

COURT OF APPEAL OF ALBERTA

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REGISTRY OFFICE: CALGARY

APPLICANT: GOVERNORS OF THE UNIVERSITY OF
CALGARY

STATUS ON APPEAL: RESPONDENT

RESPONDENT: ALBERTA (INFORMATION AND PRIVACY
COMMISSIONER)

STATUS ON APPEAL: APPELLANT

INTERVENOR: THE FACULTY ASSOCIATION OF THE
UNIVERSITY OF CALGARY, CANADIAN
ASSOCIATION OF UNIVERSITY TEACHERS
and CANADIAN ASSOCIATION OF LAW
TEACHERS

STATUS ON APPEAL: JOINT INTERVENORS

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Appeal from the Decision of
the Honourable Mr. Justice N.E. Devlin
Dated August 30, 2024

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I. FACTS

A. Overview

1. This appeal concerns the proper interpretation of two exemptions in Alberta’s *Freedom of Information and Protection of Privacy Act*, [RSA 2000, c F-25](#) (“*FOIPPA*”): “teaching materials” (s. 4(1)(h)) and “research information” (s. 4(1)(i)) (“the Exemptions”).¹ These exemptions impact records of employees of post-secondary educational bodies across Alberta (“Academics”). Addressing this issue requires consideration of the role academic freedom plays as an interpretive aid and whether the Exemptions can capture records associated with an Academic’s participatory activities, alleged to constitute “social activism.”

2. The Faculty Association of the University of Calgary, the Canadian Association of University Teachers, and the Canadian Association of Law Teachers (collectively, the “Coalition”) intervene in this appeal to make the following joint submissions. First, the distinction between “*participation in* social activism” and the “*study of* social activism” as a basis to delineate the scope of the Exemptions is flawed; materials flowing from participatory activities described as “social activism” can constitute teaching materials and/or research information. Second, the Coalition proposes a framework to assist adjudicators when determining whether records alleged to concern an Academic’s participation in activism are subject to disclosure under *FOIPPA*.

3. The Coalition notes that, effective June 11, 2025, the *Access to Information Act*, [SA 2024, c A-1.4](#) replaced *FOIPPA*. The relevant portions of the new legislation adopt the same language as the former. The Coalition’s submissions are thus not impacted by this legislative change.

B. Background Facts

4. The Coalition takes no position on the facts of this appeal.

II. GROUNDS OF APPEAL

5. The Coalition takes no position on the grounds of appeal.

¹ *Freedom of Information and Protection of Privacy Act*, [RSA 2000, c F-25](#), ss 4(1)(h), (i) [“*FOIPPA*”].

III. STANDARD OF REVIEW

6. The Coalition takes no position on the standard of review.

IV. ARGUMENT

7. In the decision under appeal, the Chambers Justice commented on “participation in social activism” and its relationship to academic activities which are protected from disclosure under the Exemptions.² Below, the Coalition analyzes the Chambers Justice’s commentary to reveal flaws warranting this Court’s clarification. Building off this analysis, the Coalition concludes by proposing a framework for adjudicators from the Office of the Information and Privacy Commissioner of Alberta (“OIPC”) to use when deciding whether materials alleged to constitute “participation in social activism” are teaching materials or research information.

C. False Dichotomy: “Study of social activism” vs “participation in social activism”

8. The Chambers Justice held that the Adjudicator’s narrow interpretation of the Exemptions in *University of Calgary (Re)*, [2022 CanLII 76344 \(AB OIPC\)](#) (the “Inquiry”), was unreasonable because it failed to balance the interest in disclosure against the impact on academic freedom which the Exemptions protect.³ The Chambers Justice then analyzed the documents still at issue, which pertained to a complaint made by two professors to the Canadian Judicial Council against a sitting provincial court judge.⁴

9. In this context, the Chambers Justice recognized that “the entire point of academic freedom is to protect scholarship that may be unpopular or politically targeted”.⁵ He nonetheless held that “a distinction can and should be drawn between academic *study of* social activism and direct *participation in* social activism” (emphasis in original).⁶ He reasoned that “academics who **personally involve themselves** in social actions/ causes” should be “subject to scrutiny and oversight” (emphasis added).⁷ The Chambers Justice concluded:

² *Governors of the University of Calgary v Alberta Information and Privacy Commissioner*, 2024 ABKB 522, at paras 73-81 [[ABKB Decision](#)].

³ *Ibid.*, at paras 39-40, 63.

⁴ *Ibid.*, at para 4; paras 73-81.

⁵ *Ibid.*, at para 77.

⁶ *Ibid.*, at para 79.

⁷ *Ibid.*

[81] However socially utile their work in their regard may have been, it falls outside the scope of the research exception. It is analogous to a law professor acting for a client in a criminal case. While proper and worthwhile endeavours, arguably offering collateral benefits to teaching and research functions, these **direct forays into the direct field of practice** are not research or teaching activity in and of themselves. [...]
(Emphasis added.)

10. These comments reveal separate but interrelated propositions. First, it is not relevant to the applicability of the Exemptions whether the materials can be characterized as a form of activism, since academic freedom exists to protect all scholarship, including that which may be “unpopular or politically targeted.” Second, when the materials alleged to be social activism stem from a “participatory” activity, these are “direct forays into the direct field of practice” and thus cease to be academic, making the Exemptions inapplicable.

11. The Coalition argues that the first proposition is correct: it is irrelevant whether the materials can be described as aiding social activism. The second proposition is incorrect: there is no dichotomy between participation and study of social activism. Indeed, participatory teaching and research are professionally accepted methodologies (even if described as activism). The Coalition also seeks to clarify the Chambers Justice’s comments regarding activities which are “direct forays” into professional practice. The subsections below expand on these points.

i. Characterization as “Social Activism” is Irrelevant to Applicability of Exemptions

12. Whether a record constitutes a form of social activism or public advocacy is not a valid criterion with which to determine if an Exemption applies, for two reasons.

13. First, it is difficult to define what constitutes “social activism” as the meaning is based on socio-political perspectives that are hard to assess objectively. That is, different people may have different views of what social activism is. This makes it extremely challenging to rely on the descriptor of “social advocacy” as a metric of assessment in this context. For example, some people might argue that teaching critical race theory, critical disability theory, feminism, or even Indigenous law is a form of activism in the legal field. These examples demonstrate that even teaching on a particular topic could be considered participating in activism, and yet these activities would fall within the Exemptions.

14. Second, academic freedom exists in part to support Academics in putting forth new ideas, even when socially controversial, politically unpopular, or in support of a particular worldview.⁸ Indeed, both decision makers below agreed that whether the materials relate to social activism does not answer whether the Exemptions apply to a record at issue.

15. At the Inquiry, the requester argued that the records sought did not constitute research *because they were activism*.⁹ The Adjudicator rejected this argument, noting that “[t]he fact that research may be geared toward, and used in the context of, activism or advocating a particular position **does not strip it of its status as research**” (emphasis added).¹⁰ Instead, the Adjudicator determined that certain records sought were not exempt from disclosure under s 4 (1)(i) since “research information” refers only to documents that are part of a “designed or developed systematic investigation.”¹¹

16. Even though the Chambers Justice found the Adjudicator’s definition of “research information” overly narrow, he agreed that whether the documents constitute “activism” is irrelevant for the purpose of the Exemptions.¹² The Chambers Justice explained that academic freedom exists precisely to protect scholarship which is politically targeted or unpopular.¹³

17. Indeed, academic freedom is a professional right that protects an Academic’s freedom to teach, research (and publish), and speak as a citizen without fear of institutional discipline or censorship, as long as their work meets academic integrity standards.¹⁴ Writing for the majority of the Supreme Court of Canada in 1990, Justice LaForest recognized that academic freedom is of “pressing and substantial importance” since the “free and fearless search for knowledge and the propagation of ideas” is “essential to our continuance as a lively democracy.”¹⁵ Various courts and

⁸ See for e.g., [ABKB Decision](#), *supra* note 2, at para 73; *York University and York University Faculty Association*, 2007 CanLII 50108 (ON LA), at para 26.

⁹ *University of Calgary (Re)*, 2022 CanLII 76344 (AB OIPC), at para 21.

¹⁰ *Ibid.*

¹¹ *Ibid.*, at paras 18, 24-28, 33-35.

¹² [ABKB Decision](#), *supra* note 2, at paras 74-78.

¹³ *Ibid.*, at para 77.

¹⁴ Appendix A: James L. Turk, “Academic Freedom in Canada: Its Origins, Components, and Limits” (2023) 25:1 CLEJ 35 at 40; See United Nations Educational, Scientific and Cultural Organization (UNESCO) [Recommendation concerning the Status of Higher-Education Teaching Personnel](#) (1997) at para 27 [“UNESCO”]; See also [ABKB Decision](#), *supra* note 2, at para 52; See also *Parent c R*, 2014 QCCS 132, at para 124 [Parent].

¹⁵ *McKinney v University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 SCR 229, at page 282 [McKinney].

tribunal decisions have affirmed the critical role academic freedom plays for the meaningful exchange of ideas in a vibrant democracy, and its link to the *Charter's* freedom of expression.¹⁶

18. Academic freedom provides Academics the freedom to question conventional wisdom, explore ideas, and engage critically with institutional practices.¹⁷ It allows them to participate in institutional governance and openly critique the institutions they work for, administrations, and governing bodies—all conduct which could be perceived as advocacy.¹⁸ Academic research ought to be freely communicated to students, peers, and the general public, without institutional censorship or pressure to conform public pressure. As such, academic freedom protections cannot depend on whether the subject matter is perceived as “activism” or “advocacy.” Social activism is simply not an appropriate metric for delineating whether a record constitutes “research information” or “teaching materials.”

19. The Coalition therefore respectfully requests that this Court affirm that there is no dichotomy between “activism” and “research” and further recognize that activism *can* constitute research and teaching. Indeed, relying on a distinction between “activism” and “research” creates an illogical and overly narrow interpretation of the Exemptions and diminishes the academic freedom protections needed to nurture a healthy democracy.

ii. Participatory Activities Can Be Academic

20. While the Chambers Justice acknowledged the interplay between activism and research, he muddled this proposition by later suggesting that, for the purposes of *FOIPPA*, “*participation in social activism*” is distinguishable from the “*study of social activism*,” and that academic freedom encompasses only the latter.¹⁹ The Coalition respectfully submits this is incorrect and undermines the academic freedom protections underlying the Exemptions. The Coalition posits that documents arising from participatory activities which may be perceived as “activism” can legitimately constitute both “teaching material” and “research information” under *FOIPPA*.

¹⁶ See for e.g., *Pridgen v University of Calgary*, [2012 ABCA 139](#), at paras 113-114, 117; *Parent*, *supra* note 14, at paras 120-124; *University of Ottawa (Re)*, [2011 CanLII 74312 \(ON IPC\)](#) at para 123 [*Ottawa, 2011*]; *University of Ottawa (Re)*, [2012 CanLII 31568 \(ON IPC\)](#) at para 29.

¹⁷ *Turk*, *supra* note 14 at 55, 61.

¹⁸ *Ibid.* See *UNESCO*, *supra* note 14, at para. 27.

¹⁹ *ABKB Decision*, *supra* note 2, at para 79.

21. Academic freedom protects not only an Academic's freedom to decide what to research or teach. It extends to the Academic's freedom to decide *how* to undertake this research and *how* to teach it, within the constraints of ethical and professional obligations.²⁰ In his article, *Academic Freedom in Canada: Its Origins, Components, and Limits*, Professor James Turk explains that the core purpose of teaching in the modern-day university is not simply to impart knowledge, but more broadly to "enable students to think for themselves and have the tools and abilities to think critically and intelligently in all aspects of their lives".²¹ He asserts that this can only be achieved if University professors "have the freedom to use their best professional judgment" as to *how* to teach. This pedagogical choice depends on what the professors "know about themselves [...], what they know of their students, the nature of the subject they are teaching, and their view of what engages and motivates students to learn."²² A professor has the academic freedom to decide that a particular subject is more effectively taught through a participatory activity with the students that takes place outside the normal classroom setting and within community, or by relying on a participatory activity as a case study of analysis, for example.

22. This pedagogical diversity and flexibility are not merely theoretical ideals. They are reflected in current participatory teaching and research methodologies throughout Canadian universities, and within law faculties in particular. This type of teaching and research could be considered the Academic participating in activism.

23. Several examples demonstrate that legal pedagogy, for instance, includes methods of teaching that are heavily participatory or involve direct engagement in a community outside the traditional classroom setting. For example, for over 40 decades, academics have advocated for law schools to function equally as professional training centres and intellectual hubs.²³ Clinical law courses, which take place directly within a community organization and outside the law school but which law students gain law school course credits for, are celebrated as the ideal pedagogy that bridges theoretical and practical training.²⁴

²⁰ Turk, *supra* note 14 at 47-49, 58.

²¹ *Ibid*, at 47.

²² *Ibid*, at 48.

²³ Appendix B: See Leon E Trakman, "Law and Learning: Report of the Consultative Group on Research and Education in Law, Social Sciences and Humanities Research Council of Canada" (1983) 21:3 Osgoode Hall L J 554, at 555-556.

²⁴ *Ibid*.

24. Some could argue that an Academic's development and administration of certain clinical courses and curricula constitutes participation in a form of activism because it advances or departs from a particular ideological point of view or has a particular societal goal in mind. For example, placing law students in a Trans Identity Clinic for course credit stems from a belief that trans rights are human rights.²⁵ Likewise, placing law students in a civil rights organization for course credit may be a way in which an Academic recognizes and addresses systemic racism in our legal system. The fact that these clinics advance a particular worldview, are participatory and directly engage with communities, does not strip them of their teaching and learning character. Rather, the participatory nature of these experiences, and the direct impact on the community, is what allows the Academic to effectively teach their students more practically and meaningfully about how the law manifests in real life.²⁶

25. Another example is an Academic's introduction and development of Indigenous law research and teaching into post-secondary institutions. Given that Indigenous law and legal orders are epistemologically distinct from the "western" common law and civil law traditions, the diverse Indigenous ways of knowing and learning might not readily fit into traditional western law school pedagogy.²⁷ In his article: *Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education*, Professor John Borrows explains that teaching Indigenous law under the common law or civil law categories risks perpetuating colonial frameworks and distorting Indigenous law altogether.²⁸ He suggests that, in order to teach Indigenous law in law schools in support of revitalization, academics ought to seek input and experience directly from Indigenous elders and Indigenous legal practitioners and consider implementing different pedagogical frameworks, entirely.²⁹ Endeavouring to teach Indigenous law through its own epistemology could be viewed as a participating in activism since it challenges the dominant legal system and promotes Indigenous self-determination.

²⁵ See for e.g., Osgoode Hall Law School, "The 519 Community Centre – Trans ID Clinic", online at <<https://www.yorku.ca/osgoode/pbsc/the-519-community-centre-trans-id-clinic/>>.

²⁶ Appendix C: See Frank Munger, "Inquiry and Activism in Law and Society" (2001) 35:1 L & Soc'y Rev 7, at pp 10-11.

²⁷ Appendix D: See Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 at 862-873.

²⁸ Appendix E: John Borrows, *Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education*, (2016) 61:4 McGill LJ 795 at 812.

²⁹ *Ibid*, at 820-825.

26. Relatedly, the Truth and Reconciliation Commission calls for the “establishment of Indigenous law institutes for the development, use and understanding of Indigenous laws.”³⁰ The University of Alberta’s Wahkohtowin Law and Governance Lodge (the “Lodge”) is a prime example of a research centre established in response to this Call to Action. For the last several years, the Lodge has offered a land-based course which allows law students the opportunity to “learn directly from Elders, knowledge-holders and the land itself, all while immersed in the community.”³¹ The Law Society of Alberta has described the Lodge as “reconciliation in action.”³² Reconciliation itself can be considered a form of activism, since it is an intentional action based on a set of beliefs, values, and assumptions about how society should redress colonial injustices. Reconciliation is also inherently political as it involves policies regarding land rights, sovereignty, treaties, systemic racism, and resource control. The Lodge is a poignant example of how research, teaching, and “participatory social activism” might overlap in academia.

27. By providing these examples, the Coalition does not suggest that Indigenous law is or can only be taught or researched in a particular participatory method, or that teaching Indigenous law is inherently a political act. Rather, the Coalition wishes to highlight that different epistemologies, pedagogies and ideologies reflect the legal pluralism of Canadian legal education today. As a result, the distinction between “participation” and “study” fails to account for certain academic “participatory” research and teaching that enrich Canadian post-secondary education institutions.

28. Finally, professors may base their research or teaching on their direct participation in their professional field. A poignant example of this approach is Professor Cindy Blackstock’s involvement in the landmark Canadian Human Rights complaint alleging that the federal government discriminated against First Nations children by providing inequitable funding for on-reserve child welfare services and by failing to fully implement Jordan’s Principle.³³ Dr. Blackstock published an article recounting this protracted nine-year legal battle from her

³⁰ Truth and Reconciliation Commission of Canada, “Calls to Action”, (2015), at #50, online at: <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf>.

³¹ Faculty of Law, University of Alberta, “Wahkohtowin Law and Governance Lodge, “The ᑭᓐᓂᓐᓂᓐ Wahkohtowin: ᑭᓐᓂᓐᓂᓐ miyo-wicêhtowin Principles and Practice summer course”, online: <<https://www.ualberta.ca/en/wahkohtowin/workshops/land-based-courses.html>>.

³² Law Society of Alberta, “Reconciliation in Action — Wahkohtowin Law and Governance Lodge” (26 September 2024), online at: <<https://www.lawsociety.ab.ca/reconciliation-in-action-wahkohtowin-law-and-governance-lodge/>>.

³³ See *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2.

perspective; reflecting on the importance of using litigation in partnership with grassroots, interdisciplinary, and community-based engagement to confront systemic discrimination.³⁴ The article concludes with recommendations related to legal reform, cross-cultural practice, and rebalancing power in access-to-justice- environments.³⁵

29. It would make little sense to automatically exclude the materials arising from Dr. Blackstock’s “direct participation” in this advocacy from the Exemptions, simply on the basis that they are participatory. These materials have substantiated published articles and case-study subject matter for law school classes. Thus, materials arising out of “direct participation” in society, including social advocacy or activism, can attract *FOIPPA* exemption protections.

30. Indeed, any dichotomy between an academic’s “participatory research” and “non-participatory research” is improper. Legal scholars routinely engage with the broader community as part of their research work.³⁶ Participatory action research is one example of a research methodology in which the researcher engages directly with research participants to create knowledge and produce tangible outcomes for affected communities.³⁷ Participatory action research-in-law brings together legal researchers and citizens who are experiencing legal challenges. It gives voice to the citizens’ perspectives, generates social change, results in systematic research, and generates new knowledge. Often this type of participatory work enhances inquiry and knowledge mobilization, which may impact policy and decision-making processes and, in turn, address social, civic, economic, or moral problems in society.³⁸

31. Part of the justification for participatory action research, or what some academics call “scholarship of engagement” or “scholarship of application”, is the idea that academic research

³⁴ Appendix F: See Cindy Blackstock, “*The Complainant: The Canadian Human Rights Case on First Nations Child Welfare*, (2016) 62:2 McGill LJ 285.

³⁵ *Ibid*, at 326-328.

³⁶ See for e.g. Tri-Council, “Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans – TCPS 2 (2022), [Chapter 9: Research Involving the First Nations, Inuit, and Métis Peoples of Canada](https://ethics.gc.ca/eng/tcps2-eptc2_2022_chapter9-chapitre9.html), definitions of “Communities customs and codes of research practice” and “community engagement” at Preamble and Context, online: <https://ethics.gc.ca/eng/tcps2-eptc2_2022_chapter9-chapitre9.html>.

³⁷ Appendix G: See for e.g., Lisa M Vaughn, Farrah Jacquez, “Participatory Research Methods – Choice Points in the Research Process” (2020) 1:1 Journal of Participatory Research Methods 1, at 1-2, 5-7.

³⁸ Appendix H: See generally Ernest L Boyer, “*Scholarship Reconsidered: Priorities of the Professoriate*” (1990) Special Report, The Carnegie Foundation for the Advancement of Teaching, at p 23.

should be *both* rigorous and socially relevant.³⁹ By partnering with the communities they seek to serve, academia can regain the public's confidence and address real-world challenges for the betterment of society.⁴⁰ One can imagine how this type of research could be construed by some as participating in social activism, but its participatory character and societal impact do not inherently make these materials any less academic.

32. In conclusion, the study of, *and participation in*, social change, and other forms of social activism work are valid and accepted forms of academic research and teaching. Participatory activities contribute to post-secondary education and academia in significant ways. Excluding materials from *FOIPPA*'s protection on the basis that they arise from a "participatory" activity erodes the academic freedom protections that the Exemptions exist to safeguard.

iii. Direct Participation in the Field that falls outside FOIPPA

33. The Chambers Justice stated that documents arising from projects that Academics "personally involve themselves in" represent "direct forays into the direct field of practice" which do not benefit from the disclosure Exemptions.⁴¹ As outlined above, an Academic's participation in an activity or practice *may* create records which constitute research or teaching materials for the purposes of *FOIPPA*. However, there may be circumstances where this "direct participation" is unrelated to an Academic's research or teaching and is therefore not covered by the Exemptions. In such circumstances, the materials resulting from the Academic's independent endeavors might not be within the academic institution's custody and control at all. If the materials are not within the academic institution's custody and control, they are outside the scope of *FOIPPA* and cannot be subject to disclosure requests under the legislation.⁴²

34. The Coalition submits that, to determine whether certain documents, alleged to constitute "participation in social activism," are captured by the Exemptions, an adjudicator should assess whether the activity is part of the Academic's employment (typically, tenured academic staff's

³⁹ Appendix I: Ernest L. Boyer, "*The Scholarship of Engagement*" (1996) Stated Meeting Report, at 23, 27-28, 33 [Boyer 1996].

⁴⁰ See generally Boyer 1996, *supra* note 39 at 18, 22.

⁴¹ *ABKB Decision*, *supra* note 2, at paras 79, 81.

⁴² *FOIPPA*, *supra* note 1, at s 4(1) ("This Act applies to all records in the custody or under the control of a public body [...]"). See also Information Commissioner of Canada, "Control of Records", online at: <<https://www.oic-ci.gc.ca/en/information-commissioners-guidance/control-records>>.

work is divided between research, teaching and service). As articulated above, it is incorrect to simply ask whether the activity at issue is “participatory” in nature, or whether it relates to “social activism.” The adjudicator must consider, in light of the context, whether the activity engaged in has ties to the Academic’s research or teaching, or academic activities. If the records are instead the manifestation of a purely independent or personal activity, the materials are the Academic’s personal property, not within the purview of the academic institution. For example, consider a circumstance in which a professor writes an op-ed for a newspaper on a subject unrelated to the academic’s work. These materials would not be subject to disclosure, since they are untethered from the Academic’s work for the institution.⁴³

35. Without clarifying this point, the Court risks that adjudicators will inappropriately expand what materials are subject to *FOIPPA* in the first place. With this in mind, the Coalition proposes a framework for adjudicators to apply when grappling with whether specific records, alleged to arise from a participatory activity that constitutes “activism,” are captured by the Exemptions or should be disclosed.

D. Framework to Consider at Inquiry by Adjudicator

36. The Coalition proposes the three-question framework below to assist adjudicators in determining whether the Exemptions apply to materials that have been described as participation in social activism.

37. This framework is premised on the broad and liberal interpretation of “research information” and “teaching materials” which upholds the academic freedom protections that underlie these Exemptions.

i. Connection to Scholarship?

38. First, the adjudicator should ask: does the subject matter of the records have *any* connection to the Academic’s teaching or research?

39. There will be clear a connection to an Academic’s research or teaching where the subject matter references or relates to the individual’s academic area of scholarship. This will most

⁴³ [Ottawa, 2011](#), *supra* note 16, at para 181.

obviously be the case where the Academic *has* taught in this field of study or published work covering this subject. For example, where the materials relate to the existence of subconscious bias in the justice system, and the professor teaches equality and the law or criminal justice, there is a clear link between the materials at issue and the subject matter expertise of the Academic.

40. An indirect connection between the subject matter of the records at issue and the Academic's teaching or research is also sufficient. Even where the Academic has *not yet* taught in this subject matter, or published on this topic, but it is a subject on which the Academic *could* decide to teach or publish in, a connection will arise. For example, a professor who has taught or researched property law could easily begin working on environmental racism. Recall that academic freedom includes the freedom to decide what areas to research or teach. Academics may research and teach outside their area of specialization, and their specialization may evolve over time.

41. One indicator of this could be where the materials arise in the same academic department or faculty. For example, if the materials relate to Aboriginal law, and the academic specializes in contract law, the field of law broadly establishes a connection. Furthermore, even if it is of a different discipline, where the topic relates to an adjacent or potentially intersecting field of study, there will be a sufficient connection between the subject matter of the records and the professor's scholarship. Consider a situation in which a professor teaches tax law, and the materials relate to economics, or where the professor teaches health law and the materials relate to nutrition. While this determination is context specific, it must be a relaxed standard to ensure adjudicators "maximize academic freedom by minimizing interference."⁴⁴

42. If the answer to this first question is yes—there is some connection present—then the materials will be exempt from disclosure under *FOIPPA*, and the inquiry ends. If the answer to this first question is no, the adjudicator moves on to consider the second question.

ii. Connection to Affairs of Post-Secondary Institution?

⁴⁴ [McKinney](#), *supra* note 15 at p 282.

43. The second question the adjudicator should ask, if the answer to the first question is no, is: does the subject matter of the records have any connection to the Academic's responsibilities or duties at their post-secondary institution, or that institution's affairs?

44. This will be the case where the materials relate to an Academic's service work or are largely administrative in nature. The following are examples of records that would be related to the affairs of the institution, but which are not research or teaching related materials: agendas for meetings; documents prepared in fulfillment of a university administrative position and in relation to the duties of that position; and documents received or consulted by a member in their capacity as a member of a department, faculty, or university (for example, a hiring committee, personnel committee, and tenure or promotion committee, but excluding any personal notes or annotations added by the member).⁴⁵

45. If the answer to this second question is yes, and the records have a connection to the Academic's responsibilities or duties at their host institution, then the materials are subject to disclosure under *FOIPPA*, and the inquiry ends at this stage. If the answer to this second question is also no, the adjudicator then moves on to consider the final question.

iii. Personal Activity or Independent Project Unrelated to Scholarship?

46. If the answer to the first question and the second question is no, the adjudicator must finally consider whether the materials arise from an activity or project which is personal to the academic or independently engaged in and unrelated to their scholarship. If the answer is yes, the materials are not subject to *FOIPPA* because they are not under the custody and control of the institution and thus cannot be disclosed under the legislation.

47. This will be the case where the subject matter is untethered to the Academic's current or potential scholarship and is outside the scope of their duties as an employee of the institution. It does not matter whether the Academic is engaging in this activity or project identifying themselves as a professor or professional. The fact that an Academic is still identifying themselves with their professional title to author the materials, or while engaging in the activity, does not mean the

⁴⁵ See e.g. [Ottawa, 2011](#), *supra* note 16, at para 8; *Lukits v. Treasury Board (Department of National Defence)*, [2019 FPSLRB 32](#) (CanLII), at para 144.

materials relate to the affairs of the post-secondary institution, or diminish the Academic's personal interest and ownership over the materials.

48. Consider a circumstance in which an Academic writes an open letter to their governing body or elected official or writes an op-ed in a newspaper regarding current events, on which the subject matter is unrelated to their current or potential scholarship and duties as employees of their host institution. This is precisely what happened in the aftermath of the devastating mass shooting that took the lives of 22 people in several rural Nova Scotia communities in April of 2020. Shortly after the attack, 30 Law Professors authored an open letter calling for a public inquiry into systemic violence against women broadly.⁴⁶ The Academics wrote the letter identifying themselves as professors, not merely as concerned citizens, and the letter advocated publicly for a specific action to be taken by the provincial government. The records arising from the open letter or the op-ed authored by these Academics are not under the custody and control of the post-secondary institution and could not be subject to disclosure under *FOIPPA*.

49. Similarly, consider the Chamber's Justices analogy regarding a law professor acting for a client in a criminal case, which he identified as "direct forays into the direct field of practice" which are not research or teaching "in and of themselves".⁴⁷ In such a circumstance, if the subject matter of the records are completely unconnected to the Academic's scholarship, it makes little sense to take for granted that the records (which are found to be untethered from the Academic's work for their host institution), nonetheless fall within the custody and control of the institution.

50. Adjudicators ought to turn their mind to the possibility that the materials are not under the custody and control of the institution when reviewing decisions made by a public body, even where the institution itself has not raised this ground for refusing disclosure. Otherwise, adjudicators risk inappropriately granting disclosure of materials that are not subject to *FOIPPA* in the first place, having taken for granted the preliminary issue of custody and control. Such an outcome would contradict the purpose of the legislation, which seeks to give the right of access only "to the records

⁴⁶ Emma Smith, "N.S. law profs call on premier to commit to inquiry into April's mass shooting", *CBC* (15 May 2020), online: <https://www.cbc.ca/news/canada/nova-scotia/-mass-shooting-premier-professors-open-letter>.

⁴⁷ *ABKB Decision*, *supra* note 2, at para 81.

in the custody or under the control of a public body”, and it would create precedent which severely undermines academic freedom protections.⁴⁸

E. Conclusion

51. Distinguishing between “*participation in* social activism” and the “*study of* social activism” to delineate the scope of the Exemptions is incorrect and doing so risks undermining the academic freedom protections that the Exemptions exist to protect. Materials arising from “social activism” or participatory activities *can* fall within the ambit of the Exemptions. Whether this is the case, requires a context specific review that should consider the three-question framework proposed by the Coalition, in keeping with the purpose of *FOIPPA*.

V. RELIEF SOUGHT

52. The Coalition takes no position on the outcome of the appeal and respectfully requests no costs for or against it.

Estimate of time required for the oral argument: 10 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of August 2025.

Chivers Carpenter Lawyers

Per:



Kelly Nychka & Camila Franco

For the Intervenors

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

⁴⁸ [*FOIPPA*](#), *supra* note 1, at s 2 and s 53(1).

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- 2 *University of Calgary (Re)*, [2022 CanLII 76344 \(AB OIPC\)](#)
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