

RESEARCH REPORT

OCUFA

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Restricted Entry: Access to Information at Ontario Universities

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Executive Summary

Ontario universities are not covered under the provincial Freedom of Information and Protection of Privacy Act (FIPPA). Despite universities having instituted voluntary guidelines recommended by the Council of Ontario Universities (COU), it has become increasingly difficult to obtain even non-controversial data that would be readily available were Ontario universities covered by provincial freedom of information legislation. This led the Ontario Confederation of University Faculty Associations (OCUFA) to examine and test the efficacy of access to information policies at Ontario's universities by making identical access requests for faculty hiring data. The responses were sporadic at best. Without the legislative teeth of FIPPA, only seven of the institutions provided data, and in some cases it wasn't the information requested. There are also concerns about the university guidelines, which fall chiefly in three areas: unclear application and appeal procedures; lack of an independent appeal mechanism; and extensive exemptions within the policies.

As publicly funded bodies, universities should be publicly accountable through legislation which sets out parameters and requirements for access to information and privacy protection. At a time when accountability and transparency are at the forefront of public policy concerns, the Ontario government now has an opportunity and obligation to advance those goals in the university sector by including universities under FIPPA.

Restricted Entry: Access to Information at Ontario Universities

Introduction

Ontario universities are not covered under the provincial Freedom of Information and Protection of Privacy Act (FIPPA). The voluntary guidelines they have instituted at the urging of the Council of Ontario Universities (COU) to address access to information are neither effective nor enforceable. The public deserves access to information from institutions it supports with tax dollars. In recent years, Ontario universities have been reluctant even to share data or to make public information that is non-controversial and would be readily available were Ontario universities covered by provincial freedom of information legislation. This increasing difficulty in obtaining pertinent data from universities led OCUFA to examine and test the efficacy of access to information policies at Ontario's universities.

The Test

Each of Ontario's universities was sent an identical access request regarding the number of university faculty hired in each year from 1999 to the present. The data request asked for the number of full-time tenure stream, full-time sessional and part-time appointments in each year by discipline, as well as for faculty hiring plans. This is basic information which is easy to collect, and not available elsewhere. The request referred specifically to the access to information guidelines at the university, asking to be notified if it should be framed differently.

A few universities provided OCUFA with the requested information; others sent data which are useful but do not fulfil the request. Still others did not respond at all, or referred OCUFA to other sources for the information. (See Appendix A) The results demonstrate that without the legislative teeth of FIPPA, the voluntary policies produce erratic results, at best. Freedom of information at Ontario universities would be best ensured under FIPPA.

The Policies

In September 1994, COU, the advocacy association representing university administrators, approached Ontario universities with a set of access and privacy protection guidelines developed within the context of FIPPA, and with sensitivity to university concerns about freedom of information requirements not specific to their situation in academe. The suggested guidelines were presented to universities with a request to implement some form of access and privacy policy by July 1, 1995.

The publicly available policies in place at Ontario universities, and referred to in this report, were accessed via university web sites. Not all of the universities had posted policies. Where they were publicly available, the policies presented serious concerns. The suggested guidelines sent to the institutions by COU served as the model for many of the policies, and therefore they suffer from the same weaknesses.

Concerns about university access to information policies fall chiefly in three areas. First, the procedures for requesting information and then potentially appealing the response are unclear and not uniform. Unlike the provincial legislation, many of the policies do not have specific time lines for responding to a request, or for providing the information. Secondly, there is no independent appeal mechanism, and thirdly, there are extensive exemptions within the policies which essentially allow the universities to refuse to share any information they wish not to.

1) Procedures/Logistics

Including universities under FIPPA would dramatically simplify the process. The procedures for submitting FOI requests through the government and the specific steps which follow, in addition to regulated time lines for response, are clearly set out in FIPPA.

The access to information policies at Ontario universities present a much less clear cut approach. There is a lack of uniformity among the policies, and no regulated time lines for acknowledgement and/or provision of data. Further frustrating the situation, the application procedures are not easy to follow, and the policies often assume that all requests for information will come from parties familiar with the university community.

The “user unfriendly” nature of the policies discourages members of the public from filing requests. In most cases, those requesting information are advised to direct their query to the person within the university who is likely to have custodianship of the information, which presumes certain knowledge. Like the COU recommendations, many of the university policies state that the university shall have a Freedom of Information and Privacy Protection Officer who is responsible for implementing the guidelines, and to whom requests can be directed. However, contact information for this Officer is not provided as part of the policy.

2) No independence

Even more problematic, the universities are to appoint an “independent” Freedom of Information and Privacy Protection Commissioner, who responds to complaints regarding decisions made by the above-mentioned Officer. The universities were encouraged by COU to “make reasonable arrangements to secure the independence of the Office of the Commissioner.”¹ If the decision of the Commissioner is disputed, at many of the universities (including Toronto, Trent, McMaster, Guelph) the final decision on the request lies with the President. This arrangement does not even approximate an independent appeals mechanism.

One of the most important features of the Provincial Freedom of Information and Protection of Privacy legislation is that it presents avenues for both the requesting and granting parties to appeal the decisions

¹ Council of Ontario Universities Guidelines on Freedom of Information and Privacy Protection: Revised September 1994, p. 28.

to the independent Information and Privacy Commissioner as to whether the information is shared.

3) Exemptions

The general principle in the COU guidelines, which is repeated in many of the university policies, purports to grant access to university records and information. Of course universities are the keepers of sensitive information which must be protected, and thus there are legitimate exemptions to the spirit of disclosure. However, despite the stated willingness to be open about sharing non-sensitive information, there are many exemptions in the university access to information policies which are so broad as to make it possible for universities to habitually deny even nonsensitive access requests.

Some of the exemptions include information relating to deliberative processes, where records pertain to deliberations among the “committee of senior executives” which include policy options or recommendations and/or analysis.² There are also exemptions for records referring to relationships with governments and other organizations on the grounds that release of such records could potentially prejudice the conduct of relations between the university and government authorities or other agencies which provide funding.³ This exemption is worrisome because it provides an opportunity to closet information with respect to advertizing, supply or sponsorship contracts universities might have with corporations.

There are exemptions for records pertaining to research where disclosure would be contrary to the public interest or would undermine the work or reputations of the researchers.⁴ Perhaps the most troubling exemption is that which allows universities to refuse to share information which relates to “economic and other interests.”⁵ This broad exemption includes any information that belongs to the university or one of its units or members that has potential monetary value, as well as information which, if disclosed to the public, could potentially prejudice the economic or financial interests or competitive position of the university. Universities can exempt information regarding plans, positions or procedures related to any negotiations by or on behalf of the university, as well as plans relating to the management of personnel or the administration of the university which have not yet been made operational.⁶ This far-

² Council of Ontario Universities Guidelines on Freedom of Information and Privacy Protection: Revised September 1994, p. 17.

³ Ibid, p. 17.

⁴ Ibid, p. 20.

⁵ Ibid, p. 19.

⁶ Ibid, p. 19.

reaching exemption can serve as a catch-all when other exemptions aren't applicable, as it is broad enough that it could be interpreted to apply to almost any data request.

The Result

OCUFA's concerns about the voluntary guidelines were borne out in the response to OCUFA's information request. Over a three month period, much longer than the 30 day response time required under FIPPA, some institutions never responded (Laurentian, Nipissing, OCAD, Waterloo), while others acknowledged receipt of the request but haven't yet provided any information (Algoma, Carleton, Lakehead, McMaster, Ryerson). Even more interesting were responses from two universities (Queen's, Toronto) that referred OCUFA to Statistics Canada for the faculty data. Statistics Canada data are publicly available for those willing to pay for a special data run, but are always long out of date even when published. The University of Toronto stated that because the information is available from Statistics Canada, they do not provide it to others.

One institution (Ottawa) referred OCUFA to COU for the information, and utilized an exemption allowed in its policy to refuse to answer the question on faculty hiring projections, stating that "disclosure of such information is expected to prejudice the economic or financial interests or the competitive position" of the university. Another institution (Windsor) responded that they had provided the information to the Ministry of Training, Colleges and Universities through the provincial FOI process, but did not provide it directly to OCUFA.

However, despite the less than stellar response and data provision rate, some institutions did attempt to provide access to the requested information (Brock, Guelph, UOIT, Trent, Western, Wilfrid Laurier, York). This proves that OCUFA's request was reasonable, and that universities do have the capacity to collect and share the information. In some cases, however, the information provided raises more questions than it answers. Even under FIPPA, institutions cannot be required to collect data, nor to present them in a specific way. Thus, the format in which the data have been presented by the universities is idiosyncratic and not necessarily comparable. For example, the universities do not always differentiate between contract and part-time faculty. In several cases, the universities responded to questions about the number of faculty hired in a particular year by providing overall faculty complement numbers. This is useful information for an organization like OCUFA, but not an answer to the question asked. Whether the hiring information was not provided because it is not available, or because the institutions chose not to share it, was not specified.

The universities that did respond to the request made an effort to provide data, but in very different ways. Some institutions presented a series of tables (Brock, Guelph, UOIT, Trent) detailing the information, while others (Western, Wilfrid Laurier, York) provided links to publicly available information on their web sites which contained some or all of the information requested, but not necessarily presented in an easily usable format.

Under the university access to information policies, OCUFA can choose to appeal in cases where the university refused to share data, but as mentioned above, that process is unclear. With no independent body to review the merits of the request or the arguments against providing the information, the response is likely to remain the same in any event.

The Remedy

Whether FIPPA should apply to universities has long been contested by university administrators. Despite the inclusion of the colleges of applied arts and technology, COU and the universities argued against inclusion under FIPPA on the grounds that universities are not government agencies, and that the legislation had not been drafted with the inclusion of universities in mind. An amendment to include universities proceeded to the late stages of debate but the legislation was passed without including universities. In contrast, universities are subject to access and privacy legislation in other Canadian jurisdictions such as B.C., Quebec, Nova Scotia, Alberta and Newfoundland.

Because universities are the recipients of large amounts of government funding, there was concern about accountability and freedom of information even as the legislation was being enacted in 1988. Shortly after the legislation was enacted, the Attorney-General encouraged the universities, through COU, to use the principles contained in FIPPA when designing their own approach to freedom of information and privacy protection.⁷ Since that time, in response to the 1991 review of FIPPA, and the 1993 review of the Municipal Freedom of Information and Protection of Privacy Act, the government's Standing Committee on the Legislative Assembly specifically recommended that FIPPA apply to universities. Most recently, the provincial Information and Privacy Commissioner, Dr. Ann Cavoukian, recommended in her 2003 annual report that universities, as publicly funded bodies, be included under the requirements of FIPPA.

OCUFA's concerns about the efficacy of voluntary access to information policies at Ontario universities were not assuaged by the results of its information request. Despite assertions from COU and the institutions themselves, a request for data which should not be confidential has demonstrated that the individualized policies simply are not good enough. In addition to legislated time frames for response, independent appeal mechanisms, identical and clear requirements and processes for each institution, and fewer exemption loopholes, FIPPA forces publicly funded institutions to operate within a general context of information sharing.

Of course, universities are in possession of sensitive and confidential information, and as within the confines of the provincial legislation, that information should be protected. Therefore, it is advisable that FIPPA be amended to include universities, and that government take into consideration the specialized needs and realities of learning institutions, and implement protection for information such as teaching plans or proprietary research.

As publicly funded bodies, universities should be publicly accountable through legislation which sets out parameters and requirements for access to information and privacy protection. At a time when

⁷ Council of Ontario Universities Guidelines on Freedom of Information and Privacy Protection: Revised September 1994, p. 3.

accountability and transparency are at the forefront of public policy concerns, the Ontario government now has an opportunity and obligation to advance those goals in the university sector.

Appendix A: Responses to Access to Information Requests to Ontario Universities

Universities	Provided Data		Data Relevant/Useful		
	No	Yes	No	Partial	Yes
Algoma	✓				
Brock		✓			✓
Carleton	✓				
Guelph		✓		✓	
Lakehead	✓				
Laurentian	✓				
McMaster	✓				
Nipissing	✓				
OCAD	✓				
UOIT		✓			✓
Ottawa	✓				
Queen's	✓				
Ryerson	✓				
Toronto	✓				
Trent		✓			✓
Waterloo	✓				
Western		✓		✓	
Wilfrid Laurier		✓		✓	
Windsor	✓				
York		✓		✓	

Appendix B: Original Request for Information

April 23, 2004

Ontario University
Mailing Address

Dear University Official:

I am writing to request access to all records relating to the following information we are seeking:

1. The number of full-time, tenure stream faculty hired in each year, from 1999-00 to date, broken out by Faculty, where possible. Please indicate, in the totals, how many hires are replacements for resignation or retirement, and how many hires are new additions to the full-time tenure stream faculty;
2. The number of full-time sessional or contractually limited appointments hired in each year, from 1999-00 to date, broken out by Faculty, where possible;
3. The number of part-time appointments hired in each year, from 1999-00 to date, broken out by Faculty, where possible;
4. The current hiring plans for full-time, tenure stream faculty, full-time sessional or contractually limited appointments and part-time appointments in each of the next five years, or for as many years as the university's current faculty hiring plan covers.

Thank you for your help. Please let me know if this request should be directed to someone else or framed in a different way under your institution's access to information guidelines.

Sincerely yours,

Ontario Confederation of University Faculty Associations