ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-30

September 26, 2013

UNIVERSITY OF CALGARY

Case File Numbers F6048

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the University of Calgary (the Public Body) for "a copy of [his] percentile ranking within the 2011 class at the Haskayne School of Business" (Haskayne), which is a subsection of the Public Body.

The Public Body responded by informing the Applicant that the requested record did not exist and could not be created from records in the Public Body's custody or control.

The Applicant requested a review of the Public Body's response, arguing that the Public Body ought to be able to create the requested record.

The Adjudicator found that the Public Body was able to create the requested record under section 10(2), based on evidence showing that the Public Body had a practice of determining the top ten percent of students. The Adjudicator ordered the Public Body to create the requested record.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 10, 17, 72, **BC**: *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, ss. 6, **Ont:** *Freedom of Information and Protection of Privacy Act*, R.S.O 1990, c. F.31, s. 2, *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O 1990, c. M.56, s. 2.

Authorities Cited: AB: Orders F2009-005, F2011-R-001, **BC:** Order F10-30, **Ont**: MO-2130.

I. BACKGROUND

[para 1] By letter dated November 2, 2011, an individual made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for "a copy of [his] percentile ranking within the 2011 class at the Haskayne School of Business" (Haskayne), which is a subsection of the Public Body.

[para 2] The Public Body responded to the Applicant by letter dated December 1, 2011, stating that Haskayne does not create a class ranking list. It further stated that it

> cannot correlate data among students because the number of grades included in the graduation GPA may vary between 17 and 20 or 30 depending on how many courses are completed on this campus. Any attempt to create a ranking list would, therefore, be based on highly inconsistent data and an inaccurate statement of individual rankings. The School has reported that it does not have any way of manipulating the data to improve the outcome to an acceptable level.

[para 3] The Applicant requested a review from this office. The Commissioner authorized a portfolio officer to investigate and to try to settle the matter. As this was not successful, the Complainant requested an inquiry and the matter was set down.

II. RECORDS AT ISSUE

[para 4] As there were no records created in response to the request, there are no records at issue in this inquiry.

III. ISSUES

[para 5] The issue as set out in the Notice of Inquiry is as follows:

> **Does section 10(2) of the Act (duty to assist applicants) require the Public Body to create a record for the Applicant?**

[para 6] The Public Body also addresses the applicability of section 10(1) in its submissions; however, as this is the first time it has been raised, this provision is not at issue in the inquiry.

IV. DISCUSSION OF ISSUES

[para 7] Section 10(2) states the following:

> *10(2) The head of a public body must create a record for an applicant if*

> *(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and*
>
> *(b) creating the record would not unreasonably interfere with the operations of the public body.*

[para 8] Section 10(2) requires a public body to create a record if that record can be created from another record that is in electronic form using the public body's normal computer hardware and software and its expertise. This requirement is subject to limits in section 10(2)(b) (unreasonable interference with public body operations). The duties imposed by section 10(2) have been described as "electronically manipulating existing data to create a record consisting of only the data the applicant wants or that is organized in a manner the applicant wants" (see Order F2011-R-001, at para. 19).

[para 9] The Public Body has argued that

> an Applicant may ask a Public Body to create a record from a record in electronic form for the purpose of obtaining information in a form that does not currently exist within the Public Body. However, an Applicant may not require a Public Body to create an entirely new record. It is submitted that the Applicant is asking the University to create an entirely new record…

[para 10] In Order F2011-R-001 (reconsideration of Order F2009-005), the adjudicator provided a thorough analysis of the manner in which section 10(2) operates. She stated that

> The phrase, "created from a record from a record that is in electronic form" as it appears in section 10(2), could, in the abstract, refer to any of the following actions:
>
> - Making a copy (reproducing) in the same medium (e.g. electronic to electronic) to give to the applicant
> - Making a copy in a different medium (converting) - (e.g. electronic to paper) to give to the applicant
> - Converting records into a different electronic format (but with the same content and organization) (e.g. decompressing or unencrypting) in order to locate or obtain particular records or to see if they exist. (The applicant may ultimately be given all such records, only a part, or none, if no responsive records exist among the converted ones.)
> - Electronically manipulating existing data to create a record consisting of only the data the applicant wants or that is organized in a manner the applicant wants.
>
> Thus, in the abstract, section 10(2) could be taken to limit the duty to produce copies for an applicant, as well as the duty to search for responsive records, if fulfilling either of these duties could not be done within the terms of section 10(2)(a). In my view, as explained below, the better interpretation of the

> legislative scheme in the FOIP Act is that section 13, (but not section 10(2)), speaks to the first two bullets, section 10(1), (but not section 10(2)), speaks to the third, and section 10(2) speaks only to the last bullet.

(at para. 19)

[para 11] A provision similar to section 10(2) exists in the BC *Freedom of Information and Protection of Privacy Act* (section 6(2)). An order from the BC Office of the Information and Privacy Commissioner dealt with the application of that provision to an access request made to a government department asking for a record that correlates data from a Public Accounts database with other information not in that database. That order states:

> … s. 6(2)(a) does not obligate the Ministry to undertake five days or one day of manual adjustments to create the record. Section 6(2)(a) requires the Ministry to create a record when it can do so using its normal computer software, hardware and technical expertise. There may be occasions when some element of manual processing is incidental to a public body's obligations under s. 6(2)(a). However, this is not one of them. This finding is consistent with Order F10-16 and other previous orders.

(Order F10-30, at para. 18)

[para 12] Similar decisions have been made with respect to Ontario's legislation (section 2(1) of the provincial and municipal Acts) (see Order MO-2130).

[para 13] In my view, the orders cited above come to a very similar conclusion. Where a public body can create a record from information currently existing in electronic form by essentially manipulating the data, it has an obligation to do so in response to an access request, as long as it can be done using the public body's normal hardware, software and technical expertise and where creating the record would not unreasonably interfere with the public body's operations. Some incidental manual input may be necessary to do this, but such incidental input does not necessarily negate the duty.

[para 14] I do not accept the distinction the Public Body has made – that the duty in section 10(2) to create a record does not extend to an "entirely new" record. If one data element is changed on an existing record, a new record has been created. If the Public Body means to say that it is not required to create a record if creating that record involves more than incidental or minimal manual input, then I agree. However, where creating a new record involves only manipulating data in a way the Public Body has not previously done, then I disagree.

[para 15] The Applicant has provided a Public Body FAQ document to me in which the Public Body states, in response to a question as to whether students may find out how their marks compare to those of other students in a class, that "Class averages may be provided and if required a list of other students' marks that exclude the names of the other students may be provided."

[para 16] The Applicant also provided me with a copy of an email chain from a Public Body employee responding to an informal request made by the Applicant before he made his formal access request under the FOIP Act. In this email, one employee of the Public Body states in an email to a colleague that "since we need to identify the top 10% for Beta Gamma Sigma [an honours society] purposes, it's easy enough to tell a student where they fall (for example in the top 15%). I can provide this info to [the Applicant]…".

[para 17] The Public Body argues that this email is evidence that the record does not exist, but does not explain why it is not reasonable to infer from the email that the requested record could be *created*. The Public Body notes that another email in the email chain provided by the Applicant supports the position that the Public Body does not rank each student:

> Haskayne students who have achieved a grade point average of 3.70 or higher over two and one half or more full-course equivalents taken in either the Fall or Winter term at the University of Calgary are eligible for the Dean's List, **but each student on the Dean's List is not ranked on an individual scale**. We also honor the top 10% of achievers of the graduating BComm class each year who qualify for the Beta Gamma Sigma. Once again, **there is no individual ranking on this list**. (my emphasis)

[para 18] I acknowledge that the Public Body seems not to have a class ranking for individual students; however, the Applicant's point is that it appears a class ranking for individual students (whether official or unofficial) *can be created*.

[para 19] The Public Body argues that any ranking of students would be inaccurate and potentially misleading because students do not necessarily take all of their courses at Haskayne and a percentile ranking cannot account for this variable. The Applicant states that

> Even though the number of courses that is calculated into a student's final GPA may vary, anywhere from 20 to 40 courses (or 10 to 20 full courses) the fact that a consistent methodology is used to determine which courses are included would lead to consistent data. If this consistent data is ranked and then the percentile ranking is determined, then the percentile ranking will be consistent, insofar as it complies with the guidelines for calculating students final GPA, and will be accurate, provided the calculation is performed correctly.
>
> It is my respectful submission that the number of grades that may be omitted from other students' GPA is largely irrelevant to my request. If the University uses a consistent system for determining the GPA on the list that it creates, then the percentile that they provide me will be accurate. In other words, if my GPA on courses that I have taken at the University is compared to the GPA of other students in the courses that they took at the University, then my ranking compared to the other students will be accurate, consistent, and valuable.

[para 20] It is clear from the Applicant's submissions that he understands the Public Body's concerns about the accuracy of a percentile ranking and is willing to accept a ranking that is consistent with parameters already used by the Public Body in determining GPAs (even if the Public Body does not believe such a ranking to be accurate).

[para 21] I find the Applicant's arguments regarding the accuracy and completeness of student rankings compelling. Unfortunately, the Public Body has not addressed these arguments and so I do not have the benefit of its position as to why the Applicant's proposed formulation for student ranking would not be achievable.

[para 22] The Applicant argues that "there is no exclusion in the Act to the reproduction or creation of a record on the basis that it is inaccurate or incomplete." I agree. Accuracy of information is referenced in only one exception to access in Part 1 of the Act. Section 17(5)(g) requires a public body to consider the accuracy and reliability of *third party* personal information in a decision to withhold or disclose that information in response to an access request. As the Applicant is not requesting personal information of third parties, this provision is not applicable.

[para 23] I do not question the Public Body's decision not to provide official rankings for students due to the concerns raised about accuracy (nor do I have jurisdiction to do so, in any event). However, I agree with the Applicant that his request could be satisfied by creating an unofficial ranking list with the same procedure used to determine the top 10% of students. I acknowledge the Public Body's argument that it does not create an individual ranking within the list of top 10% students; in other words, while the top 10% of students may know that they fell within that grouping, the Public Body does not rank those students as first, second, etc. Nevertheless, there is necessarily some process by which to determine who fell within the top 10%, which could also be used to determine who was in the top 11%, and so on.

[para 24] I also acknowledge that there may be circumstances in which a lack of information may mean that certain statistics cannot be created. However, in this case, the Applicant points out that the Public Body could use the same data as is used to create GPAs. He also notes that the Public Body seems to be sufficiently confident about the ranking of students for the purpose of creating a top 10% list to share with a third-party honour society. The Public Body has not provided any compelling arguments to refute the Applicant's points. These factors weigh significantly in my determination that the Public Body has a duty to create a record in response to the Applicant's request.

[para 25] While I will order the Public Body to create a record in response to the Applicant's request, I am not requiring the Public Body to create an *official* ranking of the Applicant or any other student.

V. ORDER

[para 26] I make this Order under section 72 of the Act.

[para 27] I find that the Public Body has failed to fulfill its duty under section 10(2) of the Act. I order the Public Body to create a record responsive to the Applicant's request.

[para 28] 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.

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Amanda Swanek
Adjudicator