

# SIMON FRASER UNIVERSITY

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31 October 2000

Dr. Jack Blaney  
President  
Simon Fraser University  
Burnaby,  
BC,  
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Dear President Blaney,

On June 14<sup>th</sup>, 2000, Dr. James Ogloff, Chair of the URERC, circulated a memo to SFU researchers saying that the existing University Research Ethics Policy is still in force and will be until such time as SFU has a new ethics policy. However, his description of what the policy entails departed in several significant respects from R20.01. On June 20<sup>th</sup>, 2000, we sent a memo to Dr. Ogloff and the URERC asking why he and the URERC are not following R20.01. He did not reply. Three months later, in September, we sent Dr. Ogloff a note asking when we could expect a reply. On September 26<sup>th</sup> he responded, "I'll get back to you. It may be that the matter is one for the university administration and not the Committee." We still have not had a response from either him or the university administration. Meanwhile, the most recently released minutes of the URERC indicate that on July 4, 2000, the committee once again initiated a substantive change to the research ethics policy without securing appropriate approval (see points 6 and 7, below).

Several times over the past three years we have brought administrative violations of the SFU research ethics policy (R20.01) to your attention. The purpose of this letter is to notify you that these policy violations are still occurring. Several of the violations are clear-cut. Some involve infringements of academic freedom. Since 1994, the URERC and VP-Research have failed to fulfill their duty of fairness to researchers. Even in the case of the most obvious violations of R20.01, such as the School of Business Administration's "ethics application waiver," the VP-Research still has not instructed the University Research Ethics Review Committee (URERC) and the School of Business Administration to comply with R20.01. Indeed, he is not complying with the policy himself. If the VP-Research and the URERC are exempt from the university research ethics policy, why should anyone else feel bound by it?

In February 1998, the VP-Research resigned as Chair of the URERC in recognition of his institutional conflict of interest. Shortly thereafter, you took the positive step of taking the responsibility for drafting a new policy out of the hands of the VP-Research and URERC and giving it to the Research Ethics Policy Revision Task Force (hereafter the "Task Force"). Since then, the university research community has gone month to month in the belief that a new ethics policy is just around the corner. However, two more years have passed, during which time we have seen a Senate committee take over the task of revising the ethics policy, a successful

grievance by us against the ethics administration's infringement of our academic freedom, and the appointment of "consultants" to administer ethics applications when that is the job of the URERC. Still, there is no new policy in sight, and no guarantee that Senate will accept the next draft. It could still be a year or more before we have a new policy. The VP-Research and the URERC — a committee constituted by and operating according to principles that clearly violate the *Tri-Council Policy Statement* — continue to violate R20.01.

University Policy A30.01 (*Code of Faculty Ethics and Responsibilities*) says that faculty, "have a responsibility to abide by the rules and regulations established for the orderly conduct of the affairs of the University, provided that the rules and regulations do not infringe the academic freedom of faculty and students...." For several years the VP-Research and URERC have not abided by the rules and regulations specified in the university ethics policy, and have applied R20.01 in a way that infringes academic freedom and the URERC's duty to fairness. Because they continue to do so, we are invoking policy A30.01 and refusing to undergo ethics review until the University formally resolves the problems we outline below.

R20.01 says that, "Questions of interpretation or application of this policy or its procedures shall be referred to the President whose decision shall be final." Accordingly, we ask you to rule on the following eight points.

### **For the President's Decision: Issues Regarding the Interpretation and Application of R20.01**

***1) The VP-Research and the URERC created a separate ethics approval process for the Faculty of Business Administration thereby breaching its duty of fairness in the application of R20.01 to the rest of the University.***

Since December 1994 when the Clayman-Chaired URERC initiated this arrangement, no research ethics application in the Faculty of Business Administration has been approved according to the procedure laid out in R20.01, except perhaps for research conducted as part of course requirements. The University research ethics policy R20.01 requires that *all* applications be approved by the Chair on behalf of the Committee or by a majority vote of the Committee if the Chair calls the Committee together. The VP-Research and URERC cannot delegate this power to a faculty member in Business Administration, even if that person sits on the URERC. Neither the VP-Research nor the successive Chairs of the URERC he has appointed have stepped in to discontinue this practice, which has now continued for two and a half years since we first informed you.

**Resolution:** The URERC, VP-Research, Faculty of Business Administration and any other unit enjoying an application waiver should be instructed to follow university policy.

***2) Extended the requirement for ethics review to secondary data sources (the VP-Research has the wrong definition of "research" posted on the URERC web page)***

R20.01 says that, "All research involving subjects to be undertaken by a [University] researcher ... will be directed to the Committee." A scholar using a secondary database is using "research" that has already been done. If the policy is interpreted as requiring approval of use of secondary data, then other sections of the policy, such as the requirements for informed consent,

would be impossible to fulfill (researchers would have to track subjects in secondary data bases to secure informed consent).

The URERC web page definition of "research"<sup>1</sup> does not correspond to the definition in the 1992 version of R20.01.<sup>2</sup>

**Resolution:** the VP-Research should post the R20.01 definition of "research" and issue a statement notifying researchers that use of secondary databases does not require ethics review.

**3) *The URERC still uses the "limited confidentiality consent statement" in its application forms without explaining to applicants that they do not have to use it. This consent statement can be used to prevent some researchers from following their disciplinary ethics code, could be interpreted as waiver of privilege, and does not provide the information necessary for informed consent.***

The "Rationale" for policy R20.01 begins, "There is a professional responsibility of researchers to adhere to the ethical norms and codes of conduct of their respective disciplines." The URERC's policy of "limited confidentiality" prevents researchers from following their disciplinary ethics codes. Beginning in 1994, the limitation of confidentiality represented an unauthorized substantive change to R20.01. The University research ethics administration held up our research for eighteen months because we refused to use the URERC's "limited confidentiality consent statement" on the grounds that it infringed our academic freedom to follow our disciplinary ethics code. Through the conciliation process, we won the right to follow our disciplinary code. However, the URERC is still using the limited confidentiality consent statement as its default option without explaining to applicants that they do not have to use it.

**Resolution:** The URERC should be instructed to stop using the limited confidentiality consent statement, as it prevents some researchers from adhering to the ethical norms and codes of conduct appropriate to their respective disciplines.

**4) *The URERC Chair's June 14<sup>th</sup> 2000 memo indicates that all graduate student research with human subjects must be submitted for ethics review. However, R20.01 says that departments and faculties are responsible for reviewing research done as part of course requirements.***

R20.01 says, "Responsibility for determining the ethical acceptability and conduct of ... student research that is carried out in fulfillment of course requirements and which involves subjects rests with the department or faculty in which the course is being taught." The URERC can "examine the review procedure used by departments and/or Faculties and to review particular student cases where the Committee deem it appropriate to do so." However, it cannot usurp the role of departments and faculties in "determining the ethical acceptability" of research done as part of a course requirement. Dr. Ogloff's memo of June 14<sup>th</sup> suggests the URERC is doing exactly that. Our two requests for clarification on this issue have received no response.

**Resolution:** the VP-Research should be held responsible for ensuring that the URERC follows the policy.

<sup>1</sup> <http://www.sfu.ca/vp-research/ethics/ethcom/approval.html>

<sup>2</sup> <http://www.sfu.ca/policies/research/r20-01.htm>

***5) The creation of the "Research Ethics Consultant" position subverts the core structure of the Research Ethics Policy. The Policy charges the URERC with the task of undertaking ethics review. It has given that job to a consultant.***

R20.01 makes no provision for a "Research Ethics Consultant" to handle the entire interaction with applicants and make recommendations to the Chair, who then accepts the recommendation without any interaction with the applicant save for the acceptance letter. And yet, this appears to have become standard practice since the ethics consultant position was established. "Procedures" section 6.g.viii says that among the submissions an applicant must make is any "Such material or information *as the Chair or Committee* may request" (emphasis added). The policy makes no provision for a "consultant" to interact with an applicant, let alone request or require anything of them. The URERC and VP-Research do not have the authority to delegate this power. The clear intention of R20.01 is to constitute the URERC as the university's decision-making body regarding research ethics applications; the REC position subverts that intent.

**Resolution:** The Chair and the Committee should review applications and interact with applicants as per the procedure laid out in R20.01.

***6) Revelation of Prospective Harm: The URERC's July 4<sup>th</sup> "Duty to Report" Requirement is a Substantive Change to the Policy that Infringes Academic Freedom***

At its July 4<sup>th</sup> meeting, the URERC apparently decided to require researchers to report to the "authorities" *any* prospective harm:

The Committee agreed that if the researcher receives information obtained from the subject, which reveals that harm will be done to an individual, this information must be reported to the authorities immediately (July 4<sup>th</sup>, 2000 minutes as posted on the URERC web site).

This "duty to report" policy marks another substantive change to R20.01. The URERC does not have jurisdiction to substantively change this policy. This particular change is ill advised because:

- i. The "duty to report" policy creates an ethical catch-22 for researchers. R20.01 says. "There is a professional responsibility of researchers to adhere to the ethical norms and codes of conduct appropriate to their respective disciplines." No disciplinary ethics code permits a breach of confidentiality for "harm that will be done to an individual." Disciplinary ethics codes open the door for violating a guarantee of confidentiality to prevent *serious harm or death*, but they do *not* require researchers automatically to report threats. As proclaimed in its minutes for July 4<sup>th</sup>, the URERC's "duty to report" policy infringes the academic freedom of researchers to follow their disciplinary research ethics codes.
- ii. By not defining the type of harm in question (e.g., that it should be very serious, imminent and involve a specific target), the "duty to report" policy is not consistent with the principles laid out in Canadian common law that would permit (but not require) a violation of confidentiality in those unique circumstances (for a description of these principles, see *Smith v. Jones*, [1999] 1 S.C.R. 455).
- iii. The duty to report policy gives the impression that a researcher will always have to make a "snap" decision. A "threat" may be such that the researcher has hours or days to consider

how to respond. There may well be enough time to use the kind of practice described in the *Canadian Code of Ethics for Psychologists*. That *Code* says psychologists should:

IV. 15 Abide by the laws of the society in which they work. If those laws seriously conflict with the ethical principles contained herein, psychologists would do whatever they could to uphold the ethical principles. If upholding the ethical principles could result in serious personal consequences (e.g. jail or physical harm), decision for final action would be considered a matter of personal consequence.

IV. 16 Consult with colleagues, if faced with an apparent conflict between keeping a law and following an ethical principle, unless in an emergency, and seek consensus as to the most ethical course of action and the most responsible, knowledgeable, effective, and respectful way to carry it out.

The same sort of approach should be taken to "heinous discovery."

**Resolution:** The "duty to report" policy described in the July 4<sup>th</sup> minutes of the URERC should be rescinded immediately.

### ***7) Contrary to R20.01, the URERC is Exposing Researchers and Participants to Risk***

The "duty to report" policy that the URERC is trying to impose likely can be traced back to *Tarasoff v Regents of Univ. of California* (551 P.2d, 334 (Cal. 1976)). In this widely cited case — which did *not* arise in a research context — a California court attempted to define the obligation of a psychotherapist towards a third party whom a patient had threatened to kill. Even if the same decision were to be applied to the research context, it is important to recognize that *Tarasoff* is a Supreme Court of California decision and is binding only in California and other jurisdictions that have adopted it. Other states have taken the position that confidentiality in therapy outweighs the value of duty to third parties (Owens, 1998<sup>3</sup>). British Columbia has not adopted *Tarasoff*.

British Columbia also has not adopted the recent Georgia decision in *Garner v. Stone* (2000). This case resulted in \$280,000 damages after a psychologist, following *Tarasoff*, violated a confidence to prevent what he deemed to be a threat to the lives of others (see Appendix for a brief description). This case raises the following concerns about the URERC's "duty to report" policy:

- i. If the *Garner v. Stone* decision were to be reproduced in British Columbia, the URERC's "duty to report" policy could result in legally actionable harms to research participants. The URERC's mandate is to protect research participants, not harm them.
- ii. The URERC has created its edict without generating any accompanying guidelines as to how researchers are supposed to distinguish a "vision" or "fantasy" (as occurred in *Garner v. Stone*) from a "real" threat (as occurred in *Tarasoff*).
- iii. Suppose that, following *Garner v. Stone*, a research participant is awarded damages as a result of harm done by the revelation of confidential information according to the URERC's "duty to report" policy. Has the university agreed to pay any and all damages arising from such an action?

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<sup>3</sup> Howard Owens, "The Tarasoff Case. Myths and Misconceptions" (*Forensic Psychiatry* January 1998).

- iv. The URERC's "duty to report" policy is not consistent with the "duty" that the Supreme Court of California decision specified in *Tarasoff*: i.e. the "duty to *protect*." In this regard, Owens (1998) notes that when the Supreme Court of California amended its 1974 decision, "it redefined the obligation of the therapist to one of protecting the potential victim, rather than requiring a warning." The URERC is ill advised in requiring immediate reporting of threats to authorities when other options may exist that would better protect *both* research participants *and* third parties.

**Resolution:** The policy introducing the "duty to report" described in the July 4<sup>th</sup> 2000 minutes should be rescinded immediately.

***8) The Inconsistency of Ethics Decisions Violates the URERC's Duty of Fairness.***

Ethics review has become a process of adjusting to the personal ethics philosophy of each new ethics consultant, a position that the policy does not actually make provision for. The requirements of the first ethics consultant, the second ethics consultant and the URERC are inconsistent. Currently, the ethics consultant and the URERC appear to be using different definitions of the "harms" underlying their different versions of the duty to report. Administration by fiat is manifestly unfair.

**Resolution:** The Chair and the Committee should review applications and interact with applicants as per the procedure laid out in R20.01.

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Yours truly,

John Lowman and Ted Palys  
School of Criminology

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# Appendix

## Psychologist Sued For Giving "Tarasoff" Warning

Complete Article Available at  
<http://www.lawnewsnetwork.com/stories/A12736-2000Jan4.html>

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## Ex-Cop Wins Rare Confidentiality Case

### Jury Awards \$287,000 for Psychologist Telling of Client's Lethal Fantasies

Trisha Renaud  
Fulton County Daily Report  
January 5, 2000

In what is apparently the first such trial in Georgia and possibly in the country, a DeKalb County jury has held a psychologist liable for disclosing a patient's confidences.

When Gwinnett County police officer Gordon Garner III told clinical psychologist Anthony V. Stone during a fitness-for-duty interview that he had had a vision of killing his captain, and thoughts about killing eight to 10 others including the chief and a county commissioner, Stone took it seriously.

Stone eventually reported the conversation to Garner's superiors.

Garner took Stone to court. He charged negligence and defamation, and claimed that his subsequent suspension from the force and demotion to duty at the dog pound were a direct result of the psychologist's betrayal. Garner eventually was terminated.

Stone responded that his duty to warn those to whom Garner posed a danger eclipsed his duty to respect the patient's confidence.

Last month, a DeKalb State Court jury awarded Garner and his wife \$176,470.96 in damages and \$103,778.71 in attorney's fees. *Garner v. Stone*, No. 97A-30250-1 (DeKalb St. filed Feb. 5, 1997).

Lawyers for both sides believe it is the first such case to come to trial in Georgia.