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# One Person, Two Universities, Three Alberta Cases

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**Cases Considered:**

*Oleynik v University of Calgary*, 2012 ABQB 189 (Case #1); *University of Alberta v Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247 (Case #2); *Association of Academic Staff of the University of Alberta v University of Alberta*, 2012 ABQB 248 (Case #3)

These three cases involve personal privacy issues in the process of applying for a research grant from Social Sciences and Humanities Research Council of Canada (SSHRC). Two of the cases suggest that the access to information requests to Universities were being used to obtain evidence to support allegations of bias in decision-making.

Dr. Oleynik (Oleynik) was an associate professor at Memorial University in Newfoundland. His 2007 application for a SSHRC grant was denied. One of the individuals on the selection committee was an Associate Professor of Humanities at the University of Calgary. In April, 2008, Dr. Oleynik applied to the University of Calgary for access to information under the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (*FOIPPA*). Dr. Oleynik wanted access to copies of email correspondence sent or received by the professor in which his name was mentioned, as he was concerned about "eventual misuse" of his personal information.

In June 2008, the University of Calgary responded that the committee members normally do not email each other and that email is only used to communicate with the committee chair. In August 2008, Dr. Oleynik applied to Alberta's Office of the Information and Privacy Commissioner (OIPC) to review this response. When authorized mediation was not successful, the matter was scheduled for a written inquiry. After reviewing the written submissions, the OIPC Adjudicator concluded that the University of Calgary had conducted a reasonable search for the responsive records and that it had met its duty to assist the inquirer under section 10(1) of the *FOIPPA*.

Case #1 is an application by Dr. Oleynik for judicial review of the Adjudicator's decision. Dr. Oleynik unsuccessfully applied to have fresh evidence heard in the judicial review. There were a number of other preliminary issues raised by Dr. Oleynik, which were either dismissed or dealt with in conjunction with the entire case. (Most of the reported decision actually dealt with these preliminary issues.) With respect to the judicial review, Madam Justice J.B. Veit held that the standard of review of the adjudicator's decision was reasonableness. Because the adjudicator had given reasons for her decision, Justice Veit concluded that the decision was reasonable, and dismissed the judicial review.

Case #2 and Case #3 were released one after the other. Both were heard by Justice Donald Lee. In Case #2, Dr. Oleynik applied to the University of Alberta's Information and Privacy Office, requesting access to email communications in which his name (Dr. Oleynik) was mentioned and that occurred during a seven month period (October 15, 2007 to April 18, 2008) between Professor Richard Szostak and SSHRC officials, together with other discussants. The University wrote Dr. Szostak asking whether he had any records responsive to this request. Dr. Szostak replied that he had deleted all SSHRC electronic correspondence each time he returned from SSHRC meetings as instructed by SSHRC. In addition, SSHRC had directed that any other records should be taken to the Committee meetings and left with SSHRC for destruction. Thus, the University wrote to Dr. Oleynik that it had not retrieved any records.

Dr. Oleynik complained to the OIPC, and eventually an Inquiry based on written submissions was held on the issue of whether the University of Alberta had met its duty to assist Dr. Oleynik under section 10(1) of the *FOIPPA*? The Adjudicator also directed the University to answer these questions:

1. Is the mandate of the University of Alberta different from that of Wilfrid Laurier University such that Order PO-2936 (Ontario Information and Privacy Commissioner, *Wilfred Laurier University*) can be distinguished?
2. Does the University of Alberta Faculty Agreement preclude or contemplate participation as a member of the SSHRC committee?
3. If the mandate of the University of Alberta is similar to that of Wilfred Laurier University, and/or the University of Alberta Faculty Agreement contemplates participation as a member of the SSHRC committee, would this mean that the University of Alberta has custody or control under the Act of emails on its server created as part of a committee member's role on the SSHRC Committee?

The Adjudicator held that the University had custody or control of the responsive records because the emails at issue had "passed through its servers" or because the University had some right to "deal with its records." Thus, the University had failed its duty to assist Dr. Oleynik because it had failed to provide sufficient evidence regarding the searches it performed and why the University was unable to provide the requested records. However, since the University had provided that information during the course of the investigation, the Adjudicator did not order the University to provide any further information to Dr. Oleynik.

The Adjudicator had concluded that the records were under the University's custody or control, relying on the factors set out in the *Wilfred Laurier University* case, another case involving records of SSHRC committee members. Records created under SSHRC committee work were created as part of the professor's duties to the University, and thus the University had some right to possess the record. Since the records were located on a University server, and were not kept apart from other records, the University had some responsibilities for the care and protection of the records. The Adjudicator was supported in this conclusion by looking at the Faculty Agreement's requirement that the staff member provide service for his or her discipline, which the Arbitrator concluded included service on a SSHRC committee.

The University of Alberta applied for judicial review of the Arbitrator's decision (Case #2). The Association of Academic Staff of the University of Alberta (AASUA) was granted intervenor status in the review. After a lengthy argument about standard of review, Justice Lee concluded that the appropriate standard of review was reasonableness. The Arbitrator's decision was owed deference because the Arbitrator was interpreting her home statute (e.g., the meaning of "custody

or control" under the *FOIPPA*) (para 49). The appropriate question was whether the decision was rationally supportable based on the record before the Adjudicator (para 80). In granting the University's application for judicial review, Justice Lee held that the Adjudicator's decision was unreasonable because it failed to consider the purpose of *FOIPPA*, failed to consider that SSHRC exercised great control of the records in question, and failed to adequately apply the relevant factors in determining whether the University, in fact, had custody or control of the records (para 113).

Case #3 involved an application by AASUA for judicial review of the Adjudicator's decision in Case #2 to ask the parties to provide the Faculty Agreement between the University of Alberta and the AASUA, and to answer questions about its interpretation. The AASUA argued that the Adjudicator should have provided AASUA with notice of the hearing and an opportunity to make submissions about the Faculty Agreement, to which the AASUA was a party, and that she had breached the duty to be fair.

To determine the issue, Justice Lee first analyzed whether the AASUA was a party affected by an access to information request under section 67 *FOIPPA*. Justice Lee concluded that AASUA was not affected by the request: it had no interest in the record; it did not create the record; and its operations were not affected by the access to the record. Justice Lee noted that if AASUA was not an affected party under section 67, there was no basis for assessing the Adjudicator's exercise of discretion, nor for asserting a breach of procedural fairness and natural justice caused by the failure to notify AASUA, nor for providing it with the opportunity to appear and provide evidence.

Nevertheless, Justice Lee went on to discuss the Adjudicator's exercise of discretion and the duty of fairness. Justice Lee concluded that the Adjudicator had implicitly decided that there were no other persons affected by the access request and thus it was not necessary for her to expressly give reasons as to why she reached such a conclusion (para 42). This was not a dispute between the University of Alberta and the AASUA that affected the AASUA's rights, privileges or interests. Moreover, the Adjudicator's interpretation of the Faculty Agreement was not binding on a grievance arbitrator. Thus, there was no breach of procedural fairness.

Justice Lee then dismissed the AASUA's application for judicial review.

Of particular interest in these cases is the issue of whether the University, having a system that provides routine back-up of records on a server, gives the University what is equivalent to a right to possess the records. Justice Lee concluded (para 96 (Case #2)) that a right to possess a record in these circumstances must "at the very least include a right to access and use the record for its own use." Justice Lee also concluded that the Faculty Agreement did not provide the University with the right to deal with records created by faculty members in fulfillment of their obligations with another body – SSHRC (para 97). It was unreasonable to conclude that the professor created the records as part of his employment duties, and then to conclude that the University created the records. The University's mandate of a broad commitment to research did not create a right to records created by a faculty member acting in a volunteer capacity for another entity (para 98). Justice Lee took note of *City of Ottawa v. Ontario*, 2010 ONSC 6835, in which there were similar facts. The City of Ottawa permitted its employees to use its system for personal emails, subject to the right to monitor IT systems for security breaches, non-compliance with city policies and procedures and for network management reasons. Justice Lee noted that this was similar to the University's computer use policies and its ability to make back-ups or to delete emails (para 99)

The City of Ottawa employee, who was a City Solicitor, used his work email address to send and receive emails related to his board work on the Children's Aid Society (CAS). The emails were stored on the City's email server. Someone requested disclosure of all emails, letters and faxes sent by the employee to and from CAS. While the Arbitrator for the Privacy Commissioner concluded that the City had custody or control of the emails because of its possession of them on the server, the Ontario Superior Court of Justice found that it was unreasonable for emails belonging to a private individual to be subject to access by members of the public merely because they were sent or received on a government owned email server. The fact that an employer might need access to the emails for computing purposes does not mean that these are subject to an access to information request.

Justice Lee (in Case #2) also noted that the computer use policy in the *Wildred Laurier University* case specified that emails could not be used for outside purposes, while the University's policy was broader and provided no restrictions with respect to personal use (para 110).

This would seem to imply that individuals who use university email servers should become familiar with the university's policies on computer use in order to determine whether their personal emails could be the subject of an access to information request. See the University of Calgary's Computing Services Agreement.

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