IN THE MATTER OF AN ARBITRATION

BETWEEN

THE ASSOCIATION OF PROFESSORS OF THE UNIVERSITY OF OTTAWA (APUO)

("the Association")

AND

THE UNIVERSITY OF OTTAWA

("the Employer")

RE: Policy Grievance Respecting Records and Communications with Academic Staff – Supplementary Award

BEFORE: Philip Chodos, Arbitrator

APPEARANCES:

For the Association: Mariette Pilon, Counsel, Canadian Association of University Teachers (CAUT), John Henderson, Counsel, APUO, and Renata Green, Administrator, APUO

For the Employer: Steven Williams, Counsel, Louise Pagé-Valin, Associate Vice-President, Human Resources Services, University of Ottawa, and Pamela Harrod, Advisor to the President, Special Projects, University of Ottawa

HEARD AT OTTAWA, ONTARIO, JANUARY 8, 2009.

[1] This matter arises out of an arbitral award between the parties issued by the undersigned on September 29, 2008. The award described the matters in dispute as follows:

> . . . this grievance was precipitated by an access request under the FIPPA, which, since June 2006, applies to university institutions, subject to the exemption under section 65.(1)(8.1). More specifically, the subject grievance was generated in response to Exhibit U-2, a letter issued by the University's Secretary, Pamela Harrod, which in very broad terms sought from academic staff documents in their possession relating to the access request received by the University, so that the University could fully respond to that request.
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> . . .
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> … I do agree with both counsel that the collective agreement does have relevance with respect to the determination of this matter – in particular the question as to whether documents and communications in the possession of academic staff can be considered within the custody and control of the University.

[2] The award concludes with the following paragraph:

> . . . I find that Exhibit U-2 is contrary to the collective agreement and should be withdrawn. I appreciate that some of the observations made above with respect to documents that may be in the custody and control of the University are far from comprehensive or definitive. Accordingly, I shall remain seized of this matter in the event that the parties need to seek further guidance with respect to the application of the access request to specific types of documentations.

[3] The grievance filed by the Association stated the following:

> The Association hereby grieves against:
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> (a) the notices to members on or about 9 November 2006 regarding a request under FIFPA, including all actions and directives to members from the office of the University Secretary related thereto;
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> (b) the letter to the Association dated 24 November 2006.

Without admitting the necessity to provide specific grounds for the grievance, and without restricting itself to the following, the Association states the following grounds:

1) records of APUO members are not in the control or under the custody of the University;

2) the University does not have the right to demand, or the right of access to, copies of all documents, whether in printed or electronic form, which are in the possession of an APUO member, including those at a location other than the University;

3) e-mails sent and received using the University e-mail system are not documents for which the University has custody or control;

4) in response to a request under FIPPA, the University does not have the unilateral right to change existing working conditions nor to violate the established principles of privacy which prohibit the interference in the professional activities of an APUO member or any action that would inhibit the free exchange of information and ideas between academics;

5) the actions of the University contravene, *inter alia*, articles 5.1, 5.3, 9 and 10.3 of the collective agreement, Policy 90, past practice at the University, generally recognized practice in the university sector and academic freedom.

Remedy

As remedy for the above noted grievance, the Association seeks a withdrawal of the claims made by the employer respecting members' records and communications and a retraction of the demand for access to said documents, and/or declarations from an arbitrator accordingly, cease and desist orders, as well as damages, or such other orders as may be deemed appropriate by an arbitrator.

[4] On October 7, 2008, following receipt of the award, John Henderson, Legal Counsel to the Association, wrote to Louise Pagé-Valin, Associate Vice-President, Human Resources Services, University of Ottawa, proposing a meeting with the Employer for the purpose of seeking agreement with respect to the application of the award and a response to the Freedom of Information and Protection of Privacy Act (FIPPA) request. The Association also enclosed a copy of a letter to Daphne Loukidelis,

the adjudicator with the Information and Privacy Commissioner, who was seized with one of the appeals under the FIPPA (#PA07-397). This letter forwarded the above-noted award and also noted that: "Arbitrator Chodos has retained jurisdiction and has remained seized of the matter pending the discussions between the union and the University regarding further remedy."

[5] On November 17, 2008, the University received a "Notice of Inquiry" from adjudicator Diane Smith (who was seized with the other appeal file), requesting a formal response from the University by December 12. 2008 regarding the appeal. On that date, the University sent its submission replying to the "Notice of Inquiry".

[6] On November 17, 2008 Mr. Henderson also wrote to the undersigned requesting the reconvening of the arbitration hearing in accordance with the concluding paragraph of the arbitral award.

[7] On December 10, 2008, adjudicator Smith was advised of the scheduling of further hearings in this matter as requested by the Association. The Association also requested that adjudicator Smith suspend her inquiry and "postpone the December 12 deadline for the University's submission, until the end of the arbitration."

[8] Ms. Smith responded as follows in a letter dated December 16, 2008:

> . . . I have decided to await the arbitrator's decision concerning the University of Ottawa's custody or control over records sent or received by professors before deciding how to proceed with them. I will, however, continue to proceed with the portion of the inquiry dealing with all the other records at issue.
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> My decision to await the arbitrator's decision is being made without prejudice to my right to adjudicate under the *Freedom of Information and Protection of Privacy Act* any and all matters in this appeal.

[9] The undersigned was advised that adjudicator Loukidelis had indicated to Mr. Henderson during a telephone conversation that she was moving ahead, but not on the custody and control issue. Adjudicator Loukidelis was also notified of the pending arbitration hearings.

[10] The parties met on December 8, 2008, at which time the Employer notified the Association that in its view the arbitrator had decided the essence of the dispute and accordingly there was nothing left for the arbitrator to address.

Argument

[11] On behalf of the Employer, Mr. Williams submitted that the grievance sought the withdrawal of Exhibit U-2; as a result of the arbitration hearing and award it has been withdrawn. Consequently, there is no need for further intervention on the part of the arbitrator. Mr. Williams maintained that the adjudicator under the FIPPA was not ceding any jurisdiction with respect to the appeal. In fact, the adjudicator made it clear in her letter of December 16, 2008, that she retained jurisdiction to deal with the issue of custody and control.

[12] Mr. Williams stated that the University is not challenging my jurisdiction to address and interpret the FIPPA. The University's position is that there is no need for me to exercise any further jurisdiction in this matter beyond the issuance of the award of September 29, 2008. He observed that when I retained jurisdiction, I did so in the event that "the parties" needed further guidance. However, only one party is seeking my intervention. He also observed that this is not a matter of enforcing an award; the offending document has been withdrawn. Furthermore, the Association is in effect attempting to raise new arguments by way of its submissions to the University regarding the application of the FIPPA. These arguments could, and should, have been made in the course of the original hearing. It was open at that time to the Association to make an alternative argument to the "broad brush" approach, which was rejected in my award.

[13] According to Mr. Williams, the Association is asking me to do what the award indicates is impossible; that is, to provide a comprehensive approach to the issue of custody and control. One party is, in effect, seeking to raise a new argument and obtain a new award.

[14] Mr. Williams also submitted that there is no collective agreement issue going forward. The original referral to arbitration arose out of a request for certain documents, which was set out in Exhibit U-2, and I ordered withdrawal of that letter and that has been done. To the extent that there remains an issue between the parties with respect to the FIPPA, that is no longer a collective agreement issue, as those issues

were thoroughly addressed in the hearing in the first instance. The interpretation of the FIPPA is more within the expertise of the Privacy Commissioner than that of the arbitrator. There is in fact no live controversy that would allow me to continue the hearing of this grievance. To continue this hearing would put the arbitrator in a position of hearing argument with respect to the interpretation of the arbitral award, which is inappropriate. He also observed that if the proceeding continues and results in a supplementary award, it is conceivable that that award would conflict with an order of the Commissioner. Mr. Williams maintained that it is difficult to envisage how this matter may actually come to a definitive end if I take jurisdiction at this stage.

[15] In support of his submissions, Counsel referred to the following authorities: Quebec (Attorney General) v. Quebec (Human Rights Tribunal), [2004] 2 S.C.R. 223; Re Cape Breton University v. Canadian Union of Public Employees, Local 3131 (2005), 141 L.A.C. (4th) 421; Re Trillium Lakelands District School Board v. Elementary Teachers' Federation of Ontario (2007), 169 L.A.C. (4th) 19; and Re Central Park Lodge Ltd. v. Service Employees International Union, Local 268 (2000), 91 L.A.C. (4th) 403.

[16] The Association responded that the issues in dispute are far from being moot. It contends that the University is required to proceed with the access request and therefore has to issue a new Exhibit U-2. Counsel for the Association observed that, while the Employer had accepted my jurisdiction to address Exhibit U-2, it is now changing its mind, and is taking the position that it is not a matter for the collective agreement but rather should be dealt with by the Information and Privacy Commissioner. Ms. Pilon noted that at the outset of the original hearing the University acknowledged that I had jurisdiction.

[17] Counsel submitted that the law is clear that a tribunal should be allowed to complete its statutory task, as set out in section 48(1) of the Ontario Labour Relations Act (OLRA). This requires a final and binding decision of all matters in dispute. By in effect denying this principle, the University is trying to avoid an arbitration award in matters that relate to the collective agreement. The issue of custody and control is clearly related to the interpretation and application of the collective agreement. It also involves the FIPPA under which the request was made. However, as per section 10(1) of the FIPPA, the legislator chose not to define what constitutes custody and control. The University has in fact acknowledged that the adjudicator under the FIPPA must resort to the collective agreement in interpreting what constitutes custody and control. In the

Court of Appeal judgment of Ontario (Divisional Court) v. Ontario Attorney General, (1997), 34 O.R. (3d) 611, the Court concluded that ". . . the test found in section 10(1), namely 'custody or control', is not one requiring a specialized expertise to interpret." However, the interpretation of the collective agreement, which is necessary in determining custody and control, is within the expertise of the arbitrator. Ms. Pilon submitted that if it were left to the adjudicator under the FIPPA to make a determination, there could be several decisions from the Commissioner respecting the collective agreement, which should be more properly within the purview of the arbitrator.

[18] Counsel also noted that I had retained jurisdiction arising from this grievance. To say that both parties must agree for me to exercise my jurisdiction is an absurd proposition; it would amount to a denial of my obligation under the OLRA to make a final decision.

[19] In conclusion, Counsel for the Association stated that the application of the access request continues to be a live issue that is within my jurisdiction.

[20] In support of its submission, the Association cited the following judgements: Ontario (Solicitor General) v. Mitchinson (2001), 55 O.R. (3d) 355, and Chandler v. Alberta Association of Architects, [1989] 2 S.C.R. 848.

[21] Counsel for the Employer replied that there is no revised Exhibit U-2, or any intention to reconstitute it. If there are any future requests for records, they will be addressed with the benefit of the arbitral award. Mr. Williams noted that the University is not challenging in any way my jurisdiction to apply the FIPPA; however, the exercise of my jurisdiction is complete. That is, I have completed my statutory task as per Chandler (supra).

Reasons for Decision

[22] The narrow issue addressed by this award is whether I have jurisdiction to hear further submissions from the Association respecting the grievance that was the subject matter of my arbitral award of September 29, 2008. It is the Employer's contention that the matters addressed in that award have been put to rest; that is, my award is complete, and the Association is in effect attempting to reopen the matter and make alternative arguments that could have been made in the first instance.

[23] In support of his submissions, Counsel for the Employer referred to several decisions. The gist of those decisions is that tribunals should be reluctant to address issues that have become moot. I agree with that principle. However, this goes to the very heart of why I retained jurisdiction in my September 29, 2008, arbitral award. I specifically recognized that there may well be issues arising out of the grievance and the award that required further determination on my part, and accordingly I retained jurisdiction in order to address those issues. By retaining jurisdiction, and hearing further submissions as requested by the Association, I am not reopening the award; rather, I am completing it. I recognize, however, that I must exercise caution in exercising the jurisdiction that I retained in this matter. Clearly, it is not open to the parties to make further submissions or alternative arguments in respect of matters that have already been decided. However, in the context of this case, it was certainly anticipated that there might be a need for further consideration and deliberations in order to address the range of issues specifically raised in the Association's grievance. In fact, counsel who represented the University in the first instance specifically recognized and acknowledged that possibility.

[24] I respectfully disagree with Counsel for the Employer's contention that the withdrawal of U-2 effectively brings to an end the arbitral issues. Even a cursory reading of the grievance (see paragraph 3, supra) demonstrates that the grievance was about more than the fate of U-2. Any doubts about this were surely dispelled during the course of the lengthy hearings, during which Counsel for the University made detailed and wide-ranging submissions concerning the issue of custody and control.

[25] With respect to Mr. Williams' submission that the retention of jurisdiction was predicated on both parties bringing the matter back to the arbitrator, I would observe that such a proposition would effectively give one party a veto over the completion of the award. There have been many instances where arbitrators have retained jurisdiction – for example, on the question of compensation – to allow the parties to reach an agreement and thereby avoiding potentially protracted hearings. The acceptance of the contention that both parties must agree before an issue can be brought back before the arbitrator would put the grievor at a severe disadvantage. I would agree with Counsel for the Association that this would constitute a subversion of the arbitration process.

[26] Accordingly, I find that I have jurisdiction to hear submissions with respect to the question as to which types of documents in the possession of members of the Association are subject to the access or control of the University. I am prepared to hear submissions concerning this issue. Consequently, this arbitration hearing will reconvene on February 16, 2009 for that purpose.

DATED AT OTTAWA, ONTARIO, JANUARY 20, 2009.

Philip Chodos
Arbitrator