

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2010-016**

January 10, 2011

**UNIVERSITY OF CALGARY**

Case File Number F5068

**Office URL:** <http://www.oipc.ab.ca>

**Summary:** The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) to the University of Calgary (the “Public Body”) for the Committee of Investigation’s report to the Provost. The Public Body denied the Applicant’s request. The Public Body withheld the record pursuant to section 4(1)(b). The Adjudicator held that the record fulfilled the requirements of section 4(1)(b) and that there was no obligation, under the FOIP Act, to provide the Applicant with access to the record.

**Statutes Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c.F-25 ss. 4(1)(b), 17(4)(d), 24(1), 72.

**Authorities Cited:** **AB: Orders:** 99-025, F2010-012

**Cases Cited:** *Canada (Minister of National Revenue – M.N.R.) v. Coopers & Lybrand Ltd.* (1978) 92 D.L.R. (3d) 1

**I. BACKGROUND**

[para 1] The Applicant made a complaint to the Public Body regarding the conduct of one of its professors. The Public Body investigated the complaint and a Committee of Investigation (the “Committee”) was struck.

[para 2] On May 2, 2009, the Applicant made an access request under the FOIP Act to the Public Body for the following:

- a. The professor's response to the Committee's Penultimate Report;
- b. The Committee's report to the Provost; and
- c. The Applicant's personal information stored in the Public Body's personal information banks.

[para 3] On June 18, 2009, the Public Body provided the Applicant with some information but withheld other information pursuant to sections 4(1)(b) and 17(4)(d).

[para 4] On July 24, 2009, the Applicant requested a review by this Office. Mediation was authorized but did not resolve the issue.

[para 5] On December 16, 2009, the Applicant requested that the Information and Privacy Commissioner conduct an inquiry into the Public Body's decision to withhold the Committee's report to the Provost. The matter was scheduled for an inquiry.

[para 6] During the inquiry, the Public Body and the Applicant each submitted an initial submission and a rebuttal submission.

## **II. ISSUE**

[para 7] There was one issue identified in the inquiry notice: Is the record excluded from the application of the Act by section 4(1)(b)?

[para 8] In the Applicant's submissions, the Applicant raised other issues including whether the Committee had properly addressed all of the concerns she raised in her complaint and whether it had provided the Applicant with an adequate remedy. These issues are not within my jurisdiction to decide. As such, I will not make a determination regarding those issues.

## **III. INFORMATION AT ISSUE**

[para 9] The information at issue consists of a four page letter from the Committee to the Provost.

[para 10] In the Applicant's submissions, the Applicant stated that in addition to this four page letter, she would like access to additional records, including her personal information which is stored in her "personal information bank or elsewhere". I do not find that these additional records are properly at issue in this inquiry. Although the Applicant requested additional information in her access request, the Applicant did not, in her request an inquiry on December 16, 2009 refer to these additional records, and the Notice of Inquiry did not identify these additional records as the records at issue in this inquiry.

#### **IV. DISCUSSION**

##### **A. Is the record excluded from the application of the Act by section 4(1)(b)?**

[para 11] Section 4(1)(b) reads:

*4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*

...

*(b) a personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity including any authority designated by the Lieutenant Governor in Council to which the Administrative Procedures Act applies.*

[para 12] In order for a record to fall within section 4(1)(b), two requirements must be fulfilled:

1. the record must be a personal note, communication or draft decision; and
2. the record must be created by or for a person who is acting in a judicial or quasi-judicial capacity including any authority designated by the Lieutenant Governor in Council to which the Administrative Procedures Act applies.

##### **1. Is the record a personal note, communication or a draft decision?**

[para 13] After a review of the submissions before me, I find that this first requirement under section 4(1)(b) is fulfilled. I find that the record at issue consists of a “communication” from the Committee to the Provost. In coming to this conclusion, I accepted the Public Body’s definition of “communication” as found in *Black’s Law Dictionary*. *Black’s Law Dictionary* defines a “communication” as “the expression or exchange of information by speech, writing, or gestures”. I find that the record fulfills this definition. I find that the record consists of an expression or exchange of information from the Committee that was communicated in writing to the Provost.

##### **2. Is the record created by or for a person who is acting in a judicial or quasi-judicial capacity?**

[para 14] The Public Body states that the Committee was acting in a quasi-judicial capacity when it created the record.

[para 15] In *Canada (Minister of National Revenue – M.N.R.) v. Coopers & Lybrand Ltd.* (1978) 92 D.L.R. (3d) 1, the Supreme Court stated that in order to determine whether an entity is acting in a judicial or quasi-judicial capacity, the following non-exhaustive list of factors should be weighed and evaluated, with no one factor being necessarily determinative of the issue:

- a. Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
- b. Does the decision or order directly or indirectly affect the rights and obligations of persons?
- c. Is the adversary process involved?
- d. Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense? (see Order 99-025)

**a. Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?**

[para 16] I find that this criterion under section 4(1)(b) is fulfilled. I find that the Committee held a hearing in order to adjudicate the Applicant’s complaint against the professor. The submissions before me show that following a review of the Applicant’s complaint, the Committee decided to proceed under “Option 3” which is a process set out in the Public Body’s “Guidelines for Administrators When Acting on Concerns about Conduct” (the “Guidelines”). Option 3 is a formalized disciplinary process which could result in disciplinary consequences. The Guidelines state that this process is normally available only when both of the following conditions are met:

1. The alleged conduct is sufficiently serious to warrant discipline; and
2. The concerned person is willing to put his/her concern in writing as a formal complaint and have his/her identity disclosed to the party causing the concern.

[para 17] The Guidelines state that if the Public Body chooses to proceed with this process, that following a preliminary assessment, the process could involve a “further investigation” which the Guidelines describe as follows:

*5.1.4 The Investigative Report*

...

*Further investigation may involve any or all of the following:*

- 1. Further written submissions from the parties;*
- 2. Oral communications with one or both parties, with the opportunity for the other party to hear what has been said and respond as well;*
- 3. Written or oral communication with other witnesses;*
- 4. Investigation or documentary or other evidence.*

[para 18] In the present case, the information before me shows that the Committee received written and oral submissions from the parties, drafted a penultimate report, gave the parties the opportunity to respond to the report and then issued the final report.

[para 19] Given the foregoing, I am satisfied that the Committee conducted a hearing into the Applicant's complaint. Although the Applicant takes issue with various parts of the process, including the Committee's decision not to permit her to cross-examine the witnesses, and refers to the Committee's description of the process as an "investigation" instead of a "hearing", I am satisfied that the process undertaken by the Committee nevertheless constituted a form of hearing that fulfills this criterion.

**b. Does the decision or order directly or indirectly affect the rights and obligations of persons?**

[para 20] In Order 99-025, the former Commissioner cited the *Canadian Oxford Dictionary* and defined a "right" as "a thing one may legally or morally claim; the state of being entitled to a privilege or immunity or authority to act". The former Commissioner also referred to *Black's Law Dictionary* which defined a right as a "power, privilege, or immunity guaranteed under a constitution, statutes or decisional laws, or claimed as a result of long usage".

[para 21] I find that this criterion is fulfilled. I find that the Committee's decision directly or indirectly affected the rights and obligations of persons and, in particular, the professor who was the subject of the complaint. The Guidelines state that if misconduct is found during the disciplinary process it could result in a variety of remedies and sanctions being imposed. In the present case, the Committee's report states that the Committee was given the authority to investigate and make factual findings which were then provided to the Provost who had the authority to impose a "resolution" which could include disciplinary action. Page 6 of the Committee's final report states:

*The appropriate resolution, whether disciplinary or not, is not the responsibility of the Committee of Investigation, but of the administrative officer, in this case the Provost and Vice –President (Academic).*

[para 22] In the present case I find that although the Committee's report may not directly have affected the rights of the professor, the Committee could indirectly affect his rights by investigating the allegations and then providing its findings within the report to the Provost who then had the ability to impose disciplinary action. Although it is unclear as to the extent of action that the Provost may have taken, the information before me nevertheless shows that, as a result of the Committee's report, a disciplinary letter was placed on the professor's file. The Public Body states that the consequences of this action are significant as the letter could be referred to in the future and used in further proceedings if necessary. I find that this action affected the rights of the professor.

**c. Is the adversary process involved?**

[para 23] In Order 99-025, the former Commissioner referred to *Black's Law Dictionary* which defined an "adversary proceeding" as "one having opposing parties, contested, as distinguished from an ex parte hearing or proceeding".

[para 24] I find that the Committee followed an adversarial process. I find that the proceeding before the Committee was contested and that there were opposing parties

participating in the proceeding. In addition, each party either had representation before the Committee or had the opportunity to have representation. Both parties also made submissions to the Committee.

**d. Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?**

[para 25] In Order 99-025, the former Commissioner stated that substantive rules are that part of the law that create, define and regulate rights and duties of parties.

[para 26] The Public Body states that this criterion is fulfilled. The Public Body states that the Committee had an obligation to apply and, did apply, substantive rules in its proceeding. The Public Body states that the Committee applied the rules of natural justice and procedural fairness pursuant to sections 1.5 and 1.6 of the Guidelines.

[para 27] In my view, the reference to “substantive rules” within this criterion does not refer to these types of principles. In Order F2010-012 the Adjudicator addressed this same issue. The Adjudicator found that this criterion was intended to address whether the decision-maker was required to apply substantive rules to a set of facts in individual cases as opposed to a general policy in a broad sense. She held that while the rules of natural justice and procedural fairness are important, these were not the type of principles that this criterion was meant to address. I agree with this interpretation.

[para 28] However, notwithstanding the foregoing, after a review of the submissions before me, I find that this criterion is fulfilled. I find that the Committee had an obligation to apply substantive rules to individual cases before it. The Committee’s report shows that the Committee applied policies such as the *Faculty of Graduate Studies Guidelines Governing the Supervisory Relationship*, the *Code of Professional Ethics* and the *Privacy Policy* to the facts. I also find that the rules within these policies were the basis on which the Committee made its finding within its report which was then provided to the Provost who could, as previously mentioned, impose disciplinary action.

**3. Summary**

[para 29] I find that the record at issue fulfills the requirements of section 4(1)(b) and is excluded from the application of the FOIP Act. I find that the record is a communication by the Committee and that the Committee created the record while it was acting in a quasi-judicial capacity.

[para 30] In the Public Body’s initial submission the Public Body raised a new provision, section 24(1), which was not identified as an issue in the inquiry notice. An issue therefore arises as to whether the Public Body should be permitted to raise this exception at the inquiry stage. However, as I have found that the record at issue is excluded from the application of the FOIP Act, I will not make a decision as to whether to permit the Public Body to raise this exception.

**V. ORDER**

[para 31] I make the following order under section 72 of the FOIP Act.

**A. Is the record excluded from the application of the FOIP Act by section 4(1)(b)?**

[para 32] I find that the record at issue fulfills the requirements of section 4(1)(b) and is excluded from the application of the FOIP Act. As the Act does not apply to this record, there is no obligation on the Public Body to provide the Applicant with access to this record.

Lisa McAmmond  
Adjudicator