

**SUBMISSIONS TO THE FREEDOM OF INFORMATION
AND PROTECTION OF PRIVACY ACT REVIEW COMMITTEE**

ON BEHALF OF

THE COUNCIL OF NOVA SCOTIA UNIVERSITY PRESIDENTS

Since November, 2000, when the *Freedom Information and Protection of Privacy Act* was amended to include universities, the eleven universities in Nova Scotia have worked hard to meet the challenge of implementing appropriate policies and procedures and setting up structures to ensure compliance with the Act. This task has been particularly challenging because the Act was not drafted with universities' unique organizational structure in mind. The characteristics of university structure – collegiality, bicameral organization, and peer review -- have presented numerous challenges to universities in implementing the Act, interpreting the Act in response to requests for access, and in structuring future operational and academic arrangements.

This submission focuses on three main areas:

1. Recommendations for amendments to section 19C of the Act so that it more accurately encompasses the range and practicalities of peer review processes within the university;
2. Recommendations for amendments to section 27 in order to facilitate the sharing of university resources;
3. Request for clarification.

University Structure

University organizational structure is unique. Unlike government, universities are structured, in part, on a collegial model, a model which encourages shared participation of members of the university community (faculty, staff, students and members of the broader university) in a wide range of decision-making. This collegiality occurs within a bicameral structure. Universities typically comprise a Board that has authority for the general operation of the university and a Senate that has responsibility for academic matters. The precise division of authority and relationship between these two bodies varies from university to university and is typically prescribed by the statute that created each university. The academic functions of universities are divided by areas of academic discipline among Faculties, which are often further variously subdivided among Schools, Departments, and/or programs, depending upon the size and scope of the academic disciplines within the particular university.

The range of decisions which are made through collegial, or include, collegial processes vary from university to university but typically include appointment, reappointment, promotion, and tenure of academic staff (faculty members), reviews of academic programs, reviews or surveys of academic departments, searches and/or reviews of academic administrators, and development of certain types of university policy.

Peer Review

Peer review is an integral part of many of these collegial processes. Peer review is the performance evaluation of individuals, academic departments and programs by fellow academics. It is based in recognition of the fact that only an academic can judge the academic performance or contributions of another academic. For example, a nuclear physicist is in the best position to provide thorough and constructive comment on the nuclear science of another nuclear physicist. While administrators or other members of the broader university community may be able to comment on some of the attributes or contributions of the nuclear physicist (for example, the ability to communicate as a teacher, ability to supervise employees), those who are not academics are not in a position to critique such things as her science, her methodology or the depth of her publications. Thus, for a peer review process to be effective, it is essential to obtain the candid and constructive views of the fellow academics of those under review. Without them, the university is not in a position to fully judge the academic performance and contributions of their academic staff or the quality of their academic programs.

In order to obtain the views of appropriate experts, the university must be in a position to provide assurances of confidentiality to those experts. Faculty members working in the same department, Faculty or discipline as the individual or group under review may be reluctant to provide a completely candid assessment for a variety of reasons. For example, an English professor may be in a position to provide comment on the academic contributions of another English professor who occupies the office next door. They see each other every day, and are quite friendly. He also believes that his next door neighbour is weak academically, and in particular that her publishing lacks the depth necessary to warrant tenure. If this professor was not assured confidentiality, he might be less likely to offer this candid assessment because he does not want to ruin a good working relationship with his co-worker. Or, perhaps he was concerned about his own interest in being considered for promotion and did not want to alienate his colleague in case she had input into his process. The situation is even more sensitive for students and non-tenured faculty members, who may be dependent upon those under review for references or recommendations in connection with their own academic future.

Thus, maintaining the confidentiality of these processes creates an environment where academics are more likely to offer their complete and candid assessment of their fellow academic or academic program. It may also ensure, in cases where comments are solicited from the academic community generally, that they are forthcoming from as large a number and as broad a range of academics as possible.

Section 19C

An attempt was made to protect the confidentiality of certain peer review processes in section 19C of the Act; however, this section does not fully capture the reality of certain peer review processes or their range in scope.

At present, section 19C states as follows:

19C The head of a university may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled solely for the purpose of

(a) determining the applicant's suitability for

- (i) appointment, promotion or tenure as a member of a faculty of a university,
- (ii) admission to an academic program, or
- (iii) receipt of an honour or award;

or

(b) evaluating the applicant's research projects and materials,

if the information is provided explicitly or implicitly in confidence.

This section is problematic in three areas:

First, appointment, promotion and tenure do not provide the only examples of peer review within most universities. Many universities have departmental and/or program reviews that are also dependent upon confidential assessments of fellow academics. An example is a department survey (review of a department's performance) conducted by a committee (comprised of experts from within a particular Faculty as well as academics from outside the faculty) that solicits confidential comments on a range of topics from faculty members inside and outside the department. Without an assurance of confidentiality many academics may not participate in the process. The critique of a particular program or operation of a department might be interpreted as a comment on those who are responsible for that aspect of the program or department. If experts are reluctant to offer comments, then the university is being deprived of the input of members of the most significant group capable of providing constructive evaluation.

One example of the dilution of the peer review process has already occurred as a result of a recent Court of Appeal decision, *French v. Dalhousie University*. The latter case concerned a survey (review) of an academic department. In the course of the review the survey committee solicited and received comments from a range of academics, including those from within the Department at issue, concerning the Department Head as well as the Department as a whole. Notwithstanding that the Department Head was provided with a copy of the final report of the survey committee, which included a summary of the comments provided, the court ordered that Dalhousie disclose to the Department Head the comments made by his fellow academics, without the protection of anonymity. This decision has had a chilling effect on the departmental survey processes. As a direct result of this decision, the Faculty in issue no longer solicits written peer evaluations in the departmental survey process, but rather seeks oral representations only. The only record is the summary of those oral representations in the final report. This change in process has resulted in a dramatic decrease in the number and range of opinions received by similar survey committees. The committee still includes their findings and

summarizes comments in a detailed report that is disclosed; however, the basis for the peer review components of the reports lacks the range and depth that they have historically enjoyed, and that they require for a complete assessment.

Another example of peer review processes that is not captured by section 19C is the appointment of academic administrators, such as Deans of Faculties (the senior administrator at the Faculty level), Department Heads (the senior administrator of a unit within a Faculty) and, in some instances, Vice-Presidents with responsibility for overall academic or research functions of the university. Underlying each of these administrative appointments is an academic appointment. As with any other academic appointment, the evaluation of the academic component of these administrative positions must be done through a peer review process. Confidentiality of the comments solicited in these processes is extremely important because in many instances the experts offering comment will ultimately be accountable to the successful candidate. In the case of a Deanship, for example, a faculty member may think twice about offering a critique of the candidate's academic depth, if he thought that there was a risk that the candidate, if successful, might subsequently learn of them.

Second, some peer review processes have multiple purposes. Section 19C protects comments made by an applicant where it is collected *solely* for certain specified purposes. Sometimes, however, there are multiple purposes in collecting evaluative information. One such example is a departmental review or survey, described above. In part, the purpose is to evaluate performance of a particular department. Part of that evaluation necessarily includes evaluation of the Department Head, or other administrator, responsible for the department. Such evaluations of the Department Head may be used as part of the process to determine whether that Department Head will be offered subsequent terms as Head. Surely, the defining characteristic should not be the number of objectives the process was designed to achieve, but whether or not the evaluative or opinion material was provided in the course of a confidential peer review process.

Third, section 19C is too narrow in its terminology. First, section 19C(i) refers solely to "tenure"; however, other terminology is often used to describe the same kind of appointment, such as "appointments without term" and "continuing appointments." Given the narrow construction given the exclusions under the Act, the universities are concerned that these other categories of appointment that carry with them the same characteristics as what is traditionally termed "tenure" will not be given equal consideration.

Second, section 19C(i) does not refer to all steps of the academic appointments process. It refers only to "appointment, promotion and tenure." Not all academic appointment processes follow this simple sequence. Sometimes, faculty members are reappointed to a particular class or appointment following a process which may be distinct from the process for "appointment" or "promotion" or "tenure" but which still includes a peer review process deserving of protection.

Third, section 19C(iii) is too narrow in limiting itself to evaluative material compiled for the purpose of determining an applicant's suitability for "honours or awards." Scholarships and bursaries are other means for students to be recognized and to be given further funds. The evaluative material compiled for scholarships and bursaries is

no less sensitive than that collected for honours and awards and should be protected in the same manner.

Recommendation – Section 19C

Based on the foregoing comments, the Council of Nova Scotia University Presidents recommends the following amendment to section 19C (changes in italics):

19C The head of a university may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled [] for the purpose of

(a) determining the applicant's suitability for

- (i) appointment, *reappointment*, promotion or tenure as a member of a faculty of a university,
- (ii) *appointment or reappointment as an academic administrator of a university*,
- (iii) admission to an academic program, or
- (iv) receipt of an honour, award, *scholarship or bursary*;

or

(b) evaluating the applicant's research projects and materials,

if the information is provided explicitly or implicitly in confidence.

The Council of Nova Scotia University Presidents also recommends that a definition of tenure be included in the Act, as follows:

"Tenure" includes appointments of an indefinite term.

Making these amendments will not reduce transparency in the process since the protection is limited to evaluative comments that were provided explicitly or implicitly in confidence. It only protects the confidential peer review part of the process, and does not necessarily extend to the whole of the process. As noted above, peer review processes are frequently only one part of a larger process. For example, many appointments processes for faculty, as well as senior academic administrators, include a public component as well as the more traditional interview, as part of the overall process. These amendments seek only to protect the peer review component so that individual academics can comment candidly and freely in relation to the academic strengths and weaknesses of their colleagues, including their administrators.

Sharing of Resources Among Universities

Section 27 of the Act addresses circumstances under which public bodies are permitted to disclose personal information. Section 27(g) permits disclosure "to a public body to meet the necessary requirements of government operation." There is no similar provision for universities. The absence of such a provision creates unnecessary challenges in the universities' efforts to share key resources because they would be

prohibited from sharing personal information that would be necessary for the effective operation and delivery of those shared resources.

Say, for example, that the universities wished to expand the shared library resources and services among themselves, or extend shared resources to more of their number. Within the universities, libraries have access to contact information so that they can notify patrons when a book is due, when a book has come in, to monitor outstanding fines, to facilitate access to electronic resources etc. In sharing library resources among the universities, it is necessary to extend access to this same information to the other participating universities. Absent specific legislative authorization to share information, universities must set up alternative ways of ensuring that such information is available. Options include designing an information system particular to the shared resources or obtaining the consent of each of thousands of students. The latter option creates a logistical nightmare and both options require significant expenditure of financial and human resources.

Sharing of resources among universities is a way of reducing costs. The Act should not serve as a barrier to this effort. If government is permitted to share information to other public bodies to the extent necessary for government operations, then surely universities should be permitted to share information amongst themselves to the extent necessary to operate shared resources.

Recommendation – Section 27

The Council of Nova Scotia University Presidents proposes that a parallel provision be included for universities, as follows:

- 27.1 A university may disclose personal information to another university where that information is necessary for the operation of shared programs, shared activities, or shared resources.

Requests for clarification

The Council of Nova Scotia University Presidents would like to seek clarification two issues.

First, is serious consideration being given to expanding the Review Officer's authority to include powers of investigation and auditing? If so, the Council of Nova Scotia University Presidents respectfully asks for the opportunity to provide further comment. The underlying concern in relation to such a proposition is two-fold. First, such processes will necessarily result in increased costs to the university. There should be some mechanism to defray such costs. Second, the federal privacy legislation, the *Personal Information Protection and Electronic Documents Act*, includes investigation and audit powers. To the extent that the federal legislation may be found to apply to universities (at this point it is unclear), mechanisms should be put in place to avoid the possibility of duplication of processes. Surely, having to respond to two separate legislative processes would place an unfair burden on the universities.

Second, are email addresses considered personal information? Email is the most common way of contacting students for a variety of reasons – from official notices from the registrar, to communication between professors and students, to advising students of upcoming academic and social events, to communication among students. Whether or not email addresses are considered personal information is significant in terms of the degree of protection universities must accord email address lists. To date, most universities have erred on the side of protecting this information as personal information; however, there is significant debate on this issue. The Council of Nova Scotia University Presidents would appreciate clarity on this particular issue.

Conclusion

The Council of Nova Scotia University Presidents asks that the Review Committee give serious consideration to the proposed changes and requests for clarity. The proposed changes are designed to protect legitimate expectations of confidences in a unique setting, and are not intended in any way to undermine the transparency that the Act was created to achieve.

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