ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2020-06

April 9, 2020

UNIVERSITY OF CALGARY

Case File Number 005224

Office URL: www.oipc.ab.ca

Summary: An individual made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), dated January 6, 2017 to the University of Calgary (the Public Body). The request was for documents (memos, letters, emails, notes, etc.) or any identifying number associated with the Applicant received or sent by Dr. V of the Haskayne School of Business at the University of Calgary (the Public Body). The request specified that the search for records use parameters set out in the request, with the time frame of September 10, 2016 – January 6, 2017.

The Public Body declined to search for responsive records, stating:

> The University asserts that it does not have custody and/or control of the records. [Dr. V] serves as a volunteer on the SSHRC Appeals Committee. This volunteer role is separate from his academic role at this University. Any records that [Dr. V] might have received from, or sent to, SSHRC were because of his volunteer position with SSHRC, and not in his capacity as a University of Calgary academic. The Courts have found that an academic acting in a volunteer capacity is not acting as a University employee and therefore, any records that [Dr. V] may or may not have are not the University's records.

The Applicant requested a review by this Office and subsequently an inquiry into the Public Body's response. The inquiry was limited to records of Dr. V in relation to his role with SSHRC.

The Adjudicator determined that the Alberta Court of Queen's Bench decision in *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247 (CanLII) was directly relevant to the issue in this case. Applying the analysis in that decision, the Adjudicator determined that the Public Body does not have custody or control of the records at issue in the inquiry.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 10, 72.

Authorities Cited: AB: 97-006, F2009-023, F2019-05, **Ont**: PO-2836, PO-2842

Cases Cited: *City of Ottawa v. Ontario*, 2010 ONSC 6835, *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247 (CanLII)

I. BACKGROUND

[para 1] An individual made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), dated January 6, 2017 to the University of Calgary (the Public Body). The request was for documents (memos, letters, emails, notes, etc.) containing the Applicant's name or any identifying number associated with the Applicant received or sent by Dr. V of the Haskayne School of Business at the University of Calgary (the Public Body). The request specified that the search for records use parameters set out in the request, with the time frame of September 10, 2016 – January 6, 2017.

[para 2] The Applicant had applied for a grant from the Social Sciences and Humanities Research Council of Canada (SSHRC), which had been denied. He appealed that SSHRC decision; Dr. V had been on the appeal panel.

[para 3] The Public Body declined to search for responsive records, stating:

> The University asserts that it does not have custody and/or control of the records. [Dr. V] serves as a volunteer on the SSHRC Appeals Committee. This volunteer role is separate from his academic role at this University. Any records that [Dr. V] might have received from, or sent to, SSHRC were because of his volunteer position with SSHRC, and not in his capacity as a University of Calgary academic. The Courts have found that an academic acting in a volunteer capacity is not acting as a University employee and therefore, any records that [Dr. V] may or may not have are not the University's records.

[para 4] The Applicant requested a review by this Office; he was not satisfied with the outcome of the review and requested an inquiry.

II. RECORDS AT ISSUE

[para 5] As the inquiry relates to the Public Body's obligations under section 10(1), there are no records at issue.

III. ISSUES

[para 6] The issue set out in the Notice of Inquiry dated September 9, 2019, is as follows:

> Did the Public Body have a duty to conduct a reasonable search for responsive records and to respond to the Applicant as required by section 10 of the Act? If so, did it meet this duty?
>
> In deciding the above issue, the Adjudicator will determine whether the Public Body has custody or control over the records within the terms of section 4 of the FOIP Act.

IV. DISCUSSION OF ISSUES

Preliminary issue – matters not within the scope of the inquiry

[para 7] The Applicant has brought forward several issues that do not relate to the sole issue in this inquiry.

[para 8] In his rebuttal submission, the Applicant raised concerns about the form of the Public Body's initial submission. He noted that the Public Body's submission is unsigned, while also acknowledging that there is no requirement by this Office for submissions to be signed. Nevertheless, the Applicant argues that the unsigned submission makes it impossible to identify who is making the claims and assess the validity and credibility of those claims.

[para 9] The issue in this case rests on the proper interpretation of custody and control under the FOIP Act, as well as the interpretation of relevant case law. The relevant facts in this case – that Dr. V chaired a SSHRC Appeals Committee that considered the Applicant's appeal relating to a grant application – is uncontested. The credibility of the author of any submission is not a factor.

[para 10] I can therefore assess the 'validity' of the Public Body's arguments without needing to consider the identity of the author.

[para 11] The Applicant also argued that whether the Public Body's submission is signed determines whether section 4(1)(a) applies to it. This section excludes filed court records from the scope of the FOIP Act. It does not have any application to the Public Body's submission to this inquiry, nor does it apply to the records requested by the Applicant.

[para 12] The Applicant is also concerned that Dr. V did not swear an affidavit for this inquiry. The Applicant believes that an affidavit "could (and should) have shed more light on [Dr. V's] role as a chair of the SSHRC Appeals Committee and on his reasons for not signing the Conflict of Interest and Confidentiality Agreement for Review Committee Members, External Reviewers, and Observers" (rebuttal submission, at para. 7).

[para 13] Both parties seem to agree that Dr. V was a chair of the SSHRC Appeals Committee. I do not require further information about Dr. V's role as chair to address the issues in this case. Regarding the Confidentiality Agreement, that is likewise irrelevant to this inquiry, for reasons I will discuss later in this Order.

[para 14] Both the Applicant and the Public Body have provided an abundant amount of information for this inquiry. I have reviewed all of the information before me; much of it is ultimately unnecessary to answer the question at hand. Nevertheless, I understand why each party believed the information might be relevant. All this is to say that none of the submissions presented by either party in this inquiry is deficient in any way.

[para 15] The Applicant also refers to a separate access request he made to the Public Body, which is the subject of a separate inquiry currently underway by a different adjudicator (the 2016 request). The Applicant states that the Public Body provided records responsive to his 2016 request and that this is evidence that the Public Body has custody or control over the records responsive to the request in this case. The Applicant states that the adjudicator running the inquiry into the 2016 access request did not raise the issue of the Public Body's custody or control of records in that inquiry, which also indicates that custody or control is assumed.

[para 16] The Applicant provided a copy of the Public Body's response to that 2016 request. That response paraphrases the request as being for records that mention the Applicant within the custody or control of the Deputy Provost of the Public Body. The Public Body's response identifies that individual as Dr. M. That 2016 request appears to have nothing to do with Dr. V or SSHRC records and the Applicant has not identified a connection between that request and the request at issue in this inquiry. The 2016 request therefore has no relevance to this inquiry. That the Public Body has custody or control of *some* records relating to the Applicant does nothing to further the Applicant's argument that it has custody or control over Dr. V's records created in his role with SSHRC.

Did the Public Body have a duty to conduct a reasonable search for responsive records and to respond to the Applicant as required by section 10 of the Act? If so, did it meet this duty?

[para 17] A public body's obligation to respond to an applicant's access request is set out in section 10, which states in part:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 18] The duty to assist includes responding openly, accurately and completely, as well as conducting an adequate search. The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the applicant (see Order 97-006, at para. 7).

[para 19] The Applicant's access request was for correspondence to or from Dr. V that contains the Applicant's name or particular identifying numbers. The Applicant clarified with the

Public Body that one of the identifying numbers relates to a federal court action. The remaining numbers relate to the Applicant's file with SSHRC and a grant application. Dr. V was a member of the Appeals Committee that heard the Applicant's appeal of the rejection of his grant.

[para 20] The Public Body informed the Applicant that it has no involvement with any federal court action involving the Applicant and as such has no records relating to that action (letter dated February 6, 2017, attached to the Applicant's request for review). The Applicant has not raised any concerns regarding that response.

[para 21] In that same letter, the Public Body informed the Applicant that records relating to Dr. V's participation on the SSHRC Appeals Committee are not within the custody or control of the Public Body.

[para 22] Both parties to this inquiry address only records relating to Dr. V's role as chair of an Appeals Committee with SSHRC. The Applicant's initial request for review, his request for inquiry and his submissions to this inquiry address only records of Dr. V in relation to his role with SSHRC. Therefore, while the Applicant's access request might be interpreted more broadly than that, those are the only records at issue in this inquiry.

Similar decision in University of Alberta v. Alberta (Information and Privacy Commissioner), 2012 ABQB 247 (CanLII)

[para 23] Order F2009-023 from this Office dealt with a similar access request. In that case, the Applicant made an access request to the University of Alberta for email communications between a member of a SSHRC Selection Committee and other members of a SSHRC committee (one of the committee members was employed with the University of Alberta). The issue in that inquiry was whether the University of Alberta had custody or control of the requested records.

[para 24] The adjudicator cited two orders of the Ontario Information and Privacy Commissioner, Orders PO-2836 (*WLU*) and PO-2842, involving Wilfred Laurier University and University of Ottawa respectively. These Ontario orders also addressed whether the universities have custody or control of records created or received by academic staff relating to evaluation of SSHRC applications. In Order PO-2836, the adjudicator found that while the professor was participating in a SSHRC committee as part of his university job duties, and "while it is true that "bare possession of the information" does not amount to custody or control for the purpose of the *Act*, there is, in my view, ample evidence in this appeal to support a finding that the University has "some right to deal with the records and some responsibility for their care and protection" [Order P-239]." The university's responsibility and care of the records stemmed from its oversight of the administration and management of its computer systems, including its server and databases.

[para 25] This analysis was followed in Order F2009-023, resulting in a finding that the University of Alberta had custody or control of email communications of academic staff relating to SSHRC committee work.

[para 26] However, this finding was overturned in *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247 (CanLII) (*U of A*). In that decision, the Court found that SSHRC was the body that had control of the records, and not the University of Alberta. SSHRC had the ability to instruct committee members how to handle SSHRC-related information (i.e. confidentiality clauses, requirements to destroy copies once the work is complete). In contrast, the University of Alberta did not have such ability.

[para 27] The Court noted that the University of Alberta had a broad mandate to encourage research, but the University's encouragement for staff to participate in SSHRC activities is not relevant to the question of control over SSHRC-related records. It said (at para. 98):

> A professional who volunteers time with an outside body, even one closely associated with the profession, does not cede to the employer rights to records created in that endeavour. For example, if records are produced by a lawyer employed by the government on his or her work computer in the course of providing volunteer service to the Canadian Bar Association, the fact that those records were produced by an employee does not give the government a right to either deal with or possess those records. They are akin to the email records in *City of Ottawa v. Ontario*, 2010 ONSC 6835.

[para 28] The Court also disagreed that having "some right to deal with the records" equates to the right to possess the records. That the University had some responsibility for the care and protection of responsive records arose from its routine of backing up its server. The Court cited *City of Ottawa v. Ontario*, 2010 ONSC 6835, in which the Ontario Superior Court found that a public body's usual maintenance of its email systems did not amount to custody or control over an employee's personal emails unrelated to an employee's job duties. In that decision, the Court stated (at para. 42):

> The nature of electronically stored files makes the need for monitoring more pressing and the actual monitoring more frequent, but it does not change the nature of the documents, nor the nature of the City's conduct in relation to them. It does not, in my view, constitute custody by the City, within the meaning of the Act.

[para 29] This analysis in the *U of A* decision has since been applied to determinations of whether a public body collected personal information of an employee who placed personal documents on the public body's electronic systems. In Order F2019-05, I reviewed the Alberta and Ontario case law discussed above and concluded (at paras. 43-44):

> The Ontario and Alberta courts have concluded that this ability to regulate personal documents or records by virtue of obligations to maintain its systems is not sufficient, by itself, to give a public body control over these documents such that they can be subject to access requests. As these Courts have stated, the ability to regulate personal documents stems from the public body's ability to regulate its systems and use of its systems. The ability to regulate is not tied to the document itself. Absent other considerations, the public body does not have the right to possess the document or regulate the document other than to maintain its systems. (Other considerations include workplace investigations during which a public body might intentionally collect an employee's personal files kept on the public body premises or electronic system).

> In my view, this kind of custody or control also does not mean that a public body has collected the personal information within the terms of Part 2 of the FOIP Act. Whether electronic or tangible, when an employee voluntarily stores personal information at the workplace and that information:
>
> - is for the personal use of the employee
> - is unrelated to the employee's work duties, and
> - is unrelated to the functions of the public body (i.e. is not personal information of the employee collected for human resources purposes)
>
> then the public body will generally not be found to have collected it within the terms of Part 2 of the Act.

[para 30] The case law can generally be summarized to state that if a public body's ability to regulate a record is due only to its obligation to maintain its systems, rather than the ability to regulate the record itself, that public body likely does not have custody or control of the record within the meaning of the FOIP Act. I agree with this general principle.

[para 31] As discussed in Order F2019-05, if the public body then collects and/or uses the record for its own purposes (e.g. an internal employment investigation), then the public body will have custody and control of that record (see Order F2019-05 at paras. 52-55). None of the submissions before me indicate that this circumstance is applicable here.

[para 32] The Applicant has referred to the Ontario Order PO-2836 (WLU), in support of his arguments, as well as a court decision from Quebec. There may be decisions from other jurisdictions that support the Applicant's position; however, decisions from other jurisdictions are merely persuasive. The *U of A* decision is directly relevant and binding. Unless that decision can be distinguished, I will apply it.

[para 33] The Applicant argues that the *U of A* decision is distinguishable from the case at hand such that I should arrive at a different outcome. Some of his arguments relate to the Public Body's policies regarding the use of its electronic systems. Some of his arguments relate to whether participating in the SSHRC Appeals Committee was part of Dr. V's job duties with the Public Body.

[para 34] With respect to computer use policies, the Applicant cites sections 4.6, 4.7, 4.10 and 4.13 of the Public Body's Acceptable Use of Electronic Resources and Information Policy (Policy); sections 4.1 and 4.3 are also relevant. Section 4.1 states that electronic resources may be used for University-related purposes or pursuant to section 4.3. Section 4.3 authorizes personal use of electronic resources on an occasional basis. Section 4.6 states that system administrators monitor, record and audit the use of electronic resources for maintenance and security purposes, ensuring effective operation and routine backups. Section 4.7 states that the University does not routinely monitor the content of information transmitted or stored in its electronic resources and that management or administrators can review the contents only in limited circumstances that are clearly set out in that section. That section notes that users should never consider their use of the electronic resources to be completely private. Section 4.10 sets out unacceptable use of the electronic resources. Section 4.13 sets limits on the creation, access,

use and collection of personal information to what is necessary for the user's University responsibilities.

[para 35] The Applicant argues that the Public Body has authority to regulate any records at issue by virtue of the Policy. However, it is clear from the Policy that any regulation of responsive records is by virtue of the Public Body's regulation of its electronic systems, rather than the record itself. For the reasons discussed above, I do not find this argument to be persuasive.

[para 36] The Applicant has also argued that Dr. V's participation in the SSHRC Appeals Committee related to his job duties for the Public Body.

[para 37] The Applicant states that Dr. V received a thank-you letter for his participation and that such letters are often copied to superiors and used in tenure applications and for salary considerations. The Applicant also states that participation in SSHRC committees constitutes Outside Professional Activity (OPA), which is referenced in the Collective Agreement between the Faculty Association and the Governors of the University. Staff must disclose a record of all OPA, including an accounting of associated time commitments (section 13.5 of the Collective Agreement). The Public Body disagrees that participation on a SSHRC committee constitutes OPA. I do not need to make a determination on that point; even if Dr. V's participation in the SSHRC committee constitutes OPA, the requirement to provide the Public Body with an accounting of that participation does not also mean that staff would be required to provide the Public Body with any records created in relation to that outside activity.

[para 38] Regarding the thank-you letter, the copy provided by the Applicant shows that it was sent to Dr. V by SSHRC. There is no indication that a copy was provided to anyone else at the Public Body. That SSHRC thanked Dr. V for his participation in the Appeals Committee does not say anything about custody or control of the records Dr. V created during his participation in the Committee. It may be that Dr. V later provided a copy of this thank-you letter to the Public Body for salary or other job-related purposes. If so, that might indicate that the Public Body has an interest in the quality of Dr. V's participation insofar as he is affiliated with the Public Body. It is not difficult to imagine that the Public Body has an interest in the academic reputation of its staff members, and therefore had an interest in whether a staff member's SSHRC participation reflects well on that staff member. This interest does not bring the staff member's SSHRC work within the custody or control of the Public Body.

[para 39] The Applicant has also pointed out that the Public Body signed an Agreement with SSHRC, which requires the Public Body to make staff available for SSHRC activities. He also emphasizes the important role of peer review in research; research falls broadly within the Public Body's mandate.

[para 40] At most it might be said from the Applicant's arguments that participation by Public Body staff members in SSHRC activities is *related to* those staff members' work with the Public Body. Nevertheless, the work is done on behalf of another institution; that it broadly relates to the staff members' work with the Public Body is not sufficient to grant the Public Body custody or control of the SSHRC-related records.

[para 41] The Applicant has also argued that Dr. V did not sign the SSHRC Conflict of Interest and Confidentiality Agreement for Review Committee Members, External Reviewers, and Observers. That agreement sets out the law applicable to SSHRC; specifically that the federal *Access to Information Act* and *Privacy Act* apply to SSHRC. Those federal Acts govern the collection, use and disclosure of personal information under the control of SSHRC, and applicants have a right of access to information provided by committee members about their applications.

[para 42] The Applicant argues that because Dr. V did not sign this agreement, SSHRC does not have custody or control of records pertaining to Dr. V's participation on the SSHRC Appeals Committee.

[para 43] The Applicant is mistaken about the significance of that agreement to applicable access and privacy law. The statement in the agreement about the application of the federal Acts to SSHRC records is a statement about the law; it does not require a participant's signature or agreement for it to be true. Dr. V cannot 'override' the application of either or both federal Acts by neglecting to sign the agreement.

[para 44] The arguments put forward by the Applicant to distinguish the present case from *U of A* and other relevant Alberta precedent are not persuasive. The various arguments about particular provisions in the Public Body's policies on the use of electronic resources, the Collective Agreement, the agreement between SSHRC and the Public Body, and the conflict of interest agreement do not amount to a material distinction sufficient to persuade me to come to a conclusion different from that in *U of A.*

[para 45] I find that the Public Body does not have custody or control over records relating to Dr. V's participation on the SSHRC Appeals Committee.

V. ORDER

[para 46] I make this Order under section 72 of the Act.

[para 47] I find that the Public Body does not have custody or control of the records relating to Dr. V's participation on the SSHRC Appeals Committee. Therefore, the Public Body did not fail to meet its duty under section 10(1) of the Act to search for any records responsive to that part of the Applicant's access request.

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Amanda Swanek
Adjudicator