

In the Court of Appeal of Alberta

Citation: Governors of the University of Calgary v Alberta (Information and Privacy Commissioner), 2025 ABCA 253

Date: 20250710
Docket: 2401-0254AC
Registry: Calgary

Between:

Governors of the University of Calgary

Respondent

- and -

Alberta Information and Privacy Commissioner

Respondent

- and -

Universities Canada

Applicant

- and -

The Faculty Association of the University of Calgary, Canadian Association of University Teachers, and Canadian Association of Law Teachers

Applicants

**Reasons for Decision of
The Honourable Justice Bernette Ho**

Application for Leave to Intervene

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[1] There are two applicants seeking intervenor status: (i) Universities Canada; and (ii) the Joint Intervenors, consisting of the Faculty Association of the University of Calgary, the Canadian Association of University Teachers, and the Canadian Association of Law Teachers/L'Association Canadienne des Professeurs de Droit. They seek to intervene in an appeal from a decision of the Court of King's Bench, allowing an application for judicial review of a decision of the Alberta Information and Privacy Commissioner: *Governors of the University of Calgary v Alberta Information and Privacy Commissioner*, 2024 ABKB 522 [Decision].

Background

[2] A request was made to the University of Calgary (“UCalgary”) under the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 [FOIPPA] for documents connected to two professors, about a specific subject. UCalgary denied access on the grounds that any records that were responsive to the request were not subject to FOIPPA because they fell within the following exclusions under section 4(1) of that legislation:

- (h) teaching materials
 - (i) of an employee of a post-secondary educational body,
 - (ii) of a post-secondary educational body, or
 - (iii) of both an employee of a post-secondary educational body and the post-secondary educational body;
- (i) research information of an employee of a post-secondary educational body;

[3] The denial was challenged before a delegate of the Commissioner. The delegate, who was referred to as the adjudicator in the Decision, interpreted these provisions and decided that some of the records sought did not fall within these exceptions, as defined. The adjudicator ordered UCalgary to process the access request for the records that were not exempt.

[4] UCalgary applied for judicial review of the adjudicator's decision. The chambers judge allowed UCalgary's application and found that the adjudicator's interpretation and application of the FOIPPA was unreasonably narrow. The chambers judge remitted the matter to a different adjudicator for reconsideration.

[5] The Commissioner has appealed. In its factum, the Commissioner submits that the chambers judge erred in determining and applying the standard of review, that his decision should

be set aside, and that the adjudicator's decision should be reinstated. The Commissioner did not address the chambers judge's reasons relating to the merits of adjudicator's decision because of the Commissioner's ongoing involvement with this matter as a decision-maker: *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 at paras 53-62.

[6] In the respondent's factum, UCalgary submits that the chambers judge did not commit an error in relation to the standard of review. UCalgary also addresses the merits of the adjudicator's decision and submits that it was unreasonable because the objectives of protecting the academic freedom and the intellectual property of post-secondary institutions and their staff were not considered as part of the statutory context and purpose of the exemptions. Instead, the adjudicator applied unduly narrow definitions of "teaching materials" and "research information." UCalgary asks that the Commissioner's appeal be dismissed.

Test for permission to intervene

[7] A single justice of this Court may grant a person intervenor status in an appeal, subject to any terms and conditions: *Alberta Rules of Court*, Alta Reg 124/2010, r 14.37(2)(e), 14.58(1). The purpose of intervenor status is to allow non-parties to provide the court with useful submissions that bring a different perspective to bear on the issues being litigated by the parties: *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2005 ABCA 320 at para 2. Applications to intervene are assessed through a two-stage approach, where the court determines the subject matter of the appeal, and then assesses the proposed intervenor's connection to that subject matter: *Papaschase* at para 5.

[8] The test for intervenor status involves an assessment of:

- (1) whether the proposed intervenor has a particular interest in or will be directly and significantly affected by the outcome of the appeal, or
- (2) whether the intervenor will provide some special expertise, perspective, or information that will help resolve the appeal.

VLM v Dominey Estate, 2023 ABCA 226 at para 2.

[9] An intervenor does not necessarily need to satisfy both branches of this test, but intervenor status does not automatically follow from meeting either branch of the test: *Dominey Estate* at para 3.

[10] This Court has recognized a variety of factors that may be considered in deciding whether to grant intervenor status, including whether the presence of the intervenor is necessary for the court to properly decide the matter; whether its presence will be useful, different or bring particular expertise to the appeal; whether the intervenor's interest will not be fully protected; and whether

the intervention will cause delay or prejudice, widen the dispute, or turn the court into a political arena: *Dominey Estate* at para 2.

[11] Intervenors may not raise new issues, and may not supplement the record without permission: *Metis Nation of Alberta Association v Alberta (Indigenous Relations)*, 2022 ABCA 250 at para 14; *Rules*, r 14.58(3).

Analysis

[12] Broadly speaking, both applicants seek to address the substance of the adjudicator's decision through submissions regarding the significance of academic freedom and the meaning of the terms "teaching materials" and "research information." They argue their submissions go to the subject of the appeal and will assist the panel to "step into the shoes" of the chambers judge to assess the administrative decision: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 45-47; *Northern Regional Health Authority v Horrocks*, 2021 SCC 42 at paras 10-12; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 51.

[13] I am satisfied that Universities Canada and the Joint Intervenors meet the first branch of the test for intervenor status. Both have, through their members, a particular interest in, or will be directly or significantly affected by, the outcome of the appeal. However, as noted above, meeting one branch of the test for intervenor status is not determinative, and here, it is important to consider whether the proposed intervenors will provide some special expertise, perspective, or information that will help resolve the appeal, as opposed to simply duplicating or supporting the positions already advanced by UCalgary.

Universities Canada

[14] Universities Canada is a membership organization that represents 97 post-secondary institutions and advances the interests of Canadian universities and the university sector by engaging in advocacy, providing a forum for university leadership, and fostering collaboration. Some of its members are institutions that are subject to the *FOIPPA*, including UCalgary. Universities Canada submits it has experience intervening in litigation, and because of its diverse membership and engagement with the whole sector, it has a unique perspective on the issues engaged in this appeal beyond those that are specific to UCalgary. For example, some members of Universities Canada focus solely on teaching or solely on research, or are privately-owned, unlike UCalgary.

[15] When asked to provide some detail regarding the submissions they would make if granted intervenor status, Universities Canada suggested they would address the types of collaboration that occur between universities and that the terms "teaching materials" and "research information" need to be defined broadly or collaboration could be deterred.

[16] I do not consider this to be offering a unique or helpful perspective. UCalgary has already addressed collaboration broadly in its factum, arguing that the development of both teaching materials and research information is an inherently collaborative process, and that the interpretation adopted by the adjudicator could have a chilling effect on collaboration that would be detrimental not just to UCalgary, but to post-secondary institutions generally. Universities Canada has insufficiently differentiated the submissions it intends to make, from those UCalgary has already made on these points. Therefore, I am not satisfied that Universities Canada will offer a fresh or unique perspective that will be of assistance to the panel, rather than duplicating submissions already made by UCalgary.

[17] In addition, although Universities Canada confirmed they would make submissions based on the current record, it is difficult to see how Universities Canada would provide the perspective of different member institutions without submitting new evidence, which would cause undue delay if permitted. I do not accept that Universities Canada could meaningfully address the experience of a private institution or a teaching university without adducing additional evidence.

[18] I am not prepared to exercise my discretion to grant Universities Canada intervenor status. Their application is dismissed. I direct that no costs of this application are payable by Universities Canada notwithstanding this result.

Joint Intervenors

[19] The Joint Intervenors represent the interests of university faculty, including the faculty members of UCalgary who were the subject of the access to information request. Given the Joint Intervenors have as their base faculty members, as opposed to universities, I accept that they may offer a fresh or unique perspective to the panel, depending on what the Joint Intervenors propose to argue if granted intervenor status. In particular, I note that the statutory exemptions at issue in *FOIPPA* expressly refer to “an employee of a post-secondary educational body”, and I consider that employees may have a different perspective than their employer institutions on these issues.

[20] The Joint Intervenors’ proposed arguments were outlined at paragraph 16 of their Memorandum of Argument. To the extent that the Joint Intervenors advocate in favour of a broad interpretation of “teaching materials” and “research information”, I conclude that UCalgary has sufficiently addressed the importance of a broad interpretation to its faculty and additional submissions will not assist the Court to decide the matter.

[21] However, I accept the Joint Intervenors may assist the panel on the topics of “social activism,” and in proposing an alternative analytical approach to be applied by the Commissioner. The adjudicator found that research that is geared towards the ends of social activism did not strip it of its status as research, whereas the chambers judge drew a clear distinction between studying social activism and engaging in it. UCalgary briefly expressed disagreement with the distinction drawn by the chambers judge in its factum, but its analysis on this point was limited. The Joint Intervenors intend to focus on this issue and argue that the distinction is flawed. They also intend

to propose a different analytical approach to be applied by adjudicators when determining whether the exemptions apply. I accept that these submissions may be helpful, though I remind the Joint Intervenors that they are not permitted to submit new evidence, nor expand the issues before the panel.

[22] I am prepared to exercise my discretion to grant the Joint Intervenors intervenor status to address the points outlined in paragraph 21 of these reasons. I further impose the following deadlines and restrictions.

- (a) The Joint Intervenors may file a factum that is no longer than 15 pages in length. They shall not duplicate arguments contained in UCalgary's factum. The Joint Intervenors' factum must be filed and served no later than Friday, August 15.
- (b) The appellant shall have a right to file a written reply to the Joint Intervenors' factum, though the Court understands that the appellant may choose not to engage in a discussion of the substance of the arbitrator's decision. The written reply shall be no longer than 8 pages in length and must be filed and served by Friday, August 29.
- (c) The Joint Intervenors are limited to a maximum of 10 minutes of oral submissions, unless otherwise directed by the panel.
- (d) The Joint Intervenors must rely on the existing evidentiary record, and may not raise or argue new issues on appeal.
- (e) The Joint Intervenors shall have no costs of this application. Costs on the appeal remain in the discretion of the panel.

Application heard on June 26, 2025

Reasons filed at Calgary, Alberta
this 10th day of July, 2025

Ho J.A.

Appearances:

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