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April 7th, 2010

Court Addresses the Duty of a University to Assist a Professor who was Seeking Information Related to his Teaching

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Cases Considered:

University of Alberta v. Alberta (Information and Privacy Commissioner), 2010 ABQB 89

In Alberta, universities are subject to the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("*FOIPA*"). University of Alberta professor Dr. Mikhail Kovalyov applied to the University for access to two kinds of records (but only the first kind of record was the subject of the court case). His original access to information request asked for information pertaining to his proposal for changes to a math course provided to the Chair and Associate Chair of the Mathematical and Statistical Sciences Department ("Math Department"); in particular, he asked for "written complaints, notes of oral complaints and any and all other documentation including any email between the Chair and Associate Chair or anyone else pertaining to this matter" (at para. 2). The University asked for clarification of the request, and Dr. Kovalyov replied with additional information, including a CD containing an audio-recording of a conversation between unidentified individuals discussing the math course and related complaints. The University wrote to Dr. Kovalyov, replying that it understood that Dr. Kovalyov was also requesting the documents the Chair referred to at the end of the audio-record, as well as all other documents, emails, notes, phone records pertaining to any information related to it, including information about the identification of the person from the very top of the University that the Chair referred to in the recorded conversation. Dr. Kovalyov did not reply to the University's clarification letter.

The University's Access and Privacy Advisor ("University Advisor") sent a memorandum to the FOIP Liaison officer in the Math Department. In addition, the University Advisor met with the Math Department Chair and Associate Chair, asking them to search for all records, electronic and paper, responsive to the request. Both the Chair and Associate Chair searched their emails for responsive records, using the keywords "Misha" and "Kovalyov". There were five pages of records responsive to this particular request that were provided to Dr. Kovalyov, and he responded that the University had not adequately responded to this part of his request. The University replied that a full and complete search had been conducted and no further records existed.

The provincial Office of the Information and Privacy Commissioner ("OIPC") became involved when Kovalyov asked it to review the University's response to his requests. The OIPC informed the University that it was appointing an Adjudicator to consider whether the University met its duty to the applicant (Dr. Kovalyov) under s. 10 of the *FOIPA* with respect to the records that were requested.

Section 10(1) of the *FOIPA* states:

> **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.

The Adjudicator held that the University had not established that it had conducted an adequate search and thus did not meet its duty to assist under *FOIPA* s. 10(1). This finding was based on three factors: (1) the University limited its search to records only in the possession of the Chair and Associate Chair of the Math Department, and provided no explanation why it did not expand the search to include other members of the Department; (2) the University had limited its keyword search in emails to Dr. Kovalyov's first and last name, and did not use other reasonable search terms, such as the name and number of the course he had proposed changes to; and (3) the University did not consider whether it was possible to restore the deleted findings (at para. 9).

The Adjudicator ordered the University to:

> 1. Search the electronic backup files if the University determined that it was possible that responsive records existed in such files;
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> 2. Expand its keyword search of electronic records if the University determined that such an expansion could locate further responsive records;
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> 3. Expand the search to other members of the University Department, if the University determined that such an expansion could locate further records; and
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> 4. If in the course of the ordered searches, the University were to determine that there were no responsive records, or that the records could not be restored, it should communicate that determination to Dr. Kovalyov (at para. 10).

The University then applied to the Court of Queen's Bench for judicial review of the Adjudicator's decision. The University argued that the Adjudicator's decision unreasonably: (a) expanded the proper parameters of the search for records; (b) expanded the duty to assist to include more reasons for its actions; and (c) failed to consider the requirements of *FOIPA* s.10(2).

Justice Don J. Manderscheid found that the standard of review on the question of whether the University made reasonable efforts to assist Dr. Kovalyov is reasonableness and the standard of review with respect to issues of procedural fairness is correctness.

The University argued that the Adjudicator's order to search the University's backup records breached procedural fairness and was unreasonable because it failed to address s. 10(2) of the *FOIPA*. Because the Adjudicator did not turn her mind to s. 10(2), the parties did not have the opportunity to address the issue.

Section 10(2) of the *FOIPA* provides:

> **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.

Since the Adjudicator had not addressed the s.10(2) factors as they relate to the backup records, the University had no notice that the backup records were in issue and therefore did not provide evidence regarding whether it could create a record from the backup files using its normal hardware and software and technical expertise, and/or whether doing so would unreasonably interfere with its operations. Justice Manderscheid quashed that portion of the Adjudicator's decision (the order to search the backup records) and remitted it back to the Adjudicator to receive evidence on whether the University could reasonably create the requested records.

Justice Manderscheid held that the Adjudicator's decision to require a search of records of persons likely to have made a complaint was reasonable. Further, it was reasonable to order the University to expand the keywords that were used in the search and to require the University to either expand its search or explain why such a search would not produce responsive records. Thus, the Court dismissed the remainder of the application.

This case demonstrates that the duty to assist applicants by providing complete and accurate access to information is tempered by the requirement that the requested records can be reasonably created without interfering with the operations of the public body. Whether the University of Alberta did act reasonably in relation to the backup records remains to be decided, however.

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