

**Submission to the
Special Legislative Committee Reviewing the Freedom of
Information and Protection of Privacy Act**

**By the Confederation of University Faculty Associations of BC
March 15, 2010**

Introduction

The Confederation of University Faculty Associations of BC (CUFA BC) represents professors, professional librarians, lecturers, instructors and other academic staff at BC's five doctoral universities (UBC, SFU, UVic, UNBC and Royal Roads). In total, we represent over 4,500 academic staff members.

Information is the lifeblood of the academic enterprise and so it will come as no surprise that our organization has a keen interest in the work of the Special Legislative Committee Reviewing the Freedom of Information and Protection of Privacy Act ("the Committee"). CUFA BC was involved in the creation of the Freedom of Information and Protection of Privacy Act ("the Act") and has made numerous interventions over the years to try and improve its provisions.

Although a mature piece of legislation, the Act nonetheless has room for improvement. Some improvements hearken back to the early days of the legislation; most are the consequence of the evolving role of information in our society.

With respect to the effect of the act on public universities and the faculty members at those universities, we make seven recommendations to the Committee:

- 1.0 That Schedule 1 be amended to include the definition of a "faculty member".**
- 2.0 That no changes be made to the exemptions of examination and test questions (s. 3(1)(d)) and teaching materials and research information (s. 3(1)(e)) from the scope of the Act.**
- 2.1 That s. 3(1)(e) be amended by replacing the phrase "employees of a post-secondary educational body" with "faculty members" as per Recommendation 1.0.**
- 3.0 That no changes be made to s. 22(3)(g), which presumes that the disclosure of personal recommendations, evaluations and references is an unreasonable invasion of a third party's personal privacy.**
- 4.0 That s. 35(2) be amended to allow researchers from all fields of inquiry to seek permission to use personal information found in the course of approved research to contact a person to participate in the research.**
- 5.0 That a new provision be created under s. 75 (Fees) to require that fees be excused for researchers at public post-secondary educational institutions.**
- 6.0 That new provisions be created in s. 3(1) to clarify that the records of a faculty member at a public post-secondary institution are excluded from the scope of the Act.**

Discussion

1.0 We recommend that Schedule 1 be amended to include the definition of a "faculty member".

As will become apparent in our subsequent recommendations, faculty members at public post-secondary institutions have a unique relationship to the records under their custody and control. In attempting to deal with the matters raised below, we find that the phrase "employees of a post-secondary educational body" (as in s.3(1)(e)) to be too broad to deal adequately with this unique relationship.

We have reviewed the definitions for "faculty member" employed in the University Act, the Royal Roads University Act, the College and Institute Act, and the Thompson Rivers University Act. From these, we have crafted the following comprehensive definition that we think is appropriate for the Freedom of Information and Protection of Privacy Act:

"faculty member" means a person employed by a post-secondary educational body as an tutor, instructor, lecturer, assistant professor, associate professor, professor, researcher, librarian, program director or in an equivalent position;

2.0 We recommend that no changes be made to the exemptions of examination and test questions (s. 3(1)(d)) and teaching materials and research information (s. 3(1)(e)) from the scope of the Act.

2.1 We recommend that s. 3(1)(e) be amended by replacing the phrase "employees of a post-secondary educational body" with "faculty members" as per Recommendation 1.0.

As far as we are aware, no proposals have been made to the Committee that would diminish or remove the exemptions from the scope of the Act for examination and test questions, teaching materials or research information. Nonetheless, we reiterate our support for these exemptions because they are essential to the professional lives of university faculty members.

If these exemptions were removed, the immediate negative effects would be:

- successful applications to disclose previous examination and test questions would prevent a faculty member from using those questions in future tests or examinations, thus depriving students of the educational value from answering well-honed questions;

- successful applications to disclose teaching materials may result in a faculty member's work being exploited for commercial purposes without their consent through the selling of curriculum to other teachers or by a for-profit post-secondary institution offering courses based on the disclosed materials;
- successful applications to disclose research information may jeopardize the privacy of research subjects, may deprive a faculty member of first publication rights for their research, and may result in the research being exploited for commercial purposes without the faculty member's consent; and
- faculty members would have to devote a significant proportion of their working hours to dealing with requests for disclosure rather than teaching and conducting research.

In addition to these practical considerations, the exemptions in s.3(1)(d) and s. 3(1)(e) are also fundamentally about the academic freedom of faculty members. In this context, academic freedom must be understood to include not only the products of teaching and scholarly activity, but also the products of communication about teaching, scholarly activity, and the post-secondary enterprise generally. It is academic freedom that enables faculty members to deal with controversial subjects, without fear of reprisal. It is academic freedom that enables faculty members to criticize their own institutions in the pursuit of higher quality teaching and research.

It should be readily apparent that any diminishment or removal of the exemptions in s.3(1)(d) and s.3(1)(e) would place an immediate chill on faculty members engaging in the teaching, scholarly exploration and honest assessment we need in a healthy democracy. Over the longer term, any diminishment or removal of these exemptions might well reduce the university enterprise to a shell of its former self.

3.0 We recommend that no changes be made to s. 22(3)(g), which presumes that the disclosure of personal recommendations, evaluations and references is an unreasonable invasion of a third party's personal privacy.

We are not aware of any proposals before the Committee that would diminish or remove the presumption that disclosure of personal recommendations, evaluations and references is an unreasonable invasion of privacy. Nonetheless, since this provision is central the professional lives of faculty members, we want to reiterate its importance to the university community.

In the universities, recommendations, evaluations and references are used for:

- the selection of students for admission into programs of study;
- the selection of scholarship, fellowship and award recipients;
- the selection of research grant recipients;
- the evaluation of the academic work of students;
- the evaluation of the research of students and faculty members for publication; and
- the hiring and promotion process for faculty members.

There are many sub-fields within each academic field of study. As a consequence of this diversity, the university community relies on external referees to provide specialized knowledge in evaluating the work and achievements of faculty members and graduate students.

If recommendations, evaluations and references were to become subject to disclosure, it would limit the number of people who would be willing to provide such information. It would also limit the usefulness of the information because referees would be less likely to provide their full and frank opinions. The consequences for the university community, and for high quality teaching and research, would be severe.

4.0 We recommend that s. 35(2) be amended to allow researchers from all fields of inquiry to seek permission to use personal information found in the course of approved research to contact a person to participate in the research.

Section 35(1)(a.1) prohibits researchers from using information disclosed by a public body for research purposes to contact individuals to participate in the research. Section 35(2) waives that prohibition for health-related research, providing the Information and Privacy Commissioner ("the Commissioner") approves of such contact.

Rather than disallowing such individual contact for non-health-related research out of hand, we believe that other researchers ought to have the same opportunity to make their case to the Commissioner as do health researchers. The number of cases where the Commissioner would be called on to make such a judgment for non-health-related research is likely small, but even so it would keep the door open to innovative research not currently envisaged or permitted by the legislation.

We believe the most expeditious way to enact this change would be to amend section 35(2) by striking the phrase "in respect of research in relation to health issues".

5.0 We recommend that a new provision be created under s. 75 (Fees) to require that fees be excused for researchers at public post-secondary educational institutions.

We agree with the submissions of other organizations and individuals that, in general, fees for Freedom of Information requests are too high. To this end, we support any move to reduce and/or eliminate fees for non-commercial information requests.

Speaking specifically to the case of university-based researchers, our experience is that many academic research opportunities are lost due to the excessive costs attached to Freedom of Information requests. This impedes both the development of abstract knowledge and the development of concrete means to improve public policy and public services.

In the absence of a general reduction or elimination of fees, we believe the public good derived from greater access to information for university-based researchers is sufficient that there ought to be a special provision to excuse fees for these researchers.

Accordingly, we propose that fees be excused for faculty members (as defined in Recommendation 1.0). We propose this provision be enabled through the enactment of a new section 75.2, worded as follows:

75.2 An applicant who is faculty member and who is making a request for a research purpose is presumed to be requesting a record that is a matter of public interest as per subsection (5)(b).

6.0 We recommend that new provisions be created in s. 3(1) to clarify that the records of a faculty member at a public post-secondary institution are excluded from the scope of the Act.

This proposal speaks to the unique position academics hold in our society. Although academics are employed by public universities, they are not like other employees. Even though the university benefits from the teaching and research activity of a faculty member, the ownership of their academic work remains, in large part, in the hands of the faculty member. When faculty members leave one university for another university, their accumulated records go with them to their new institution.

The exemption in section 3(1)(e) for teaching and research materials will generally exclude most records of a faculty member, but there remain other records, including email messages and other records of communication, whose status is unclear. As already discussed in Recommendation 2.1, these other records are as much a part of the scholarly enterprise as the direct products of teaching and research. Moreover, their exclusion from

the Act is necessary to protect the academic freedom of individual faculty members. This is no better illustrated than by the watershed case regarding academic freedom in Canada — the Harry Crowe case — which centered on a non-scholarly letter exchanged between academic colleagues.¹

The lack of clarity regarding custody and control of the records of faculty members led to a lengthy arbitration at the University of Ottawa in 2008 and 2009. The result of that arbitration was that the records of faculty members were confirmed to be under the custody and control of the faculty members and not the University. Therefore, the records of faculty members were not within the scope of a freedom of information access request except in very limited and proscribed circumstances.²

There have been decisions from the Commissioner's office generally favourable to this principle (e.g. Order No. 247-1998, Order No. 264-1998, Order F08-02). Although s. 22 might protect from disclosure some of the records not excluded by s. 3(1)(e), it's not clear that these sections together necessarily completely address the unique nature of the academic enterprise.

To this end, we recommend that s. 3(1) of the Act be amended by adding the following two subsections:

- (e.1) a record containing the personal notes or annotations of a faculty member;
- (e.2) a record containing the personal communications of a faculty member, including electronic mail messages;

Conclusion

The Act has generally well served the university community in British Columbia. For the most part, it balances the unique needs of the university community with the privacy rights of individuals and the right of the public to know how public bodies carry out their business.

However, the accumulated changes to the Act over the years and the evolving role of information in our society necessitate some amendments to ensure it continues to well serve the university community and the public into the future. We believe our recommendations accomplish this task.

¹ The 1958 letter was between Harry Crowe of United College (now University of Winnipeg) and his colleague William Packer, also of United College. See *Academic Freedom in Canada: A History* by Michel Horn, pp. 220-245.

² Award of Arbitrator Philip Chodos, September 29, 2008; Supplementary Award No. 1 of Arbitrator Philip Chodos, January 20, 2009; Supplementary Award No. 2 of Arbitrator Philip Chodos, May 11, 2009.