CITATION: Carleton University v. Information and Privacy Commissioner of Ontario and John Doe, requester, 2018 ONSC 3696
DIVISIONAL COURT FILE NO.: 16-2207
DATE: 20180613

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

THORBURN J., GAREAU J. and LEMAY J.

BETWEEN:	)	
	)	
CARLETON UNIVERSITY	)	*J. Zubec*, for the Applicant
	)	
Applicant		

– and –

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO AND JOHN DOE, REQUESTOR	*Linda H-C. Chen*, for the Respondent IPC
Respondent	**HEARD at Ottawa:** June 12, 2018

THORBURN J.

REASONS FOR DECISION

OVERVIEW

[1] In 2010, Carleton University ("the University") created a Commission on Inter-Cultural, Inter-Religious and Inter-Racial Relations on Campus to "contribute to a better context for dialogue and understanding on the University campus and in the surrounding community".

[2] The Commission explored issues related to Aboriginal and Jewish students and faculty as those groups reported lower levels of satisfaction with the climate of respect on campus than others who completed the Commission's university-wide survey. The survey of Jewish students and faculty, and its findings were reported to the Commission and included in the Commission's final report. The stated purpose of the study was to make the learning environment better for minority groups.

[3] In 2013, after the release of the Commission's report, an individual (**"Requester"**) made a request to the University under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (***"FIPPA"***) for access to records related the Commission, the sub-committee, and the survey of Jewish students and faculty.

[4] The University submits that the Requester seeks the information to challenge the findings of the Commission.

[5] In response to the request, the University disclosed some records but denied access to (1) meeting minutes of the Commission for certain months; (2) the survey and its results, and an explanation of the survey methodology, who designed the survey, who approved the survey, how it was conducted, who analyzed the survey results, and (3) the raw data gathered by the survey. (Parts 2, 6 and 7 of the Request for Disclosure.)

[6] The University took the position that these records are excluded pursuant to s. 65(8.1)(a) of *FIPPA*, which provides that:

> This Act does not apply,
>
> > (a) to a record respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution.

[7] The parties agree with the definition of "research" set out in the *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sched. A (as this term is not defined in *FIPPA*):

> > "research" means a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research.

THE ORDER UNDER REVIEW

A. The Positions Taken by the Parties before the Adjudicator

[8] The Requester sought disclosure of the records from the Information and Privacy Commissioner of Ontario (**"IPC"**).

[9] The question before the IPC Adjudicator was whether the information sought should be excluded from disclosure on the basis that it is "research". The Adjudicator was asked to analyze and interpret the meaning of the word "research" within the meaning of FIPPA.

[10] The University described the survey as research because "it was methodical, planned and calculated. The survey consisted of qualitative and quantitative methods of inquiry and included a detailed demographic questionnaire. The research survey was presented to targeted participants for the purpose of establishing facts or generalized knowledge about why Jewish students and faculty at the university were reporting lower satisfaction with the climate of respect

on the university's campus." Moreover, the survey was "conducted or proposed by an employee of an educational institution or by a person associated with an educational institution…"

[11] The University submitted that the research was conducted "for the institution by several people who were members of a formally constituted commission and who acted in that role rather than as independent scholars."

[12] Finally the University submitted that narrowing the definition of research to include only scholarly research is contrary to the provision in the Act as the Act does not distinguish between various forms of research.

B. The Adjudicator's Decision

[13] The Adjudicator cited the Supreme Court of Canada's articulation of how statutes are to be interpreted as set out in *Rizzo v. Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27:

> … the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[14] The Adjudicator also cited the legislative purpose underlying the addition of section 65(8.1) to the *Act* as set out in statements made by M.P.P. Wayne Arthurs in the third reading of the *Budget Measures Act, 2005* (Bill 197):

> [T]his bill proposes to make Ontario's universities subject to the provisions of the *Freedom of Information and Protection of Privacy Act* and ensure that Ontario's public funded post-secondary institutions are even more transparent and accountable to the people of Ontario. That will be both our universities and our colleges of applied arts and science. So as not to jeopardize the work being done at these institutions, though, the freedom-of-information provision would take into account and respect academic freedom and competitiveness. Clearly we understand the importance of the university post-secondary sector when it comes to doing research and innovative study programs. Thus we wouldn't want to jeopardize that academic freedom, or the competitive environment that is created accordingly.

[15] The Adjudicator found that, "the Legislature did not intend to create an exclusion from the application of the Act whose reach would be broader than is necessary to accomplish these stated objectives."

[16] The IPC Adjudicator held that the records in question did not constitute the type of "research" protected under section 65 and should therefore not be excluded from production on that basis. She therefore ordered the University to "issue an access decision to the appellant for records responsive to parts 2, 6 and 7 of the appellant's request, in accordance with sections 26, 27 and 28 of the Act".

THE ISSUE

[17] The parties agree that the definition of research set out in the *Personal Health Information Protection Act* applies. They disagree as to whether the information sought fits within that definition of research.

[18] The issue is whether the Adjudicator's decision as to what constitutes "research" within the context of FIPPA was reasonable.

COURT'S JURISDICTION

[19] The Divisional Court has jurisdiction to hear this application for judicial review under ss. 2 and 6(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

[20] Under s. 2(1), the Divisional Court may grant an order in the nature of *mandamus*, prohibition, or *certiorari*, or a declaration, an injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power.

STANDARD OF REVIEW

[21] The parties agree that the standard of review is reasonableness, as described by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9. The Adjudicator is owed deference in interpreting and applying its enabling statute. (*John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 17).

ANALYSIS AND CONCLUSION

[22] The University submits that the Adjudicator's decision is unjustifiable because:

a) The Adjudicator's decision is contrary to the legislative intent;

b) Limiting the application of s. 65(8.1)(a) to certain types of "research" is contrary to the wording of the subsection." Nothing in the wording of *FIPPA* distinguishes between types of research;

c) The Adjudicator cited the correct definition of "research", but limited her analysis to determining whether the purpose of the survey was to develop or establish "generalizable knowledge". She did not explain why the survey did not fall within this definition; and

d) The Adjudicator's decision will erode academic freedom and create a loss of a significant body of research that may be used for generalizable or scholarly purposes. It will also erode the competitiveness of Ontario universities by making university research initiatives to determine facts subject to the access provisions of *FIPPA*, make it more difficult to find research participants, attract and retain elite researchers. This will create a devastating financial effect.

[23] We do not agree.

1. Legislative Intent

[24] The stated objective of the change to the legislation to include universities is to ensure that universities are "even more transparent and accountable to the people of Ontario."

[25] Exception is made for "academic freedom and competitiveness" as, "[c]learly we understand the importance of the university post-secondary sector when it comes to doing research and innovative study programs."

[26] This interpretation suggests that the objective of section 65(8.1)(a) is to enhance disclosure about the activities carried on in universities subject to the protection of academic freedom because of the importance of research and innovative study programs in universities.

[27] This legislative intent must be borne in mind when interpreting the meaning of the word "research" in section 65(8.1)(a).

2. Wording of the Legislation

[28] Section 1 of the Act provides that:

> The purpose of the Act is to provide a right of access to information under the control of institutions in accordance with the principles that (i) information should be available to the public, (ii) necessary exemptions from the right of access should be limited and specific, and (iii) decisions on the disclosure of government information should be reviewed independently of government.

[29] Exceptions to disclosure for research are therefore to be narrowly construed. The Legislature did not intend to create an exclusion from the application of the Act whose reach would be broader than necessary to accomplish these objectives.

3. The Meaning of Research

[30] The parties agree that the Adjudicator cited the correct definition of "research". Contrary to the assertion made by the University, we find that the definition of "research" was properly applied to the evidence in this case.

[31] The survey is not "research" for pure academic purposes because this was not a search for "generalizable knowledge" or principles (such as clinical trials, SSHRCC research, grant applications for non-human primate transplantation, or peer review of research proposals.) Rather, the survey results and associated information are akin to market research which is not particular to universities and is not subject to the specific concerns of academic freedom articulated by the legislators.

[32] This was an internally generated request by the University administration to adduce important and sensitive information about a specific group within the University and identify areas for improvement: to discern the experience of the specific group within the University. It was not to invoke intellectual rigour to develop a "generalizable body of knowledge" beyond the confines of the University.

[33] Counsel for the University was unable to provide a single decision where information gathered internally by a university for its own purposes and unrelated to academic research was covered by research exemption.

[34] We are unable therefore to accept that the Adjudicator's decision is inconsistent with prior *FIPPA* decisions.

4. Adverse Consequences to Academic Freedom and Competitiveness

[35] The University's concerns that a decision not to exclude this information on the basis that it is "research" would have serious adverse consequences for academic freedom or erode the competitiveness of Ontario universities by making it more difficult to conduct university research initiatives, or attract or maintain elite researchers or students are speculative. No evidence was adduced to substantiate this claim.

[36] In any event, our decision does not mean that those records that identify an individual and or his/her answers to questions posed in the survey would be subject to disclosure. It simply means they would not be exempt from disclosure by virtue of being considered research.

[37] The survey forms for both students and faculty contain an anonymity provision that provides that, "All data are coded to eliminate identification of the respondent. Your name will not be associated with the data."

[38] Section 21 of the Act enables a party to refuse to disclose information that would disclose the personal information of another that was supplied with an expectation that it would be held in confidence. Section 17 of the Act provides that disclosure of records may also be protected by third party information exemptions.

[39] Lastly, we note that the Adjudicator did not order the production of any documents *per se*. She simply ordered the University to "issue an access decision to the appellant for records responsive to parts 2, 6 and 7 of the appellant's request, in accordance with sections 26, 27 and 28 of the Act".

[40] For these reasons, we conclude that the Adjudicator's interpretation of research was reasonable and consistent with the evidence of legislative intent, a contextual analysis of the provisions in the Act and established interpretive principles.

[41] The University is therefore ordered to decide what records responsive to parts 2, 6 and 7 they agree to produce and submit their response.

[42] We would like to thank both counsel for their excellent submissions.

[43] On the agreement of the parties, no costs are payable by either party.

Thorburn J.

Gareau J.

LeMay J.

Released: June 13, 2018