
SUPPLEMENTARY AWARD NO. 2

IN THE MATTER OF AN ARBITRATION

BETWEEN

**THE ASSOCIATION OF PROFESSORS OF THE
UNIVERSITY OF OTTAWA (APUO)**

(the "Association")

AND

THE UNIVERSITY OF OTTAWA

(the "Employer")

RE: Policy Grievance Respecting Records and Communications with Academic Staff

BEFORE: Philip Chodos, Arbitrator

APPEARANCES:

For the Association: Mariette Pilon, Counsel, Canadian Association of University Teachers (CAUT), John Henderson, Counsel, APUO, and Renata Green, Administrator, APUO

For the Employer: Steven Williams, Counsel, Louise Pagé-Valin, Associate Vice-President, Human Resources, University of Ottawa, and Pamela Harrod, Advisor to the President, Special Projects, University of Ottawa

HEARD AT OTTAWA, ONTARIO, FEBRUARY 10, 2009.

SUPPLEMENTARY AWARD NO. 2

[1] This is the third award arising out of the same grievance, which has its genesis in an access request filed under the Freedom of information and Protection of Privacy Act, R.S.O. 1990 (FIPPA). To provide a context for this award, I have reproduced the first three paragraphs of the first supplementary award, dated January 21, 2009, which, in turn, made extensive reference to the first award, dated September 29, 2008:

1. This matter arises out of an award between the parties issued by the undersigned on September 29, 2008. The award notes that:

. . . this grievance was precipitated by an access request under the FIPPA, which, since June 2006, applies to university institutions, subject to the exemption under section 65.(1)(8.1). More specifically, the subject grievance was generated in response to Exhibit U-2, a letter issued by the University's Secretary, Pamela Harrod, which in very broad terms sought from academic staff documents in their possession relating to the access request received by the University, so that the University could fully respond to that request.

. . .

However, I do agree with both counsel that the collective agreement does have relevance with respect to the determination of this matter - in particular the question as to whether documents and communications in the possession of academic staff can be considered within the custody and control of the University.

2. The award concludes as follows:

. . . I find that Exhibit U-2 is contrary to the collective agreement and should be withdrawn. I appreciate that some of the observations made above with respect to documents that may be in the custody and control of the University are far from comprehensive or definitive. Accordingly, I shall remain seized of this matter in the event that the parties need to seek further guidance with respect to the application of the access request to specific types of documentations.

3. The grievance filed by the Association reads as follows:

The Association hereby grieves against:

- (a) the notices to members on or about 9 November 2006 regarding a request under FIFPA, including all
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actions and directives to members from the office of the University Secretary related thereto;

(b) the letter to the Association dated 24 November 2006.

Without admitting the necessity to provide specific grounds for the grievance, and without restricting itself to the following, the Association states the following grounds:

- 1) records of APUO members are not in the control or under the custody of the University;
- 2) the University does not have the right to demand, or the right of access to, copies of all documents, whether in printed or electronic form, which are in the possession of an APUO member, including those at a location other than the University;
- 3) e-mails sent and received using the University e-mail system are not documents for which the University has custody or control;
- 4) in response to a request under FIPPA, the University does not have the unilateral right to change existing working conditions nor to violate the established principles of privacy which prohibit the interference in the professional activities of an APUO member or any action that would inhibit the free exchange of information and ideas between academics;
- 5) the actions of the University contravene, *inter alia*, articles 5.1, 5.3, 9 and 10.3 of the collective agreement, Policy 90, past practice at the University, generally recognized practice in the university sector and academic freedom.

Remedy

As remedy for the above noted grievance, the Association seeks a withdrawal of the claims made by the employer respecting members' records and communications and a retraction of the demand for access to said documents, and/or declarations from an arbitrator accordingly, cease and desist orders, as well as damages, or such other orders as may be deemed appropriate by an arbitrator.

[2] The supplementary award dated January 21, 2009, was precipitated by a request from the Association concerning the issue of remedy. More specifically, the Association was seeking further direction with respect to the question as to which specific documents fall within the custody and control of academic staff, as opposed to the University administration, and are therefore not subject to the FIPPA. As noted in the January 21, 2009 supplementary award, the Employer had taken the position that “the arbitral award of September 29, 2008, is complete, and consequently there is no need for further hearings in this matter.” That is, it is the Employer’s submission that the undersigned arbitrator “has no jurisdiction to deal any further with respect to this matter” (page 4 of the supplementary award). In the concluding paragraph of that award, I stated, “I have jurisdiction to hear submissions with respect to the question as to which types of documents in the possession of members of the Association are subject to the access or control of the University. I am prepared to hear submissions concerning this issue.” In light of this conclusion, a further hearing was held on February 10, 2009, at which time the parties made further submissions on this matter. It should be noted that no additional evidence was adduced by either party in support of their submissions; the parties relied entirely on the conclusions and findings of fact made in the original award of September 29, 2008.

[3] On behalf of the Association Ms. Pilon submitted that it is not seeking to make alternative arguments, or even a variation on its original submissions. Rather, it only wishes to address which documents are subject to access in light of the award of September 29, 2008. Ms. Pilon noted that in that award I concluded that the collective agreement “informs and provides context to the Act” and that University teachers are not typical employees. She also acknowledged that I had found that the approach taken by the Association in respect of the matters at issue was too broad. She referred to section 20.1 of the collective agreement (cited at page 75 of the award), which refers to the three main functions of academic staff. She noted that bargaining unit members fulfill their duties when (1) exercising individual functions and activities; (2) exercising the University’s functions and activities; and (3) when professors act in respect of Association functions. She observed that in certain circumstances there would be a cross-over; that is, documents in possession of Association members that are strictly related to professional and individual functions, and therefore in the custody and control of the member, can be submitted to the University in the exercise of a particular right or benefit under the collective agreement (for example, sabbatical

leave) in order to fulfill the requirements under the collective agreement to obtain the right or benefit. Once submitted to the University, they can be transmitted to other members of the bargaining unit who may then hold them in their capacity as a Committee member (for example, participants in personnel committees). When those documents are submitted to the Committee, the member is fulfilling a University function.

[4] In other circumstances, documents are in the possession of the member for purposes of fulfilling his or her individual functions or activities, or Association activities, in which case the documents are in the custody or control of the member. By way of illustration, Counsel referred to the testimony of Professor Leclerc (at paragraphs 53 to 57 of the September 29, 2008 award). There are, in fact, a number of examples of communications that are related to Association activities and are clearly outside the ambit of the FIPPA (section 65.(6)). With respect to other types of documents, Ms. Pilon referred to a proposal submitted by the Association to the University administration on October 27, 2008, whereby the Association sets out its views as to which documents are in the custody and control of the University administration for the purposes of the FIPPA in light of the arbitral award of September 29, 2008. (For ease of reference this document is attached hereto as an appendix to this award). The first category referred therein is entitled "Administrative duties", and refers to documents held by, for example, departmental chairs. Although these individuals are members of the bargaining unit, those documents would be under the custody and control of the University, but excluding personal notes and annotations. Counsel submitted that this is in accordance with the position adopted by the Employer's Counsel, as noted in paragraph 207 of the arbitral award.

[5] Counsel referred to paragraph A.2) of its proposal, which concerns "Committees within the University regarding general policies". The Association agrees that these documents, while in the possession and control of the professors, are being utilized as part of the requirements of a University function, such as approval of the Ethics Committee, and accordingly become within the custody and control of the University, again with the exception of personal notes and annotation. An example of such documents is found at paragraph 101 of the award, which addresses the testimony of Dr. Fahim as a participant in the Pension Investment Committee. Another example is found at paragraph 130, concerning the testimony of Professor Blute respecting his

role as a member of the FTPC. Counsel underlined however, that if those documents relate to research or teaching, they would be exempted under section 65 of the Act.

[6] A third type of document (see paragraph 3) of the proposal) concerns documents related to personnel or peer review committees - i.e. concerning such matters as tenure and promotion - which would be addressed by the DTPC and were referred to by Dr. DeBruyn, as noted in paragraph 79 of the award. The documents in the possession of members of the Hiring and Selection Committee are exclusively in the custody and control of the University. These documents would include applications, curriculum vitae, and other documents in support of an application for a position at the University. Ms. Pilon also stated that other documents, such as annual reviews, once submitted by a member of the bargaining unit also become under the custody and control of the University. The same is true of various documents relating to career path and performance evaluation, including documents that must be submitted to support an application for sabbatical leave. In general, when a bargaining unit member participates in a University function, the documents that he or she consults or comments on are not in his or her personal custody or control.

[7] With respect to student exams, Counsel for the Association described this category as "transformed custody or control." Counsel referred to paragraph 30 of the award respecting the testimony of Professor Leclerc, who stated that he would grade a thesis, and the final grade would be forwarded to the faculty administration. Counsel stated that once the grade is communicated to the University administration, it is no longer in the custody and control of the faculty member. She also noted Mr Leclerc's testimony (at paragraph 59 of the award) respecting his role as a member of the Senate Committee, in which capacity he exercises a University function. Documents momentarily in his possession in the context of that role are in the custody and control of the University. She also noted Professor DeBruyn's testimony (at paragraph 63) to the effect that exam questionnaires are filed with the University's advisor. Once filed, the Association agrees that it is then in the custody and control of the University administration. Furthermore, if presented to the Appeal Committee, it is also in the University's custody and control. That is, once a final process with respect to evaluation is completed and sent to the University administration, it is in the University's custody and control, as discussed in paragraph 7) of the Association's proposal.

[8] Counsel stated that, in general, documents that are used as part of an external evaluation of departments, and are part of an accreditation process, are in the custody and control of the University administration. Thus, the documents noted in paragraph 91 of the award in respect of the testimony of Dr. Fahim, in the Association's view this array of documents would be in possession of the member until such time as they are submitted as part of an evaluation or accreditation process.

[9] In conclusion, Counsel submitted that the various categories described above reflect the evidence that has been submitted and described in the award, and demonstrate those documents that are in the custody and control of the Administration and therefore subject to the Act. However, there are several documents that, although in the custody of the University, are exempted by virtue of section 65, in particular paragraph 65.(8.1.1) and section 65.(6) dealing with documents respecting employment relations.

[10] By way of preliminary remarks, Counsel for the Employer observed that in paragraph 26 of the January 21, 2009 supplementary award the parameters respecting this matter are set out. Paragraph 23 notes the issues that "require determination", Mr. Williams also observed that it is important not to lose sight of the policy objectives underlining the FIPPA, including the need for transparency by government institutions. By extending the legislation to universities, the intention was to allow access to information held by these institutions. The head of the university is accountable under the FIPPA, and these considerations must be kept in mind in making this award.

[11] With respect to the paragraphs of the award referred to by the Association, Mr. Williams made the distinction between a summary of the evidence and a finding of fact. The paragraphs cited by the Association are not necessarily definitive facts, although the arbitrator is entitled to draw conclusions from the evidence.

[12] Counsel submitted that if the collective agreement somehow frustrates a citizen's right of access, the language of the collective agreement must be very clear. If it is concluded that the collective agreement renders a document subject to one of the exceptions in the Act, then there is a very real risk that a citizen might be denied access. Accordingly, this supplementary award should reflect the purpose of the Act set out in section 1.

[13] With respect to the eight categories of documents identified by the Association in its proposal, for the most part Ms. Pilon was addressing documents that are clearly in the custody of the University because they were delivered to the University administration. There is not a lot of dispute about the status of custody and control of the documents in these circumstances. However, the position of the Association appears to be that documents in the possession of its members are not in the custody of the University, an argument that was already rejected in the original award at paragraph 186.

[14] Mr. Williams noted that when the IPC deals with this matter it must address the documents item by item. On the limited matter of custody and control, as set out in paragraphs 1 to 5 of the Association's proposal, it is difficult to comprehend its position. The Association seems to be saying that there is a transformation, but it is a fact that there is clearly custody and control by the University administration. This is not exactly an earth-shattering observation on the Association's part. If it is the Association's position that everything else remains in the custody and control of academic staff, then it is again asserting a broad-brush approach, which was rejected in the arbitral award, and is not in accord with the statute. With respect of the question of "personal notes and annotations," Counsel submitted that the Institution must look at the notations to determine whether it is personal information and submit that opinion to the IPC. That is, each document must be assessed as to whether it constitutes personal information or not. The presence of personal annotations in a document that is otherwise in the custody and control of the University is not thereby brought outside its custody or control. To hold otherwise would completely frustrate the intent of the legislation.

[15] Counsel for the Employer stated that the Association's position, as reflected in paragraphs 6) and 7) of its proposal, is not in accord with paragraph 232 of the arbitral award. If it were concluded that student exams are not in the control of the University, the rights of students, who are not represented here, would be fundamentally affected in that they would not be granted access to those records. Counsel maintained that under this statute the students have an enhanced right to have access to those records and cannot be denied that right. In fact, the IPC will insist that the Institution provide them with access. Mr. Williams submitted that the completed exams are in the custody and control of the University. The University is the institution that confers degrees, and the testing of students is a core component of the University's mandate. In fact,

the statute specifically deals with the issue of exams in section 18(1)(h). Counsel stated that the University has custody and control of all records; the issue then becomes whether the collective agreement fetters that custody. He agreed that email correspondence between professors, which are personal in nature, is not subject to custody and in some circumstances may have custody and control of research material. With respect to research and teaching material, Counsel also stated that while this is an issue respecting the application of section 65, the University might still have custody and control, and therefore have a call on these documents and then make the case under section 65.

[16] In reply, the Association maintained that the issue at the very core of this arbitration is the matter of custody and control, per section 10 of the Act. It is important to keep in mind that there is no definition in the Act of that term. On the question of personal notes, Ms. Pilon referred to paragraph 207 of the arbitral award, which reflected the fact that the Employer had agreed that personal notes are not subject to custody or control. With respect to notations on copies of, for example, minutes, Counsel submitted that those copies are personal to the professor, although the original minutes are in the custody and control of the University.

[17] Counsel for the Association stated that pursuant to paragraph 2) of its proposal, it is their position that when a member sits on a committee and is consulting on a matter seized by the committee, those documents are in the custody and control of the committee. Per paragraph 3), the Association agrees that, while these documents do not emanate from the University, nevertheless they are in the custody and control of the University administration. With respect to exams, she agreed that at some point the exams become under the custody and control of the University. However, when a professor is grading or correcting exams, the professor, and not the University administration, has temporary custody or control of those documents.

[18] Ms. Pilon stated that the right of access under the Act is only in respect of records that are "in the custody or under the control" of the Institution per section 10. This is in fact a jurisdiction defining issue, as stated in the Walmsley case (supra).

[19] Ms. Pilon also noted Ms. Flaherty's letter to the Association dated March 20, 2007, (quoted at paragraph 9 of the award). In that letter, Ms. Flaherty stated: "I also confirm that the employer is no longer ascertaining that all records, documents or information in the possession of APUO members...are records within the
