



Order F23-08

THOMPSON RIVERS UNIVERSITY

Jay Fedorak
Adjudicator

February 14, 2023

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Summary: An applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to Thompson Rivers University (TRU) for copies of any peer review reports that certain faculty members may have received from academic journals. TRU denied access under s. 3(1)(e) of FIPPA, on the grounds that the records were the research materials of its faculty members. The adjudicator found that the records were the research materials of its faculty members and outside the scope of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165 s. 3(1), s. 3(1)(e), s. 4; *Thompson Rivers University Act*, SBC 2005 c 17; *College and Institute Act* RSBC 1996 c. 52, s. 1; *Universities Act*, RSBC 1996 c. 468, s.1.

INTRODUCTION

[1] An individual (applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to Thompson Rivers University (TRU) for copies of peer review reports that certain faculty members may have received from academic journals. These peer review reports would have related to any research papers that they submitted for publication. TRU responded that the requested records were outside the scope of FIPPA in accordance with s. 3(1)(e).¹

[2] The applicant requested a review by the Office of the Information and Privacy Commissioner (OIPC) of TRU's decision to withhold the information under s. 3(1)(e).

¹ Since the applicant made the request, amendments to FIPPA occurred, including to this provision. It is now numbered s. 3(3)(i)(iii). For the purposes of this Order, I will refer to the provision as s. 3(1)(e).

[3] Mediation by the OIPC did not resolve the matter and the applicant requested that it proceed to an inquiry.

[4] The applicant, TRU and one of the faculty members made submissions to the Inquiry. Other faculty members supplied TRU with an affidavit that TRU included in its submission.

ISSUES

[5] The issues to be decided in this inquiry are:

1. Whether the requested records are in the custody or under the control of TRU; and
2. Whether the records are outside the scope of FIPPA in accordance with s. 3(1)(e).

[6] Previous orders have established that the public body has the burden of establishing that records are excluded from the scope of FIPPA.²

DISCUSSION

[7] **Background** – The faculty members work in a department of TRU that has been the subject of controversy over the issue of the academic quality of certain journals in which some of them have published articles. One of the faculty members wrote an article alleging that other colleagues had published in journals with substandard academic credentials.

[8] **Records at issue** – The records at issue are any peer review reports from academic journals concerning research papers that TRU faculty members submitted for publication. TRU has declined to verify whether any responsive records exist.

Are the requested records in the custody of TRU?

[9] While FIPPA does not define the term “custody”, previous orders have established how to determine whether a public body has custody of a record. The first step is to establish whether the public body has physical possession of the record. If it does, the second step is to determine whether it also has a legal right or obligation to the information in its possession.³ It follows that a public body cannot have custody if it does not have physical possession.

² For example, Order F15-26, 2015 BCIPC 28 (CanLII), para. 5.

³ See for example Order F15-65, 2015 BCIPC 71 (CanLII), paras. 11-13; Order F18-45, 2018 BCIPC 48 (CanLII), para 17; Order 02-30, 2002 BCIPC 42463 (CanLII); Order F16-15, 2016 BCIPC 17 (CanLII) at para 16.

[10] TRU has declined to request that the faculty members provide copies or confirm the existence of any responsive records. Therefore, I must qualify the description of my deliberations with respect to the records. The existence of the records is hypothetical, but I will analyze the submissions with the assumption that some records exist.

Physical Possession

[11] TRU submits that it does not have physical possession of any responsive records. It states that any such records were created by the journals and the academics responsible for the peer reviews. Any records remaining in the possession of those journals or academics are not in the possession of TRU.⁴

[12] TRU acknowledges that some of the faculty members may have received copies of peer reviews through the TRU email system and that some may remain on its servers. Nevertheless, TRU contends that this would constitute mere possession by TRU of the records, which is insufficient to establish custody for the purposes of FIPPA.⁵

[13] I conclude that it is possible that some faculty members received copies of peer review reports of academic papers they submitted for publication. They may have received these records through the TRU email system. They may have stored these records on the TRU email server. In some cases, they may have transferred copies to another medium and stored them in another location. As I found in Order F22-48, records in the possession of employees of TRU that relate to their employment, such as research materials or research information of faculty members, are in the possession of TRU.⁶

[14] I find that TRU has physical possession of any peer review reports TRU faculty members received regarding their submissions to journals. That is because the peer reports are in the faculty members' possession, as employees of TRU, and they relate to their employment duties.

Legal rights and obligations

[15] Past orders have found that employers have legal rights and obligations with respect to records in the physical possession of public body employees relating to their performance of core functions of the public body.⁷ On the other hand, the public body would not have legal rights and obligations for the purposes of FIPPA for records in the physical possession of public body employees that relate to matters other than the performance of the core function of the public

⁴ TRU's initial submission, para. 39.

⁵ TRU's initial submission, paras. 40-41.

⁶ Order F22-48, 2022 BCIPC 55 (CanLII), para. 14.

⁷ See for example Order F13-23, 2013 BCIPC 30 (CanLII).

body. For example, an employer would have no legal right to any records relating to the employee's personal life, such as records about their families or their volunteer activities, even if the faculty member kept those records in their place of work or on their employer's computer network.

[16] TRU submits that custody of records for purposes of FIPPA requires that the public body have "some right to use or deal with the record or some responsibility for their care and protection". TRU argues that as it was third-party publishers outside of TRU that conducted the peer reviews, TRU had no responsibility or oversight of the process. Therefore, TRU concludes, it has no legal right to deal with these records and no responsibility for them.⁸

[17] The applicant disagrees with the submission of TRU. He submits that as TRU has provided the servers and infrastructure to support storage of the records, it has a responsibility for any records received through them. He submits further that any responsive records relate to the business of TRU, and its reputation.⁹

[18] I considered the issue of the relationship between TRU and the research materials of its faculty members in Order F22-48. I found that, while TRU does not direct the research of their employees or exercise legal ownership of the artistic rights of publications independently of those employees, it does have a vested interest in the outcome of this research. I also found that, where a faculty member's assigned duties include conducting research, those faculty members are employees of TRU conducting research during the course of their employment. I also found that the academic research is a core function of the university and an essential component of its mandate.¹⁰

[19] The submissions of TRU, the applicant and the third party all agree on the nature of the records at issue. Peer review reports are assessments that academic journals commission when a scholar submits an academic paper for publication in the journal. The journal identifies other scholars with relevant expertise to conduct a peer review, make comments and issue a recommendation as to whether the journal should publish the paper. The journal provides the peer reviewer with a copy of the paper and invites their response. The peer reviewer's report includes an assessment of the quality of the paper and may offer suggestions for improvement.¹¹

[20] Any peer review reports would be directly related to paper submissions of the faculty members. It appears reasonable to conclude that faculty members

⁸ TRU's initial submission, paras. 42-44.

⁹ Applicant's response submission, paras. 23-25.

¹⁰ Order F22-48, para. 22.

¹¹ TRU's initial submission, para. 32; Third party's initial submission, pp. 1-3; Applicant's response submission, paras. 4-5.

would be likely to revise their research papers, based on the feedback of the peer review report. Therefore, the peer review report becomes source material for the faculty members' research. As such, the peer review report is a record that an employee of TRU uses in the context of their employment with TRU. Through its employees, TRU has rights and responsibilities for the records, including respecting their use, disclosure or destruction. This is sufficient to establish TRU's custody of any peer review reports that are in the possession of TRU's faculty members.

Conclusion on custody

[21] I find that any responsive records that are in the physical possession of an employee of TRU in their capacity as an employee are in the physical possession of TRU. I also find that TRU has sufficient legal rights and obligations with respect to these records in its possession that satisfy the test for determining that it has custody under ss. 3(1).

Are the records under the control of TRU?

[22] Either custody or control over a particular record will suffice to bring it within the scope of s. 3(1). Both are not required. As I have determined the records are in the custody of TRU, I do not need to determine whether they are also under the control of TRU. Nevertheless, for the sake of completeness I will.

[23] I follow previous orders that have identified and examined a series of indicators of control to consider when determining whether a public body exercises control of a record for the purpose of FIPPA. They include whether: the record was created or received by an officer or employee of the public body in the course of carrying out their duties; the public body has statutory or contractual control over the records; the public body has possession of the records; the public body has relied on the records; the records are integrated within the public body's other records; the public body has the authority to regulate the use and disposition of the records; the content of the record relates to the public body's mandate and functions; and the contract allows the public body to inspect, review, possess or copy the records. The list of indicators is not exhaustive and not all will apply in every case.¹²

Were the records created or received by an employee in the course of carrying out their duties?

[24] TRU does not deny that when its faculty members receive peer review reports they do so in the course of carrying out their duties as employees of TRU. These peer review reports would relate directly to research papers that the faculty

¹² See for example Order F18-45, 2018 BCIPC 48 (CanLII), para. 23; Order F15-65, 2015 BCIPC 71 (CanLII), para. 18; Order 02-29, 2002 BCIPC 42462 (CanLII), para. 18; Decision F10-01, 2010 BCIPC 5 (CanLII), para. 9.

members had created and submitted for publication and came into being as a result of the actions of employees of TRU in the course of their employment.

[25] I find that any peer review reports received were received by an employee of TRU in the course of carrying out their research-related employment duties and relate directly to those duties.

Does the public body have statutory or contractual control over the records?

[26] There was no evidence provided of statutory provisions or a contract governing the control of peer review reports.

Has the public body relied on the record?

[27] TRU argues that it has not relied on the peer review reports for any purposes.¹³

[28] Nevertheless, it is reasonable to assume that faculty members would incorporate any constructive criticism in the peer review reports into their research papers. Therefore, I find that, in such cases, an employee of TRU would be relying on the records in the course of carrying out their duties as an employee of TRU.

Are the records integrated with the other records of the public body?

[29] Given that TRU has not confirmed the existence of the records, it is difficult to assess where any records that do exist may reside. In accordance with the wording of the FIPPA access request, faculty members would have received any records that exist via email correspondence on the TRU system. If peer review reports exist, it is possible that they would still reside in the TRU email system, or would be included with the research materials, of the faculty member, to which they relate. Therefore, if peer review reports exist, it is likely that they are integrated with other records of TRU employees.

Does the public body have the authority to regulate the use and disposition of the records?

[30] TRU submits that it has no authority to regulate the use or disposition of peer review reports. I note TRU asserts that, in the collective agreement with faculty members, it has assigned the copyright and patent of any work product to its employees.¹⁴ Nevertheless, the fact that faculty members have ownership of copyright and patent to any work product does not necessarily negate the authority of TRU to regulate the use and disposition of the peer review reports. In

¹³ TRU's initial submission, para. 65.

¹⁴ TRU's initial submission, para. 53.

addition, I note that employees of TRU are not independent of TRU. Consequently, TRU exercises authority over the records, through the faculty members as employees.

[31] Therefore, TRU faculty members have the authority to regulate the use and disposition of the records as employees of TRU.

Does the content of the record relate to the public body's mandate and functions?

[32] TRU submits that the research activities of its employees do not relate to its mandate, functions and responsibilities.¹⁵ This is a surprising assertion given that s. 3(1)(c) of the *Thompson Rivers Universities Act (TRUA)* requires TRU to “to undertake and maintain research and scholarly activities”.¹⁶

[33] I do not think it accurate to say, as TRU does, that universities merely encourage their faculty members to conduct research just to maintain their credentials in the same way as other professionals, like lawyers and doctors.¹⁷ As is evident from its governing statute, scholarly academic research is an essential function of TRU.

[34] Therefore, I find that the records at issue relate to academic research, which is a core function of the university and an essential component of its mandate.

Does a contract allow the public body to inspect, review, possess or copy the record?

[35] There is no contract that addresses TRU's rights to inspect, review, possess or copy the peer review reports.

Conclusion on control

[36] I find that, on balance, the indicators of control in this case support the conclusion that any peer review reports are under the control of TRU. The records relate to the conduct of academic research, carried out by faculty members as employees of TRU, which is not only an essential purpose of a university as an institution of higher learning, but also a statutory obligation.

[37] If any peer review reports exist, they relate to the academic research of TRU employees whose job duties required they conduct research.

¹⁵ TRU's initial submission, para. 52

¹⁶ *Thompson Rivers University Act* SBC 2005 c 17.

¹⁷ TRU's reply submission, para. 51.

[38] As I have found that any peer review reports responsive to the request that are in the possession of the faculty members are in both the custody and under the control of TRU, I will now turn to the issue of whether the records are excluded from the application of FIPPA under s. 3(1)(e).

Are the records excluded from FIPPA under s. 3(1)(e)?

[39] TRU submits that any existing peer review reports are solely the research information or materials of the faculty members. The relevant provision reads as follows:

3(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:

...

(e) a record containing teaching materials or research information of

(i) a faculty member, as defined in the *College and Institute Act* and the *University Act*, of a post-secondary educational body.¹⁸

[40] Therefore, the question that I must decide is whether the requested records constitute the research information of a faculty member of TRU.

[40] **Do the Records Contain the Research Information of TRU Faculty Members?** – FIPPA excludes from its scope the research information of faculty members at post-secondary education institutions. Previous orders have considered the application of s. 3(1)(e) of FIPPA and established its principles.¹⁹ For s. 3(1)(e) of FIPPA to apply the information must:

1. Constitute research information; and
2. Belong to faculty members of a post-secondary educational body.

[41] In this case I must decide whether any peer review reports responsive to the request that are in the possession of the faculty members comprise the research information of a faculty member, as defined in the *College and Institute Act* (CIA) and the *Universities Act*.

[42] **Is the faculty member a “faculty member” as defined in the *College and Institute Act* and *Universities Act*?** – Any records within the scope of the request would have to be peer review reports of the work of faculty members under s. 3(1)(e). TRU submits that all of the faculty members identified in the access request are faculty members of TRU for the purposes of s. 3(1)(e) of

¹⁸ I note that wording used in the subsequent amendment is “teaching or research materials”.

¹⁹ See for example, Order F12-03, 2012 BCIPC 3 (CanLII); Order F10-42, 2010 BCIPC 63 (CanLII) and Order 00-36, 2000 BCIPC 39 (CanLII).

FIPPA.²⁰ The submissions of the applicant and the third party do not dispute this or argue otherwise.²¹ The third party does not dispute this.

[43] I also find that TRU is a post-secondary educational body. Schedule 1 of FIPPA defines “educational body” as including TRU. I also find that TRU is a “post-secondary” educational body because the TRUA says that the purposes of TRU include offering post-secondary education and training.²² Therefore, I am satisfied that TRU is a post-secondary educational body under s. 3(e)(i) of FIPPA.

[44] Therefore, I conclude that any faculty members who received peer review reports of the type that are responsive to this access request is a “faculty member” for the purposes of s. 3(1)(e) of FIPPA.

[45] **Does the information constitute “research” information? – I** considered the meaning of “research” for the purpose of s. 3(1)(e) in Order F11-21.²³ I reviewed the definitions of “research” used in other orders and reference works, such as dictionaries. I concluded that there are two elements required for information to be research information. The first is that it must be scientific or systematic and the researcher must take a critical approach to their evidence. The second is that the evaluation of the evidence must be for the purpose of deriving something meaningful, such as new knowledge, principles, theories or facts.²⁴

[46] TRU submits that one of the purposes of the peer review process is for qualified peers in the author’s field to validate the scholarship of their research and to determine whether the manuscript contributes to the field that merits publication.²⁵ It supports this assertion with an affidavit from its Vice-President Research.²⁶ The applicant does not contest this point.

[47] TRU submits that another of the purposes of peer review reports is “to provide authors with high-quality feedback to improve their scholarly manuscripts prior to publication”.²⁷ The applicant does not contest this point. The applicant argues, however, that the faculty members did not create the reports at issue and that the reports themselves do not constitute research.²⁸

²⁰ TRU’s initial submission, para. 89.

²¹ Applicant’s initial submission, para. 14.

²² TRUA, s. 4.

²³ Order F11-21, 2011 BCIPC 27 (CanLII), paras. 32-46.

²⁴ Order F11-21, paras. 95-99.

²⁵ TRU’s initial submission, para. 32

²⁶ TRU’s initial submission, Affidavit 1, para. 13.

²⁷ TRU’s initial submission, para. 32.

²⁸ Applicant’s response submission, para. 14.

Analysis

[48] The submissions of the parties regarding s. 3(1)(e) focus on whether there are any expectations of confidentiality with respect to the creation and dissemination of peer review reports. The parties direct their arguments to the issue of whether disclosure of the peer review reports would harm academic research. These arguments are beside the point. Section 3(1)(e) is not a harms-based exception. TRU need only establish that any peer review reports that may exist comprise research information of its faculty members.

[49] The authors of the academic papers that were the subject of any existing peer review reports responsive to the request were clearly faculty members of TRU, which is a post-secondary educational body. No one disputes this.

[50] The affidavit of the Vice-President Research persuades me that the contents of peer review reports relate to submissions to academic journals and those submissions constitute research for the purposes of FIPPA. These peer review reports evaluate the extent to which the submissions make an original contribution to their field of knowledge. It is academic experts in the relevant field of research who conduct these reviews. It is reasonable to conclude that the editors of the journals would not waste the time of these reviewers by sending them submissions that clearly fail to meet the criteria of research.

[51] It is important to note that the wording of s. 3(1)(e) does not restrict its application only to records created by the faculty member. The relevant term is “research information” of the faculty member. It is reasonable to conclude that this includes both the work product of the faculty member and all of the information, or materials, that the faculty member has gathered to inform their research. This is because disclosure of all of the notes, publications, calculations, peer comments and other materials that the faculty member has gathered for their research purposes could enable a reader to infer the content and conclusions of the research papers that the faculty member produces. “Information” or “materials” clearly includes more than the research paper that the faculty member writes at the end of the research process. I find it includes all of the information and materials the faculty members relied on to create that end product. If the Legislative Assembly had intended to restrict the application of this provision solely to the work product that a faculty member created to the exclusion of the information on which they relied, it could have worded the provision explicitly to that effect.

[52] TRU has provided affidavit testimony that one of the purposes of peer review reports is to provide researchers with feedback to improve their manuscripts. Consequently, the peer review reports in the possession of the faculty member would come to form part of the body of research information on which the faculty member would rely for the purposes of their research.

[53] In addition, it is reasonable to conclude that the content of the peer review reports would include descriptions of the research that would reveal details of the work product of the research of the faculty member.

[54] TRU has not provided copies of any of the peer review reports, nor verified their existence. Nevertheless, it has provided sufficient descriptions and evidence in its submissions to lead me to conclude that any of these reports that may be in its custody or under its control constitute the research information of the faculty members to whose academic papers they relate. This is in contrast to Order F22-38, where there was insufficient evidence before me to demonstrate that the records at issue constituted research information. In the present case, I have sufficient evidence to support this conclusion without reviewing the records.

[55] Therefore, I find that any peer review reports responsive to the request that currently are in the possession of the faculty members constitute the research information of the faculty member for the purposes of s. 3(1)(e). As a result, these records are outside the scope of FIPPA, and there is no requirement for TRU to disclose them.

Issue arising during the inquiry

[56] In its initial submission, TRU recites the accusation it raised in its submissions to the inquiry in F22-38 that the applicant improperly disclosed the contents of its submissions to someone unrelated to these proceedings. It submits again that this constitutes a breach of an implied undertaking of confidentiality and requests that I reprimand the applicant for this.²⁹

[57] I decline to do so for the reasons I cited in Order F22-38. The first is that parties may not raise new issues during the course of the inquiry without first requesting the permission of the OIPC. TRU has not done so in this case. The second is that TRU has not provided proof that it was indeed the applicant who disclosed the information at issue. These grounds are sufficient to dismiss TRU's request.

[58] I also clarify again that, in fact, there are no implied undertakings of confidentiality with respect to this Inquiry or any other under FIPPA. TRU has misread the comments of the adjudicator in the Order F15-02 that it cited.³⁰ On the contrary, there are no constraints on the use by applicants of information they obtain during the course of an OIPC inquiry. TRU's accusation remains unfounded, and I will take no action.

²⁹ TRU's initial submission, paras. 18-21.

³⁰ F15-02, 2015 BCIPCD 2 (CanLII), para. 38. The adjudicator denied the request to find that the applicant was under an implied undertaking to use an exhibit only for the purposes of the inquiry.

CONCLUSION

[59] For the reasons given above, I make the following order under s. 58 of FIPPA:

1. I confirm that any requested records that exist are in the custody and under the control of TRU for the purposes of s. 3.
2. I confirm the decision of TRU to refuse to disclose information to the applicant in accordance with s. 3(1)(e).

February 14, 2023

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

OIPC File No.: F20-82658