 68 and 70. As the Commissioner has not delegated those authorities to Adjudicators, Adjudicators have no authority to exercise those powers in his stead. Consequently, I agree with the Public Body's submission that allowing a new issue at the inquiry has the effect of circumventing the process set out in the Act. I find that I have no jurisdiction to make a decision on the issue, as to do so would have the effect of removing the Commissioner's powers under 53, 66, 68 and 70, which is an authority I do not have.

[para 46] Because the Commissioner has not had the opportunity to exercise his jurisdiction regarding the complaint about the email of June 29, 2006, I find that I do not have jurisdiction to address the Complainant's complaint. This decision does not preclude the Complainant from bringing this complaint to the Commissioner in the future, as contemplated by the Act.

[para 47] I agree with the Public Body's submissions that hearing and deciding this issue would also amount to a breach of procedural fairness. Procedural fairness requires that parties be given the opportunity to know the case to be met and to make representations. In this case, the Public Body was not provided with the opportunity to know the case to be met until after it made its initial submissions. Consequently, it had very little time to research the issue and could only make submissions on the issue in rebuttal. Had the process in the Act been followed, the Public Body would have had a greater opportunity to review the subject matter of the complaint and to make thorough representations. I find that it would result in unfairness to the Public Body to hear the issue, even if I did have jurisdiction under the Act.

## V. ORDER

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

[para 49] I require the Public Body to stop publishing the salary increment information of the Complainant and other employees with information that may contain sufficient detail to enable the identification of the Complainant and other employees.

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

[para 51] I find that I have no jurisdiction to consider whether the email of June 29, 2006 improperly disclosed the Complainant's personal information.

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Teresa Cunningham  
Adjudicator