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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 264-1998
September 25, 1998

INQUIRY RE: A request to Simon Fraser University for access to the "Campus Crime Survey" database

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on June 5, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by an applicant of the decision of Simon Fraser University (the University) to deny access to a database of survey responses.

2. Documentation of the inquiry process

On February 17, 1997 the applicant wrote to the University requesting access to "a copy of the Campus Crime Survey database (the database)." The applicant clarified that she was interested in the original database created in 1993. The applicant had previously made requests to the University for the database in letters dated May 11, 1996 and July 19, 1996. The University denied access to the requested record in letters dated July 12, 1995 and October 3, 1996. In response to the third request, the University first responded on March 21, 1997 "that the question of who owns the original database is ambiguous... this record is not now nor has it ever been in the physical possession of the University.... Moreover, to the best of our knowledge, it is impossible for us to recover the record because the original database no longer exists." As a result, the University denied access to the database.

On April 16, 1997 the applicant wrote to my Office requesting a review of the University's decision. The University and the applicant agreed to hold the inquiry outside the ninety-day period.

On March 24, 1998 the third party was given notice under section 54 of the Act that he was an appropriate person to participate in the inquiry. The Notice of Inquiry was issued on May 1, 1998.

3. Issues under review and the burden of proof

The issues under review are:

1. Did the Campus Crime Survey Database exist as a record at the time of the request of February 17, 1997?

2. If the database existed at the time of the request, was it in the custody or under the control of the University, as required by section 3(1) of the Act?

3. If the database existed and was either in the custody or under the control of the University, was it "a record containing research information of employees of a post-secondary educational body" under section 3(1)(e)?

4. If the database existed and was either in the custody or under the control of the University, was it entitled to apply section 17(2) of the Act?

5. Has the University conducted an adequate search for the record under section 6 of the Act?

As section 57 of the Act is silent with respect to a request for review on the issues of whether a record exists, and if the record exists, whether it is in the custody or under the control of the public body, the University, the applicant, and the third party were offered the opportunity to make submissions on which party bears the burden under section 3(1). The University submits that, in the absence of specific statutory provisions allocating the burden of proof, the general principle is that the onus is on the person who asserts a proposition. Although the University submits that the burden lies on the applicant to establish the existence of a record and the fact that it is in the custody or under the control of the public body, it is my view that the public body must discharge that burden. In response to an access request, it will be the public body which asserts that the record does not exist or that the record falls within the scope of section 3(1) of the Act. This approach accords with the general principle and reflects the reality that it is the public body which will be in the best position to discharge the burden under section 3.

Section 57 of the Act, is also silent with respect the duty to assist under section 6. As I decided in Order No. 103-1996, May 23, 1996, the burden of proof is on the public body.

The relevant sections of the Act under review are as follows:

Scope of this Act

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 employees of a post-secondary educational body;

....

Information rights

4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

Duty to assist applicants

6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

(2) Moreover, the head of a public body must create a record for an applicant if

(a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

Disclosure harmful to the financial or economic interests of a public body

17(2) The head of a public body may refuse to disclose under subsection (1) research information if the disclosure could reasonably be expected to deprive the researcher of priority of publication.

4. Procedural objections

The applicant raised a number of procedural and evidentiary objections. First, the applicant challenges the third party status of the professor who was the primary academic advisor to the project. The applicant contends that she left the record with the professor in his capacity as an employee of the University, not as a private researcher or "third party." The definition of "third party" in Schedule 1 of the Act encompasses "any person, group of persons or organization other than (a) the person who made the request, or (b) a public body." The professor claims proprietary ownership of the record in question. I am satisfied that the professor's employment with the University does not preclude his ability to make submissions in this inquiry as a third party. For a recent

Order where several third parties were employees of the public body under review, see Order No. 258-1998, August 31, 1998.

The applicant objects to the fact that the third party submitted new evidence with his reply submission in the form of the professor's curriculum vitae and a salary review recommendation. Parties were advised that new evidence should not be submitted in reply submissions. Since the third party did not provide any explanation for the submission of this evidence in reply, I have not considered this evidence.

The applicant objects to the third party's reference to material from the mediation process. The third party used this material to question the applicant's motives for seeking access to the record in dispute. Since the applicant's motivation for seeking access to the record is an irrelevant consideration under the Act, I also did not place any weight on this material.

The third party contends that the applicant's submissions should be accorded less weight because they were not in the form of a sworn affidavit. In response to this suggestion, the applicant has offered to resubmit her submissions under oath. Although affidavit evidence is generally preferable for inquiries of this nature, it is not required under the Act. In the circumstances of this inquiry, I am not prepared to accord less weight to the applicant's submissions merely because she did not submit a sworn affidavit. (See Order No. 214-1998, February 10, 1998, p. 3)

Finally, the University contends that the inquiry into the interpretation of section 17(2) of the Act should be adjourned to enable representatives of other universities and faculty in British Columbia to make submissions on this provision. With the benefit of the helpful submissions from the University on the interpretation of section 17(2), I did not see the need for an adjournment to deal with this issue. All of the parties have had a full opportunity to make submissions in relation to section 17(2).

5. The records in dispute

The record in dispute is an electronic database of responses to a survey. It is called the "Campus Crime Survey" database.

6. The applicant's case

In January 1993 the president of the University established a Committee to Review Personal Safety and Security (the Safety Committee) on campus. As part of this initiative, the University funded a crime victimization survey (the Campus Crime Survey, or the database). Its Traffic and Security unit administered the funding. A faculty advisory team oversaw the survey, including the third party and his wife. The applicant was contracted by the University in April 1993 to carry out the actual survey. Other employees of the University conducted the telephone interviews with respondents in the summer of 1993 under the supervision of the applicant. She informs me that the resulting database could be stored on a 1.4 megabyte floppy diskette. (Submission of the

Applicant, p. 3, and p. 12) Both the applicant and the third party prepared initial, separate analyses of the database by September 1993; they totaled three pages in length.

The applicant's work on the database was completed by the end of October 1993 when she left two copies of the database on computers at a University Institute, where she also worked for both the third party and his wife on unrelated research matters. (See Submission of the Applicant, p. 11) The applicant acknowledges that the third party was the main advisor to her and the Safety Committee on substantive aspects of the Campus Crime Survey. (Submission of the Applicant, p. 4)

In July 1994 the third party and his wife published an article based on the Campus Crime Survey in an academic journal. This led the applicant to complain in 1994 and 1995 to the President of the University that she was not given appropriate credit in this article; the University eventually decided not to investigate this matter (in March 1996), which is irrelevant to the issues properly before me in this inquiry. But this latter decision of the University's Vice-President Academic, including the admission that the database was owned by Traffic and Security, led the applicant to make a first request for access to it on May 11, 1996. (Submission of the Applicant, pp. 4-5) The decision of this senior administrator is not binding on me with respect to settling issues of access and control of records under the Act.

The University's initial response to the May 1996 access request was that the database was research information of the third party, a university employee. The applicant did not seek a review of this decision by my Office but instead sought to enlighten the University about the details of how the database had been created. By 1997 the University was claiming that although it owned the original database, it could not provide access because it no longer existed. (Submission of the Applicant, p. 10, and attachments 13 and 14)

7. The University's case

Because the University organized its submission under each heading of the issues in review, I have reviewed and presented them below.

8. The third party's case

The third party, who is a full professor in the School of Criminology at the University, submits that the survey database in dispute was part of a research program that he began in 1989-90 and that at no time did the University assert any form of ownership or proprietary interest in it. Furthermore, as of February 17, 1997 and at present, the original database itself does not exist and, in any event, was never in the custody or control of the University. (Submission, pp. 1-2, and the Affidavit of the Third Party, paragraphs 5-7, 13, and 19, and Exhibit D)

9. Discussion

The University, the applicant, and the third party have made voluminous submissions in this inquiry. I am focusing on the five issues at stake in this inquiry and the submissions specifically associated with them.

What happened in this inquiry?

At one level, this is ultimately a simple case. A unit of the University decided to sponsor a crime victimization survey and naturally turned to its School of Criminology for advice and guidance. The third party in this inquiry, and his wife, had some experience in this specialized field, and he became the major academic advisor to the project. The applicant was hired to conduct certain aspects of the empirical research, which she did to a certain point. She left the project when her funding from the University ran out. The third party then completed the database in dispute and conducted various forms of analysis, including the publication of an article. For better or worse, the third party made the database part of his ongoing research activities with no apparent objections from the original University sponsors of the research.

In 1996 the applicant / contractor decided that she wanted formal access under the Act to the original database with the ensuing complications as outlined above. Both the applicant and the third party have made a matter of principle out of the access request, appealing to such higher values as freedom of academic research and the need for accountability in the expenditure of public funds. The University, for its part, has gotten itself into a complicated or at least "ambiguous" situation, under the Act, by failing to clarify the custody and control of the database at the initiation of this project. In the circumstances, I can understand that a sponsored piece of applied research migrated into the private research project of a major advisor on the original project. The University evidently became aware of the situation when the original access request landed on its doorstep.

My task now is to deal with the issue of custody and control of the record at the time of the third request in 1997. I have no jurisdiction to resolve the kinds of broad-ranging issues that have arisen among the parties in this inquiry, nor can I restore the status quo that existed at the time of the creation of the database in dispute. I intend to address each of the five issues separately.

Issue 1: The existence of the database as a record at the time of the request of February 17, 1997

The applicant's position is that the University owned the database in dispute when she made her several requests for access to it and that therefore it is a record under the Act. (Submission of the Applicant, pp. 14-15)

The University made the following submission:

> The University accepts that the database existed at one point in time. Ultimately, however, while the University formed the opinion that the database did not exist on February 17, 1997, it had no way of definitively knowing whether its opinion was right. (Submission of the University, p. 5)

The University further asserts that the third party "subsequently completed" the database and "changed its design and data structure significantly." The University says that it had to rely on the third party for information about the subsequent status of the database. My view is that this matter should have been more fully clarified with the third party, who was interviewed only once by the University's freedom of information coordinator. (Submission of the University, p. 12) According to the University:

> The third party has declined to answer questions that would establish definitively if the Database did exist on February 17, 1997.... although the University formed the opinion that the Database was a record in its control at the time it asked the third party whether the Database existed on February 17, 1997, the University acknowledges that the third party was entitled to decline to answer the University's questions if the Database was, in fact, not a record it its control or custody... (Submission of the University, p. 6)

The third party's position on this issue is that the database sought by the applicant belongs to him; moreover, he claims that the database that the applicant is seeking access to does not exist. (Submission of the Third Party, pp. 2-3 and the Affidavit of the Third Party)

I find that there was some version of the database in existence at the time of the third access request, even though the University clearly had little evident control over what had become of the database that it had sponsored through one of its operating entities. Although it initially indicated in July 1996 that the database was the research information of the third party, the University subsequently changed its mind.

Issue 2: Whether the database was under the custody or in the control of the University at the time of the request of February 17, 1997

The applicant's position is that the database in dispute was in the custody and control of the University at the time of her access request. (Submission of the Applicant, pp. 15-16)

The University, for its part, eventually formed the view that the database was a record within its control: "However, the University accepts that in the face of conflicting accounts of the contractual basis on which the database was created and the purpose for which it was intended, the situation remains ambiguous." (Submission of the University, p. 7) I accept the University's listing of *indicia* of its actual control over the database in

terms of its origins, funding, and sponsorship. I also accept that Campus Security never asked for or received a copy of the database; it only wanted reports and analysis, which makes sense to me. I further accept the University's admission that "the contractual relationship with the applicant appears to have been managed on a casual basis. The scope of the relationship was not and is not explicitly and clearly documented." (Submission of the University, p. 7)

The University concludes that the applicant should have had access to a copy of the database, if it existed on February 17, 1997. (Submission of the University, p. 8)

The third party submits that the database and the research resulting from it belongs to him, and that the University failed "at any time to assert any form of proprietary or ownership right over either the records or the survey results." (Submission of the Third Party, p. 3)

In my judgment, the University sponsors of the Crime Victim Survey should have specified who was going to have ultimate custody of the resulting database as a normal part of the ethical review associated with any interview survey of human subjects, in this case students at the University. It did not do so, which ultimately made it relatively easy for the third party, as a professor and academic specialist, to essentially take over the database and use it, apparently in an enriched form, for the 1995 co-publication with his wife. Parenthetically, I also agree with the view of the third party that "[s]ponsorship of research is quite different from development and conduct of research." (Reply Submission of the Third Party, p. 3) The University never had physical custody of the database and obviously lost physical control over it as soon as the applicant/contractor left the project at the end of September 1993. She left two copies of the database in the custody and control of the third party and his wife (also an advisor to the Crime Victim Survey) at a University Institute. (See Submission of the Applicant, pp. 6-10)

When the proposal for such a survey went to the Vice-President of Research on March 1, 1993, the third party in this inquiry was the only one of three signatories who was a full-time academic, as opposed to an administrator. (Submission of the Applicant, appendix 28; see also the same facts in the same or related documents in the Submission of the University, Exhibits A and B)

The state of affairs outlined in this inquiry is not at all unusual when a university examines an aspect of its own functioning and, naturally, uses administrative staff, professors, and research staff to seek to accomplish certain goals, such as a Crime Victimization Survey. Unfortunately, things sometimes go awry as they have in the present matter.

I find that the database was not in the custody or under the control of the University at the time of the third request, even if it should have been. Because of the

actions of the third party, the University had effectively lost any practical claims to custody and control of the database, and it had not asserted any legal claims to custody or control.

Issue 3: If the answer to the first two issues is yes, then was the database excluded from the coverage of the Act on the basis of section 3(1)(e)?

The applicant submits that the database in dispute is not excluded from the coverage of the Act by this section. (Submission of the Applicant, p. 16)

Not surprisingly, the University strongly supports the existence and application, where appropriate, of the exclusion created by section 3(1)(e) of the Act. It submits that it will "typically have little or no knowledge of what records contain the teaching material or research information of an individual employee, particularly if that employee is a faculty member." (Submission of the University, pp. 8-9) I differ with respect to research information associated with research grants that the University administers on behalf of funding agencies, or databases, such as the one in dispute, that the University itself funded and should have properly managed. In these circumstances, I am of the view that the *indicia* of custody or control of research information in particular by the University may exist.

The University concluded as follows on this issue in dispute:

> ... the circumstances giving rise to the potential application of section 3(1)(e) of the Act are ambiguous. The circumstances are not well documented and the relationship and expectations between the applicant, Campus Security and the third party are not clear. In these circumstances, the University gave priority to the applicant's right of access. (Submission of the University, p. 9)

I agree with the University's position on this issue, although I reach a different conclusion with respect to the applicant's right of access under the Act by 1996-97.

The third party submits that the record in dispute clearly falls within the definition of "research information" under the Act, a point that I think is indisputable. (Submission of the Third Party, p. 3)

Although it is not necessary to deal with this issue, I do so to shed some light on an untested area of the Act. I find that in 1997 the database was excluded from the coverage of the Act on the basis of section 3(1)(e), because it had become the "research information" of one of the University's academic employees.

Issue 4: Was the University entitled to apply section 17(2) of the Act to the database?

The applicant submits that the University should not have applied section 17(2) of the Act to the database in dispute on the grounds that she conducted the research and created the database. (Submission of the Applicant, p. 16)

Since I agree with a number of insightful points made by the University with respect to the exercise of its discretion under this peculiar section, I am reproducing them here for the guidance of public bodies:

> The application of discretion in a university environment is particularly sensitive, given the status of the university as a community of scholars, the guarantee of academic freedom to faculty (and others), and the high degree of autonomy enjoyed by faculty.....
>
> While an applicant or the University may have some ability to adduce evidence that this harm will not occur, the probability is that the third party will be in the best position to lead evidence demonstrating the likelihood that the harm will occur if the record is disclosed. (Submission of the University, p. 10)

I further agree with the University that its application of its discretion with respect to depriving a researcher of priority of publication could become quite complex, because, to use the current example, a database may be used to yield a series of publications over time, each one of which could invoke a claim to priority of publication. (Submission of the University, p. 11) That is why a University, under the Act, has to establish who has custody and control of various kinds of records normally found in a university environment.

The third party's view is that to grant an applicant such as the present one access to his research information "would negate the ability of such Third Parties in this academic environment to properly pursue research and publish as required." (Submission of the Third Party, p. 4) As noted elsewhere, I do agree with his submission that "had the University intended to assert any form of ownership, either in the database or in the survey results, it ought properly, under its own policy, to have done so at the outset." (Submission of the Third Party, p. 4) This is now an obligation under the Act.

I found it revealing that the third party admits that he "has now been published," which is presumably a reference to his 1995 article with his wife. Although the third party adds that "work of this nature is ongoing and protection of research records, as an ongoing matter and as a matter of general principle, is critical," he is not claiming a refusal to grant access to the applicant as a matter of depriving him now of further priority of publication. (Submission of the Third Party, p. 4)

Although it is not necessary to decide this issue, I find that the University may have appropriately chosen not to disclose the database to the applicant in 1997, since the disclosure of such "research information... could reasonably be expected to deprive the researcher of priority of publication."

Issue 5: Has the University conducted an adequate search for the database under section 6 of the Act?

The applicant submits that the University has not conducted an adequate survey to locate the database in dispute, even though it knows it is in the custody of the third party. (Submission of the Applicant, p. 17)

The University admits that its initial search for the database was inadequate, but it subsequently searched a variety of relevant university administrative offices with no results. (Submission of the University, p. 12)

The third party submits that the University has never asked him for a copy of anything and he has never refused to surrender anything to the University. (Reply Submission of the Third Party, p. 6) It is arguable that the University did not exercise due diligence in this area.

Although the record was ultimately not in the custody or under the control of the University, the University was still required to make every reasonable effort to assist the applicant and to respond openly, accurately and completely to the third request. I agree that the University initially conducted an inadequate search to try to ascertain if the database in dispute was truly in its custody and control. I think that it could have done more to work with the third party to establish the actual state of the database in 1996 and 1997, but that it became very difficult because of other University proceedings that the applicant in this inquiry launched against the third party. None of these circumstances favoured the application of reason and common sense in the tangled circumstances of this inquiry. However, the University did, after undertaking further searches, discharge its duty to assist the applicant under section 6 of the Act.

Related Matters

The applicant has emphasized that the third party has no proprietary claim to the database in dispute. (Submission of the Applicant, pp. 8-9) I regard this issue as a red herring, since the real issue is that the third party ended up in control of the original database and turned it into his own research data. Whether that should have happened is a separate matter, unrelated to the issues which I must address in this inquiry.

The applicant contends that the third party has preempted the use of University property and should return it to the University, which has a duty to acquire it. (Submission of the Applicant, p. 12) My view, as in my recent decision concerning the diary of a retired school principal that was not available to his former employer, is that I can only address the status quo with respect to the existence of a record in the custody

and control of a public body at the time of an access request, as I have done above. (See Order No. 247-1998, July 13, 1998) I can only encourage any public body not to find itself in such a situation in future by clearly establishing ground rules for the custody and control of records created under the Act.

The applicant has raised the issue of whether the original database of September 1993 still exists: "I contend that the database still exists, that [the third party] has it, and that the University has the power to recover it." (Submission of the Applicant, p. 10) She also contends that the original records in the database that she prepared could not have been altered without falsifying the data, nor could new variables be created that could not be easily removed. (Submission of the Applicant, p. 12) The University's response is that "later generations of the database are not University property. They are the output of an academic's research." (Submission of the University, pp. 10, 11, and attachment 13)

The third party claims that the original electronic records from the database were inadvertently destroyed in early 1994 when agents of the University moved his computers to the School of Criminology's new quarters. He himself shredded the original survey questionnaires. (Affidavit of the Third Party, paragraphs 9 and 10) He also claims to have significantly modified the original database in the process of updating and revising it for purposes of research and writing. While I share the skepticism of the applicant of just how far removed the original microdata are from their original format, the issue ultimately has no bearing on my decision in this inquiry. Had the University done its duty diligently, this issue would not have arisen, and the applicant could have at least had access to the original database that she left with the third party in the fall of 1993.

It is informative that the University's Research Review Committee sent its approval of the Crime Victim Survey to the third party and not to University administrators. (Submission of the University, pp. 7-8, and Exhibit B) Although the Act did not yet formally apply to universities, I would now expect such an ethics committee to establish, in advance, who had custody and control of the database of survey results and what should be done with the original questionnaires and the database after the research project has been completed.

I note that the third party promised in 1996 to the University's Information and Privacy Coordinator that once his research was completed, it was his "intention that a copy of the database, ... together with full documentation be placed in the Research Data Library for general use by scholars and researchers." (Affidavit of the Third Party, Exhibit D) In the circumstances of this particular inquiry, it is my hope that the University will hold the third party to his undertaking, which may ultimately benefit the applicant as well.

10. Order

Section 58(1) of the Act requires me to dispose of the issues in an inquiry by making an order under this section. I find that the head of Simon Fraser University made every reasonable effort to assist the applicant under section 6(1) of the Act.

Under section 58(3)(a) of the Act, I require the head of Simon Fraser University to perform its duty under section 6(1) to make every reasonable effort to assist the applicant. However, since I have found that the University met its obligations under section 6, I find that the University has complied with this Order and discharged its duty under section 6(1) of the Act.

I also find that the record requested by the applicant is not in the custody or under the control of Simon Fraser University under section 3(1) of the Act. Therefore the head of Simon Fraser University is authorized to refuse access to the record. Under section 58(2)(b) of the Act, I confirm the decision of the head of Simon Fraser University to refuse access.

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David H. Flaherty
Commissioner

September 25, 1998