



Order F24-35

SIMON FRASER UNIVERSITY

Jay Fedorak
Adjudicator

May 2, 2024

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Summary: The Animal Defence and Anti-Vivisectionist Society of BC (applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to Simon Fraser University (SFU) for records relating to the use of animals in research and training protocols. SFU provided the applicant with access to some records, withholding some information under s. 19(1) (harm to personal safety). It also withheld some records as outside the scope of FIPPA in accordance with s. 3(3)(i)(iii) (research materials of person carrying out research at a post-secondary educational body). The adjudicator confirmed the decision of SFU to withhold records and information under s. 3(3)(i) and s. 19(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 3(3)(i)(i), 3(3)(i)(ii), 3(3)(i)(iii), 15(1)(l), 19(1)(a), s. 22(1), Schedule 1 (definition of “educational body”); *University Act*, RSBC 1996 c. 468; *School Act*, RSBC 1996 c. 412.

INTRODUCTION

[1] The Animal Defence and Anti-Vivisectionist Society of BC (applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to Simon Fraser University (SFU) for records relating to the use of animals in research and training protocols. SFU provided the applicant with access to some records, withholding some information under s. 15(1)(l) (harm to the security of a system). It also withheld some records as outside the scope of FIPPA in accordance with s. 3(3)(i)(iii) (research materials of person carrying out research at a post-secondary educational body).

[2] The applicant was dissatisfied with the response and requested a review by the Office of the Information and Privacy Commissioner (OIPC). Mediation failed to settle the matter and it proceeded to an inquiry.

[3] After the notice of inquiry was issued, SFU released all of the information that it had originally withheld under s. 15(1)(l). SFU then requested permission to raise the application of s. 3(3)(i)(i) (research materials of a faculty member at a post-secondary educational body), s. 3(3)(i)(ii) (research materials of a research assistant at a post-secondary educational body) to some of the records to which it had already applied s. 3(3)(i)(iii). The OIPC granted permission for SFU to include these issues in the inquiry.

[4] SFU also ceased to rely on s. 3(3)(i) to withhold approximately 1,000 pages of records. With the consent of the applicant, SFU released many of these records, while applying s. 19(1)(a) (harm to personal safety) and s. 22(1) (unreasonable invasion of privacy). The parties agreed to add ss. 19(1)(a) and 22(1) to the inquiry. The parties also agreed that SFU could apply s. 15(1)(l) to information relating to building and software security. The applicant agreed not to contest this application of s. 15(1)(l), and this is not at issue in the inquiry.

ISSUES

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

1. Whether some of the records are outside the scope of FIPPA in accordance with s. 3(3)(i);
2. Whether SFU is authorized to withhold information under s. 19(1)(a); and
3. Whether SFU is required to withhold information under s. 22(1).

[6] Under s. 57(1), SFU has the burden of proving that the applicant has no right of access to the information it withheld under s. 19(1). Section 57(2) stipulates that the applicant has the burden to prove that disclosure would not be an unreasonable invasion of the personal privacy of a third party under s. 22(1). However, the public body has the initial burden to show that the information it is withholding under s. 22(1) is personal information.¹ Section 57 does not indicate who has the burden of establishing that records are excluded from the scope of FIPPA under s. 3, but previous orders have decided that the public body has the burden.²

DISCUSSION

[7] **Background** – The submissions of the parties do not provide any information about the background to this request.

[8] **Record at issue** – The records consist of 14,960 pages of records relating to various aspects of research projects involving animals at SFU. SFU has withheld information on 14,445 pages in whole or in part.

¹ Order 03-41, 2003 BCIPC 41 (CanLII), paras. 9-11.

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

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

[9] The provisions SFU relies on read as follows:

3(3) This Act does not apply to the following:

...

(i) a record containing teaching or research materials of

- (i) a faculty member, as defined in the *College and Institute Act* and the *University Act*, of a post-secondary educational body,
- (ii) a teaching assistant or research assistant employed at a post-secondary educational body, or
- (iii) another person teaching or carrying out research at a post-secondary educational body;

[10] Previous orders have considered the application of s. 3(3)(3)(i) of FIPPA and established its principles.²⁶ Order 00-36 described the purpose of the provision as:

intended to protect individual academic endeavour. It will protect the intellectual value in teaching materials or research information developed by an employee of a post-secondary educational body, for her professional purposes, by protecting it from disclosure to those who might exploit it to her disadvantage.³

[11] The first question I will consider is whether the information in dispute is in records containing research material.

[12] **Is the information in records containing research material? – I** considered the meaning of “research” for the purpose of s. 3(1)(e) (the previous version of s. 3(3)(i)) in Order F11-21.⁴ I reviewed the definitions of “research” used in other orders and reference materials and concluded that research was the investigation into the pursuit of knowledge, and it needed to incorporate two criteria, which I described as follows:

The first criterion is that, for a study to constitute “research,” it must be systematic or scientific and the researcher must take a critical approach to their evidence. The study must involve more than the collection or collation of data. The methodology must be structured in a rational way, and the researcher should approach the information seeking answers to specific questions. The researcher should also subject the data or information to critical analysis to assess the extent to which it presents a reliable basis for

³ Order 00-36, 2006 BCIPC 39 (CanLII), p. 5.

⁴ Order F11-21, 2011 BCIPC 27 (CanLII), paras. 32-46.

forming conclusions or testing hypotheses or otherwise deriving something meaningful.

The second criterion is that the purpose of the research must involve evaluation of the information to derive something meaningful, such as new knowledge, including principles, theories or facts. This would involve the development of new theories or conclusions, or the confirmation that existing theories or conclusions, which warranted re-examination, remain valid. This is not to imply that only scientists or professional researchers could meet this standard or that the conclusions must be formal or academic in nature. It does suggest, however, that it is necessary to derive some broader meaning from the results of the investigation.

[13] SFU provides a description of each of the categories of records at issue and explains why they constitute research materials.

1. Research Protocols

[14] SFU describes some of the disputed records as research protocols that outline the objectives, methodologies and procedures of a research project. They include an abstract, background and rationale summarizing the research topic. SFU submits that they constitute research materials as the researchers use them as a guide in conducting their research and they reveal information about the research.⁵

2. Internal memorandums and communications

[15] SFU says that other records are internal memorandums and communications that researchers exchanged for the purpose of discussing and evaluating potential research projects. SFU submits that these records are research materials because they record the development, planning and analysis of research projects. SFU argues that: “These records are valuable for understanding the evolution of research proposals, informing research strategies, facilitating collaboration, and ensuring adherence to institutional requirements and ethical guidelines.”⁶

3. Research guidelines

[16] SFU identifies some of the records as guidelines about all aspects of the use of animals as part of a research project. They ensure that researchers maintain ethical standards, accurate data collection and scientific integrity in each research project. SFU submits that these records constitute research materials because researchers use them to guide the design of their research projects and often cite them in publications of the results of the research. SFU

⁵ SFU’s initial submission, paras. 39-40.

⁶ SFU’s initial submission, paras. 41-42.

submits that they play an important role in the research process and contribute to the overall rigor and credibility of the research.⁷

4. Research applications

[17] SFU says some of the records are research applications that include detailed information about the use and testing of lab animals and detailed information about each animal being used. Researchers use this information to track individual animals and ensure consistency in results of experiments. SFU submits that these records constitute research materials because they contain essential information about individual research projects. They constitute a plan of the research and a record of its progress.⁸

5. Lab animal records

[18] SFU says some of the records are about lab animals and contain information about the housing and environmental conditions in which they are kept, as well as the experimental procedures that they receive. They provide a historical record of the research that enables the evaluation and validations of the research findings as well as regulatory compliance. SFU submits that these records constitute research materials because they contain vital information about the animals used in particular research projects.⁹

6. Expected research outcomes

[19] SFU explains that some of the disputed records document the expected research outcomes and social benefits of research projects. Researchers create them during the planning stage and use them over the course of the project for tracking and evaluating success. SFU submits that these records constitute research materials because they are integral to the research process of individual projects and contribute to the advancement and dissemination of scientific knowledge.¹⁰

[20] The applicant does not make submissions as to whether these records are research materials. The applicant does not dispute SFU's characterization of the records or its claim that the matters addressed in the records meet the definition of "research materials" for the purposes of s. 3(3)(i), or that SFU is a post-secondary educational body. The applicant merely submits that SFU should review the records line by line and disclose any information that is not research materials.

⁷ SFU's initial submission, paras. 43-44.

⁸ SFU's initial submission, paras. 45-46.

⁹ SFU's initial submission, paras. 47-50.

¹⁰ SFU's initial submission, paras. 51-53.

Analysis

[21] I have reviewed the records at issue and can confirm that they contain information that has been collected from the details of individual research projects. Without revealing the substance of these research projects, I can confirm that, from the information on the face of the records, the information at issue is about matters that meet the description of “research” accepted in previous orders. The information is about scientific or systematic inquiries and the individuals involved take a critical approach to their inquiries and what they are learning. It is also reasonable to conclude that this research will result in something meaningful, such as new knowledge, principles, theories or facts.

[22] I also accept SFU’s submissions that its researchers use these documents while conducting their research. I note that wording of the applicant’s access request was for records related to animals used in research at SFU, and I can see that the records at issue respond to that request. I am satisfied that the records relate directly to the type of research to which s. 3(3)(i) would apply. Therefore, I find that the information in dispute is in records containing research materials.

[23] **Do the Records Contain research materials of Researchers at a post-secondary educational body?** – SFU submits that the records in dispute are records of people teaching or carrying out research at a post-secondary educational body as defined in s. 3(3)(i).¹¹ The evidence of SFU’s Director of Animal Care Services (Director) is that the information in dispute under s. 3(3)(i) is the research materials of people teaching or carrying out research at SFU or working in collaboration with people doing those things.¹²

[24] Therefore, I must decide if the records contain the research materials of a “faculty member” as defined by the *University Act*,¹³ a “teaching assistant or research assistant” or “another person teaching or carrying out research,” and whether SFU constitutes a “post-secondary educational body” for the purposes of s. 3(3)(i).

[25] I find that the records at issue include a large volume of documents relating to a variety of research projects. SFU has not distinguished between projects conducted by faculty members, teaching assistants, research assistants or other researchers. It submits that all of these projects are being conducted by individuals conducting research at SFU. The Director’s evidence is that individuals conducting research at SFU, along with their collaborators, created the records at issue.¹⁴

¹¹ SFU’s initial submission at para 56.

¹² Director’s affidavit at para. 2.

¹³ *University Act*, RSBC 1996 c. 468.

¹⁴ SFU’s initial submission, paras. 58-60; Affidavit of the Director of Animal Care Services, para. 2.

[26] The applicant does not make submissions about whether the records are the research materials of individuals conducting research at SFU.

[27] I accept the submissions of SFU and the Director's evidence that the records contain the research materials of faculty members, teaching assistants, research assistants and other people teaching or carrying out research. In addition, the applicant has specifically requested records of animals used in research and training protocols at SFU, so it is reasonable to conclude that the responsive records would consist of records containing the research materials of individuals conducting research at SFU. Therefore, I find that the records to which SFU applied s. 3(3)(i) constitute the research materials of individuals conducting research at SFU.

[28] I now turn to the question as to whether SFU is a "post-secondary educational body" for the purposes of s. 3(3)(i).

[29] FIPPA does not define "post-secondary educational body." It only defines "educational body." Schedule 1 of FIPPA includes the following:

"educational body" means

- (a) a university as defined in the *University Act*,
- (b) [Repealed 2003-5-19.]
- (c) Royal Roads University,
- (c.1) [Repealed 2002-35-8.]
- (d) an institution as defined in the *College and Institute Act*,
- (d.1) the Thompson Rivers University,
- (e) [Repealed 2004-33-18.]
- (f) [Repealed 2003-48-14.]
- (g) a board as defined in the *School Act*, or
- (h) a francophone education authority as defined in the *School Act*,

[30] The fact that the Legislature included the qualifier "post-secondary" before "educational body" in s. 3(3)(i) indicates that its intent was to capture only a subset of the bodies listed in the definition of educational body. It seems to me that "post-secondary" refers to education that takes place after school education that is governed by the *School Act*, as referenced at (g) and (h) of the definition. Therefore, I conclude "post-secondary" educational body in s. 3(3)(i) refers to the educational bodies listed in the definition at (a), (c), (d) and (d.1).

[31] Applying that meaning, I find that SFU is a post-secondary educational body. First, SFU is an "educational body" under item (a) of the Schedule 1 definition because s. 3(1)(c) of the *University Act* expressly says that SFU is a university:

3(1) The following corporations continue to be universities in British Columbia:

...
(c) Simon Fraser University.

[32] Second, I am satisfied that SFU is a “post-secondary” educational body because it is not the type of educational body listed in (g) or (h) of the FIPPA Schedule 1 definition. The education that SFU provides comes after the school education governed by the *School Act* and referenced in (g) and (h) of the definition in Schedule 1.

[33] Third, I note that SFU is included in the list of bodies described as public post-secondary institutions for the purposes of s. 170.2 of the *School Act*.

[34] Therefore, I find that SFU is a post-secondary educational body for the purposes of s. 3(3)(i).

[35] In summary, I find that the records to which SFU has applied s. 3(3)(i) contain the research materials of: (i) faculty members of a post-secondary educational body; (ii) research assistants or teaching assistants of a post-secondary educational body; or (iii) other persons carrying out research or teaching at a post-secondary educational body. Therefore, s. 3(3)(i) applies to the records at issue and they are outside the scope of FIPPA.

[36] With respect to whether SFU is authorized to withhold these records in their entirety or whether it must conduct a line by line review and sever the relevant information, I make the following observations. I accept that the researchers actively used these documents in conducting their research. Therefore, each entire document contains research materials. Moreover, while some of the documents may include template language along with the information specific to individual research projects, all of the information is integral to the research at issue. I also accept SFU’s assertion that the provision in s. 3(3)(i) refers to records “containing” research materials as opposed to information about research that may appear in records. All of the records at issue are records that contain research materials.

[37] I note that SFU has elected to disclose portions of some records, while withholding information about specific research projects under s. 3(3)(i). The fact that it has taken this approach to some of the records does not obligate it to take the same approach to all of the records.

Summary on s. 3(3)(i)

[38] In summary, I find that s. 3(3)(i) applies to all of the information that SFU refused to disclose on that basis. FIPPA does not apply to that information.

[39] I now turn to the information that SFU refused to disclose under s. 19(1). There are approximately 1000 partially severed pages.

Harm to individual or public safety s. 19(1)

[40] SFU submits that s. 19(1)(a) applies to information identifying individuals engaged in research involving animals. That provision is as follows:

19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health,

[41] Section 19(1) is a harms-based exception, and the question is whether disclosure of the information in dispute could reasonably be expected to result in the identified harms. As explained above, the “reasonable expectation of harm” standard, is “a middle ground between that which is probable and that which is merely possible.”¹⁵ Again, there is no need to show on a balance of probabilities that the harm will occur if the information is disclosed, but the public body must show that the risk of harm is well beyond the merely possible or speculative.¹⁶

[42] SFU submits that disclosing the identities of its employees and researchers associated with research on animals would pose a real risk of harm to their personal safety. While it recognizes that the applicant does not pose any threat to the researchers, it notes that there are no legal constraints on the subsequent disclosures by the applicant. There is a risk that the information could fall into the hands of activist groups willing to resort to extreme measures to prevent research involving animals. SFU provides affidavit evidence from the Executive Director of the Canadian Council on Animal Care who affirms that disclosure of the names of the researchers could reasonably result in them suffering threats, harassment and intimidation. He testifies that he is aware of incidents of activist groups threatening, intimidating and harassing researchers and putting their safety at risk. For this reason, the Canadian Council on Animal Care has adopted a policy of requesting that institutions protect the identities of researchers.¹⁷

[43] The applicant submits that SFU has not provided evidence to support its claim of risk of harm to the researchers and asserts that SFU has applied s. 19(1) excessively.¹⁸

¹⁵ *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, para. 201.

¹⁶ *Ibid* at para. 206. See also *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at paras. 52-54.

¹⁷ SFU's initial submission, paras. 68-73; Affidavit of the Executive Director of the Canada Council on Animal Care, paras. 8-13.

¹⁸ Applicant's response submission, para. 8.

Analysis

[44] I accept the affidavit evidence of the Executive Director about incidents of researchers suffering harassment, threats and intimidation. The Canadian Council on Animal Care takes this risk seriously enough to adopt a policy of requesting that institutions protect the identities of researchers. I accept that research on animals is a contentious issue that provokes strong emotional reactions. I note that, while the applicant denies that it poses any threat of harm to researchers, it does not deny that there may be individuals outside its organization who would.

[45] I find it reasonable to conclude that disclosure of the names or other identifying information about individuals who conduct research with animals could be reasonably expected to threaten their health or safety.

[46] Therefore, I confirm that s. 19(1)(a) authorizes SFU to withhold the names and identifying information of these researchers.

Section 22(1) – unreasonable invasion of third-party privacy

[47] SFU submits that s. 22(1) applies to the same personal information identifying individuals who conduct research on animals to which it applied s. 19(1). As I have found that s. 19(1) applies to that personal information, I do not need to determine if s. 22(1) also applies, and I decline to do so.

CONCLUSION

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

1. I confirm the decision of SFU to refuse to disclose the information to which it applied s. 3(3)(i).
2. I confirm the decision of SFU to refuse to disclose the information that it withheld under s. 19(1).

May 2, 2024

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

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