

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-4066

Appeals PA18-203, PA18-311, and PA18-312

Laurentian University

September 16, 2020

Summary: Laurentian University ("Laurentian") received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to the salary and benefits of the presidents of three federated universities. The university denied access on the basis that the records are not in its custody or control and that, as a result, there is no right of access to them under the *Act*. The requester appealed. In this order, the adjudicator finds that the federated universities are not part of Laurentian for the purposes of the *Act*, and that the employment contracts of the presidents of the federated universities are not in Laurentian's custody or control. However, she finds that some salary and benefit information of the federated universities' presidents is found in other records that are in Laurentian's custody or control, and orders Laurentian to issue an access decision with respect to those records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(1) (definition of "institution"), 10(1).

Orders and Investigation Reports Considered: Orders PO-2775-R, MO-3141, MO-3142, MO-3143, MO-3144, MO-3145, MO-3146, P-239, PO-1725.

Cases Considered: *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario (TEDCO)*, 2008 ONCA 366.

BACKGROUND

[1] The appellant, an association that was represented for the purposes of these appeals by an individual, submitted three requests under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* to Laurentian University of Sudbury (Laurentian) for information relating to each of the presidents of three federated universities affiliated with Laurentian: the University of Sudbury, Huntington University and Thorneloe University. Specifically, in each request, the appellant sought access to:

... the current contract and terms of employment for [named president of the federated university] as president of [the federated university], including salary, benefits, pension and a list of all other entitlements (for example a list of allowable expenses such as housing, terms of travel whether first class, business class, memberships in clubs and associations and other perquisites and benefits).

[2] Laurentian issued three decisions denying the appellant access to the requested records on the basis that the records are not in its custody or under its control and that, as a result, there is no right of access to them under section 10(1) of the *Act*.

[3] The appellant appealed the university's decisions and the IPC opened three appeal files. During mediation, Laurentian maintained its position that the records are not within its custody or under its control. The appellant referred to Reconsideration Order PO-2775-R (discussed in more detail later in this order) and maintained her position that the federated universities are part of Laurentian for the purpose of the *Act* and Laurentian has custody and control over the responsive records. Mediation did not resolve the appeals and they were transferred to the adjudication stage of the appeal process. The assigned adjudicator began her inquiry by inviting Laurentian, the three federated universities identified in the request, and each federated university's president to make representations.

[4] Laurentian University, the three federated universities and one president submitted representations. The appellant then provided her representations, and the appeals were transferred to me. I asked Laurentian for clarification of its representations respecting the benefit plans and received that clarification.

[5] In this order, I find that the University of Sudbury, Huntington University and Thorneloe University are not part of Laurentian for the purposes of the *Act* and that the employment contracts of the federated universities' presidents are not in Laurentian's custody or control, so there is no right of access to them under the *Act*. I find, however, that Laurentian has custody or control of certain salary and benefit information that is responsive to the request, as a result of its role as administrator of benefits plans for the employees of the federated universities. I order Laurentian to make an access decision relating to the latter records.

ISSUES

Issue A: Are the federated universities part of Laurentian for the purposes of the *Act*?

Issue B: Are the records at issue in the custody or under the control of Laurentian under section 10(1) of the *Act*?

RECORDS

[6] The records at issue are the employment contracts of the presidents of the three federated universities, and other records in Laurentian's possession containing salary and benefit information relating to the presidents of the three federated universities.

DISCUSSION

[7] The issues in these appeals are whether the federated universities are part of Laurentian for the purposes of the *Act*, and if not, whether Laurentian nonetheless has custody or control of the records under section 10(1).

[8] Section 10(1) of the *Act* reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[9] Under section 10(1), a right of access applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is in the custody or under the control of an institution; it need not be both.¹

[10] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.² A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 65, or may be subject to a mandatory or discretionary exemption (found at sections 12 through 22 and section 49).

[11] The courts and this office have applied a broad and liberal approach to the custody or control question.³ Based on this approach, this office has developed a list of

¹ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

² Order PO-2836.

³ *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.); and Order MO-1251.

factors to consider in determining whether or not a record is in the custody or control of an institution.⁴ I will set out this list in more detail later in this order but for the moment I note that it includes matters such as who created the record; whether the institution has a statutory power or duty to carry out the activity that resulted in the creation of the record; whether the content of the record relates to the institution's mandate and functions; and whether the institution's possession of the record is more than "bare possession".

[12] The factors are to be considered contextually in light of the purpose of the legislation.⁵ Where an institution does not have possession of the record, a relevant factor is whether it could reasonably be expected to obtain a copy on request.

A. Are Huntington, U Sudbury and Thorneloe part of Laurentian for the purposes of the Act?

Order PO-2775-R

[13] The appellant relies on a previous order of this office, Reconsideration Order PO-2775-R,⁶ and all parties⁷ referred to it in their representations. I will briefly summarize the order before moving to the parties' representations.

[14] Order PO-2775-R addressed the issue of whether the University of Toronto (U of T) had custody or control of a record in the possession of the University of Victoria (Victoria). The record at issue in that case was a report written by a consultant for a United Church of Canada/Victoria University Archives Task Force that had been formed as part of a program renewal exercise.

[15] "Institution" is defined in section 2(1) of the *Act*.⁸ The relevant part of that definition reads:

"institution" means,

⁴ Orders 120, MO-1251, PO-2306 and PO-2683.

⁵ *Ottawa (City) v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835

⁶ For the sake of brevity, I will refer to this order as Order PO-2775-R.

⁷ Except Thorneloe, which provided only brief representations.

⁸ Under section 2(1) of the *Act*, an "institution" means:

(0.a) the Assembly,

(a) a ministry of the Government of Ontario.

(a.1) a service provider organization within the meaning of section 17.1 of the Ministry of Government Services Act,

(a.2) a hospital, and

(b) any agency, board, commission, corporation or other body designated as an institution in the regulations.

(b) any agency, board, commission, corporation or other body designated as an institution in the regulations;

[16] Regulation 460 under the *Act* contains a schedule listing the institutions covered by the *Act*. Victoria is not listed in the relevant schedule. The parties and the adjudicator framed the issue to be decided as whether Victoria was nevertheless part of U of T for the purposes of the *Act*, and was subject to the *Act* for that reason.

[17] The adjudicator found that Victoria was part of U of T, and therefore subject to the *Act*, for three main reasons:

- The legislative history of the amendments that brought Ontario's universities under the ambit of the *Act* suggests that all universities receiving public funding were intended to be included. In the adjudicator's view, there is no principled reason why this would not include those universities whose largest source of public funding is derived from a flow-through of monies, like Victoria, from a scheduled university, like U of T.
- The degree of integration of the administrative, financial and academic operations of Victoria and U of T supports a finding that Victoria is part of U of T for the purposes of the *Act*. Here, the adjudicator pointed to U of T's flow-through funding of Victoria, and the fact that Victoria suspended its degree-granting authority for all except divinity students, which results in its students receiving a degree not from Victoria but from U of T.
- Victoria and U of T took various steps to prepare for their inclusion in the freedom of information and privacy protection regimes under the *Act* at the time of the amendments. This showed that they considered Victoria to be subject to the requirements of the *Act*.

[18] The adjudicator added a post-script to the order, stating in part as follows:

While this order deals only with Victoria, it is clear from the legislative history surrounding the amendment of the *Act*, which saw the inclusion of the university sector, that it was the intention of the Legislature that all publicly-funded universities would be subject to the *Act*.

Specifically listing all publicly funded universities in the Schedule to Regulation 460 including those universities and colleges that are federated or affiliated with universities already listed in the Schedule, would remove any uncertainty over whether those entities are subject to the *Act*. Accordingly, I am providing the Ministry of Government Services, which

has responsibility for administering the *Act*, with a copy of this reconsideration order and recommend that it move expeditiously to address these issues.

[19] The Schedule to Regulation 460 has not in fact been modified since Order PO-2775-R to add all publicly funded universities. Thorneloe, Huntington and U Sudbury are not listed in the Schedule.

[20] The appellant argues that the reasoning in Order PO-2775-R is equally applicable here, while the other parties take the position that the facts in that order are distinguishable from those present here, and/or that the order was wrongly decided. As seen later in these reasons, I find Order PO-2775-R to be distinguishable from the circumstances before me.

Representations of Laurentian, Huntington, Sudbury and Thorneloe

Background

[21] Laurentian, Huntington and U Sudbury provided some background information on their respective histories and the relationships of the federated universities with one another and with Laurentian.

[22] The three federated universities are “federated” with Laurentian pursuant to agreements that allow them to meet their own unique mandates by collaborating with a larger post-secondary educational institution.

[23] The University of Sudbury was founded and incorporated pursuant to statute in 1913 (as Collège du Sacré-Cour). It was the first, and for many years the only, institution of higher learning in Northern Ontario. In 1957, it changed its name to “University of Sudbury” and began to exercise its full teaching and degree-granting powers. It entered into the Laurentian Federation as a founding member in 1960. It offers programs and courses in philosophy, Indigenous studies, religious studies, folklore, and “études journalistiques,” all of which are accredited towards a Laurentian University degree.

[24] Huntington University is a corporation⁹ founded as an affiliate of the United Church of Canada in 1960, existing today as a liberal arts university that offers courses in religious studies, theology, ethics, gerontology and communication studies.

[25] Thorneloe University was founded and incorporated in 1961 by the Synod of the Anglican Diocese of Algoma. Today, Thorneloe is an interdisciplinary centre of teaching, learning and research in the humanities, the arts and theology.

⁹ *An Act to Incorporate Huntington University*, S.O. 1960, c. 143.

[26] Laurentian was incorporated under *The Laurentian University of Sudbury Act, 1960 (Laurentian Act)* as a bilingual institution with representation from the Roman Catholic, United and Anglican Churches. Today, it aims to be Northeastern Ontario's comprehensive university.

[27] The three federated universities have their own independent governance bodies, with each university having its own chief executive officer (president) reporting to its own Board of Regents or Board of Governors, as the case may be. It is submitted that no one of these officers or boards has any authority over the other.

Federation agreements

[28] The *Laurentian Act* contemplates academic federations between Laurentian and the federated universities by which the federated universities suspend their own granting of degrees to enable their students to obtain Laurentian degrees.¹⁰ Each agreement "admits" the smaller university into federation with Laurentian and stipulates that the federated university's degree-granting powers are suspended. The federation agreements were entered into in 1960, in the case of U Sudbury and Huntington, and 1961, in the case of Thorneloe.

Relationships between the universities

[29] Laurentian, Sudbury, Huntington and Thorneloe all stress the independence of the federated universities relative to Laurentian and to one another. Laurentian explains that while the *Laurentian Act* leaves the parameters of federation mostly to be defined by agreement, that act does expressly state that the Laurentian Board of Governors has no power to hire or fire employees of the federated universities. The federated universities all have their own collective agreements and employment policies.

[30] In accordance with the terms of their respective federation agreements, Laurentian provides a number of services to the federated universities in exchange for payment of service fees. However, the affairs of the federated universities are managed by their own independent Board of Regents or Board of Governors, and their own presidents. As an example, U Sudbury provided a copy of its own General By-law.

[31] The relationships of the federated universities with Laurentian are governed by contract, and in particular, the federation agreements. Upon federation with Laurentian, the federated universities agreed to sell certain assets and suspend certain of their degree-granting rights in order to coordinate with the other federated universities, achieving economies of scale and avoiding unnecessary duplication of services. However, the federation agreements do not give Laurentian a right to direct or control

¹⁰ The parties provided copies of the federation agreements with Huntington, U Sudbury, and Thorneloe.

the operations of the federated universities, including their management of human resources. The federated universities maintain exclusive control over their operations and their assets remain entirely their own.

[32] Huntington explains that Laurentian does not teach any classes in Huntington's buildings, that its faculty do not have offices in Huntington's buildings, and that there are no cross-appointments between Laurentian and Huntington. While students of Huntington may also be students of Laurentian, the universities themselves remain distinct. Similarly, U Sudbury says it has its own Registrar, full-time faculty members and its support staff, which it does not share with Laurentian or any other federated university. U Sudbury courses are taught by U Sudbury faculty in the U Sudbury building, though U Sudbury students may also register in classes offered by Laurentian or other members of the Laurentian federation. Laurentian does not teach any classes in the U Sudbury building nor do its faculty members have offices there.

[33] U Sudbury further explains the extent of the academic collaboration between it and Laurentian. It says that it promotes itself as distinct and separate from Laurentian, despite the latter's authority to issue degrees to those students graduating from courses at U Sudbury. The parties collaborate on academic matters, as required to give effect to Laurentian's power to confer degrees in respect of U Sudbury students. Laurentian also provides some administrative services to U Sudbury students, for which U Sudbury pays, in accordance with their contractual arrangements. For example, U Sudbury students register through Laurentian and pay their tuition fees to Laurentian, which it then transfers to U Sudbury. U Sudbury students obtain Laurentian academic credentials in accordance with Laurentian's academic requirements. Nevertheless, U Sudbury has sole control over the programs and courses it offers, the development and delivery of its programs, the size of its classes, its tuition fees, student recruitment, and evaluation. There are no cross or joint appointments between U Sudbury and Laurentian.

[34] With respect to finances, U Sudbury explains that its sources of funding include funds provided by Laurentian based on the federation agreement, religious institutions, its own endowment funds, and tuition and residence fees. Laurentian does not retain any decision-making authority over how U Sudbury chooses to allocate the funds that it receives from Laurentian, including the salaries and benefits entitlements of U Sudbury employees or its president. U Sudbury has its own building, infrastructure, and assets, which it owns exclusively. In accordance with the federation agreement, it merely rents the land on which U Sudbury and its student residence is located from Laurentian.

[35] Huntington, too, explains that it has its own building, infrastructure, assets, and employees. It also has a unique collective agreement with its academic staff, who form their own distinct bargaining unit. Non-unionized staff members are subject to Huntington's administrative and support staff policies alone, and not those of Laurentian. Like the other federated universities, Huntington also adopts and enforces

its own governing policies separately from Laurentian. For example, Huntington has its own unique Accessibility Policy; Health and Safety Policy; and Harassment, Sexual Harassment and a Violence-Free Workplace Policy.¹¹

[36] U Sudbury points out that its president is not an employee of Laurentian but of U Sudbury, appointed by the Board of Regents, in which Laurentian and its officers take no part. None of the members of Laurentian's Board or executive sit or are entitled to sit on the Board of Regents of U Sudbury. Thorneloe, too, says that its Board of Governors is solely responsible for the appointment of all of its employees and that it alone is responsible for paying its president's salary.

[37] Finally, Laurentian submits that the only responsive information it possesses is a result of one of its arrangements with the federated universities in exchange for payment of service fees. The arrangement in question allows federated university employees to participate with Laurentian employees in certain benefit plans. The federated universities pay the all benefit costs and make all benefit contributions in respect of their own employees. Laurentian handles the personal information of the federated universities' employees, subject to a duty of confidence that prohibits Laurentian from dealing with the information for its own purposes. Laurentian takes no position on whether this particular information is in its custody or control for the purposes of the *Act*, while U Sudbury and Huntington argue that it is not. This argument is addressed under Issue B below (custody and control).

Argument

[38] Laurentian and the federated universities argue that the latter are not part of Laurentian under the *Act*.

[39] The universities argue that the words "Laurentian University of Sudbury" in Regulation 460 do not include the three federated universities. Laurentian points out that its designated head is the "executive head" – i.e., its president. The president has the powers and duties of the president's office as established by the *Laurentian Act*. Pursuant to the *Laurentian Act*, he is the chief executive officer of Laurentian and has supervision over and direction of the academic work and general administration of Laurentian and its teaching staff, students, and officers. Laurentian submits that the *Laurentian Act* does not assign to its president any powers in respect of federated universities (though the *Laurentian Act* does include other provisions about federated universities). Laurentian submits that from this reading of the *Act* and the *Laurentian Act*, it is clear that the intent of the regulation was to designate Laurentian alone as an institution.

[40] Laurentian also argues that since the right of access to records applies to records in the "custody or control" of an institution, the *Act* already features a mechanism for

¹¹ Huntington provided copies of these policies.

addressing whether records belonging to a related or affiliated entity are subject to the right of access. Laurentian submits that this record-specific mechanism is the only mechanism contemplated by the Legislature to apply to matters such as the one raised by these appeals.

[41] Huntington, U Sudbury and Thorneloe, too, say that they are separate bodies from Laurentian, and that since they are not listed in the schedule to Regulation 460, their records are not accessible under the *Act*. U Sudbury argues that it has opted to contract at arm's length with Laurentian for cost efficiency reasons, but it is under no legal obligation to do so - it could terminate the contracts and choose to perform the work itself or it could contract with other service providers. U Sudbury also notes that unlike Laurentian, it does not receive a direct operating grant from the Ministry of Training, Colleges and Universities.

Order PO-2775-R

[42] Laurentian, Huntington and U Sudbury argue that Order PO-2775-R is distinguishable because it was decided based on manifestly different facts from those present here. Laurentian and Huntington also argue that Order PO-2775-R was wrongly decided.

Order PO-2775-R is distinguishable

[43] Laurentian notes that in Order PO-2775-R, Victoria University had described itself as being "in the University of Toronto", and the adjudicator found that the operational and financial affairs of Victoria and U of T were integrated to a very high degree. In contrast, section 18 of the *Laurentian Act* gives Laurentian's Board of Governors power to control the "operational and financial management" of Laurentian alone. Laurentian can enter into federation agreements as contemplated by the *Laurentian Act*, but these agreements create much less integration than that between Victoria and the University of Toronto. They merely create an academic collaboration that entails the granting of Laurentian academic credentials to students of the federated universities. They do not invite operational and financial integration.

[44] Huntington notes that the Order PO-2775-R adjudicator, in finding that there was a "high degree of integration" between the University of Toronto and Victoria University academically, placed significant weight on the fact that it was difficult to tell where Victoria University undergraduate programs ended and University of Toronto programs began. Huntington notes that, in contrast, its courses are taught by separate faculty, under a separate collective agreement, in a separate physical location. While all Huntington students are entitled to graduate with degrees conferred by Laurentian (with the exception of the graduate degree in counselling, which is conferred exclusively by Huntington) there is virtually no overlap between full-time academic staff for Laurentian and Huntington.

[45] U Sudbury argues that there is no integration between it and Laurentian beyond the academic integration described above. It says that in Order PO-2775-R, there was a high degree of integration between the University of Victoria and the University of Toronto. Under that federated framework, the humanities departments at University of Victoria and the other U of T federated universities had long been amalgamated into university-wide departments, while faculty members kept their appointments in their respective federated universities or university college. Furthermore, Victoria is not exclusive to Victoria faculty, staff and students; rather, it hosts faculty, graduate students and staff of a number of several University of Toronto departments and centres. U Sudbury says that this is significantly different from the relationship between U Sudbury and Laurentian, where there is only limited collaboration in the parties' academic operations, and U Sudbury maintains separate and independent operations from Laurentian in all other areas.

[46] With respect to financial integration, Huntington observes that in Order P-2775-R, the adjudicator found that "the financial affairs of Victoria and the University are integrated to a very high degree", and specifically noted the University of Toronto's obligation to provide funding to Victoria University "at levels comparable to the costs of similar activities within the University's own operations". By contrast, Huntington submits, the financial affairs of Huntington and University are not integrated in this manner. The federated universities' finances are separate and they do not share risk, revenue or profits. Further, while the University of Toronto provided financial support to the University of Victoria for its day-to-day operations, including such things as administration and registrar services, the reverse is true here: Huntington pays Laurentian to provide the same in this case and it is entirely within Huntington's rights to allow its contracts with Laurentian to expire or be terminated, and to contract with other service providers for IT services, security, student counselling, and so on. However, it has opted to contract with Laurentian in this regard in order to provide these services cost-effectively.

[47] Huntington explains that the federated universities are financially autonomous and fundraise separately. Each university generates its own budget and revenue, and manages its own finances. The universities bill and pay one another for use of space and services. There is no commingling of funds or assets, except for some incidental expenses, such as the sharing of licensing fees for online journals.

[48] Huntington's academic staff have their own union local (LUFA-H) and Huntington is the sole employer in their collective agreement, a copy of which Huntington provided.

[49] Huntington and U Sudbury also observe that the adjudicator in Order PO-2775-R relied on the fact that Victoria University had its own privacy policy in relation to the *Act*, as well as its own *FIPPA* officer, and that it had a process for responding to access requests that was integrated with, and delegated from, the University of Toronto. That process involved a formal agreement whereby the parties undertook to respond to

FIPPA requests collaboratively. All these factors the adjudicator took as evidence that Victoria University “understood that they would fall within the ambit of the *Act*”. By contrast, Huntington notes that it has no privacy policy because it is not subject to the *Act*. It has no *FIPPA* officer and does not process *FIPPA* requests for Laurentian. U Sudbury says essentially the same thing.

Order PO-2775-R is also wrongly decided

[50] Laurentian and Huntington submit that Order PO-2775-R is wrongly decided. They say that the adjudicator, in reading the schedule in Regulation 460 to include Victoria, relied on the purposive construction principle instead of construing the relevant text of the *Act*. Laurentian states that, for unknown reasons, the Government did not designate the federated universities as institutions, but that this should be presumed to be a deliberate choice. Huntington notes that the government never added Victoria University or the federated universities at issue here to the schedule, despite the adjudicator’s postscript noting the oversight in the Regulation and urging the government to do so.

[51] Laurentian also submits that the adjudicator in Order PO-2775-R failed to consider the significant harmful consequences of finding that a designated institution includes a legally distinct and autonomous institution. It says it will have no context to understand or interpret a request for records of the federated universities because it has no dealings with the subject matter of the request. Further, it says it has no power to conduct a search for records.

[52] Laurentian also notes that the *Act* contains not just access rights but also privacy obligations, and that to accept Order PO-2775-R’s finding as applicable here would be to suggest that the Laurentian (and its Head) are responsible for privacy protection at the federated universities.

Appellant’s representations

[53] The appellant argues that the facts here do not substantially differ from those in Order PO-2775-R. She argues that Order PO-2775-R determined that the federated universities in fact fall under the scope of the *Act* through their agreements and links with their “parent” university.

[54] The appellant notes that in fact, she contacted the Ministry of Government and Consumer Services prior to submitting the access requests at issue in these appeals, and received the following response from a ministry staff member in the Freedom of Information Unit:

“I consulted with [staff of the Information, Privacy and Archives division] on the status of federated universities and they provided the advice that

the request should be directed to Laurentian, citing Information and Privacy Commissioner IPC Order PO-2775-R, in which it was determined that the University of Toronto was required to provide records from one of their federated universities (Victoria). The IPA also provided the background information that they decided not to add the federated universities as separate institutions in the directory because they are considered to be under the umbrella of their main institution that's already listed." [emphasis the appellant's].

[55] The appellant argues that it was the legislature's intention to include federated universities under the amendments made to the *Act* to add universities as institutions subject to the *Act*. The appellant acknowledges that the federated universities are in many ways separate entities with unique characteristics with respect to faculty and programs, but stresses that they are all part of a post-secondary educational scheme.

[56] The appellant refers to the following passage from the Webster dictionary:¹²

A university, in contrast, is usually composed of a number of different colleges or schools and in most cases, postgraduate opportunities for advanced degrees in more than one field. That's why you might hear about a person attending "Forbes College at Princeton University," for example.

[57] The appellant argues that for administrative purposes with respect to their relationship to government, the federated universities are considered to form part of one university. For example, for the purpose of receiving basic income units (BIU) that each university receives from the Ministry of Education, the federated universities' entitlements flow through Laurentian. Other "flow-throughs" include tri-council funding, research ethics, and occupational health and safety rules. The appellant says that the *Act* is simply another form of government interaction by which the federated universities would "flow through" their parent university. For this reason, the appellant argues, Laurentian University, as the listed institution under Regulation 460, has the authority to request the production of the records and it controls the records at issue for the purposes of the *Act*.

[58] The appellant also relies on Laurentian's website, which, according to the appellant, describes the strong administrative relationship between the federated universities and Laurentian:

The Laurentian Federation

¹² The appellant did not stipulate under which definition this passage appears.

In 1960 and 1961 respectively, Huntington University and Thorneloe University were founded and joined with the University of Sudbury in the Laurentian Federation.

While each individual university contributes unique academic programs, distinct learning and residential accommodations, and other diverse attributes to Laurentian's offerings, students at University of Sudbury, Thorneloe and Huntington are all Laurentian students who share classrooms, services, activities and are an integral part of the Laurentian community.

The Laurentian student card provides access to the university's full spectrum of student amenities – from the library and the Laurentian Voyageur Athletics and Campus Recreation Centre, to the various support services. Laurentian's federated universities add character and flexible options for students looking for specific programming or courses, a unique learning environment, or distinct residential style.¹³ (Emphasis added by appellant).

[59] The appellant argues that the federated universities are not listed on the provincial website¹⁴ of the Ministry of Colleges and Universities because all provincial funding is provided to the "parent university" to then be disbursed and allocated to the federated universities. She argues that it would therefore be reasonable for the legislature to list the same universities under Regulation 460 of the *Act*, with the intent that the federated universities would fall under their degree-granting institution.

[60] Likewise, the appellant argues, students applying for the Ontario Student Assistance Program (OSAP) funding must list Laurentian University as their attending institution; funding is then allocated by Laurentian as the "lead" to either Thorneloe, Huntington or U Sudbury depending on the student's course selection. Even though the federated universities are not listed on the approved list of private or public colleges or universities for OSAP assistance, they are nonetheless provided with funding as a recognized post-secondary educational institution.¹⁵

[61] The appellant refers to the sharing of certain administrative/operating costs between the federated universities and Laurentian as seen in their respective federation agreements. By way of example, the U Sudbury federation agreement with Laurentian states in part:

"All students enrolled in federated universities or colleges who intend to proceed towards degrees or to obtain diplomas, certificates or other

¹³ <https://laurentian.ca/stub-176>.

¹⁴ <https://www.ontario.ca/page/ontario-universities>.

¹⁵ https://osap.gov.on.ca/SchoolSearchWeb/search/school_search.xhtml?lang=en.

academic qualifications at Laurentian University and to become entitled to degrees, diplomas, certificates or other academic qualifications at Laurentian University must comply with all requirements of Laurentian University. In the case of students enrolled in federated university or colleges, fees paid shall be apportioned between Laurentian University and such federated universities or colleges as may from time to time be agreed upon between the parties hereto provided however that the academic standing of all students now registered at Sudbury University who by virtue of the Act of Incorporation of Laurentian University and of this agreement, become registered as student of Laurentian University shall be accepted as students of Laurentian University upon the basis of their academic standing at Sudbury University, provided they comply with the requirements of Laurentian University in regard to registration and payment of fees." (emphasis appellant's)

[62] The appellant asserts that Laurentian has been established as the administrative "lead" of all the federated universities under its umbrella: there is one website, one contact phone number, one email address, one student registration scheme/student card, one campus, one application for OSAP and public funding, and one degree granted.¹⁶ In addition, the appellant notes that faculty of the federated institutions are represented by the same association that represents Laurentian faculty. In addition, the federated universities supply student counts and financial statements to Laurentian University in order to comply with government reporting requirements.

[63] The appellant notes that financial reporting for 2016/17 of Ontario universities published by Common University Data Ontario (CUDO) indicates that 90% of operating funds are obtained through ministry grants, with the second largest source of income obtained through tuition fees. The appellant also notes that 60% of the operational aspects of the universities go to pay for salary and wages.¹⁷ The appellant notes that all funds reported by CUDO include those reported by the federated universities, and that the government provides federated universities funding through the grants provided to Laurentian University, with the knowledge that they will provide the federated institutions with appropriate portions of these government grants in order to provide their educational services. The appellant argues that federated universities that receive this funding should not be permitted to "hide" behind their parent university for accountability purposes.

[64] The appellant argues that the key factor in determining whether the federated universities are part of Laurentian for the purposes of the *Act* is not whether Laurentian is involved in the operational and financial management of the federated universities. Rather, the appellant says, the key factor is the fact that the federated institutions receive public funding by way of a flow-through of grant disbursements issued by

¹⁶ Each federated university in fact has its own website, as U Sudbury noted.

¹⁷ <https://cou.ca/wp-content/uploads/2018/04/Financial-Report-Highlights-2016-17-Final.pdf>.

Laurentian in accordance with the agreements. She argues the *Act*'s core purpose is to provide the general public with a right of access to information held by publicly funded institutions. The appellant also argues that the federated universities' lack of preparedness to respond to access to information requests under the *Act* should not be used as an argument as to why they should be considered to be outside the scope of the *Act*.

[65] Finally, the appellant notes that in an article in the "University Affairs" on January 13, 2016, the description of a federated institution is provided as follow:

"A federation, generally speaking, is a specific type of affiliation where two or more institutions come together to create a new university that is recognized by civic authorities and is eligible for government funding. That was the case when the existing University of Sudbury (previously the Jesuit Collège du Sacré-Coeur) came together with the new Huntington University (United Church) and Thorneloe University (Anglican) to form the Laurentian Federation in 1960-61."¹⁸

Analysis and findings

[66] As I mentioned above, the issue of whether U Sudbury, Huntington and Thorneloe are part of Laurentian for the purposes of the *Act* was raised by the appellant in mediation, and she relies on Order PO-2775-R, which she says is indistinguishable on its facts from the circumstances before me.

[67] I see some merit in Laurentian's argument that since the right of access to records applies to records in the "custody or control" of an institution, the *Act* already features a mechanism for addressing whether records belonging to a related or affiliated entity are subject to the right of access. Laurentian submits that the federated universities are not institutions under the *Act* and that the record-specific mechanism afforded by the custody/control analysis is the only mechanism contemplated by the Legislature to apply to matters such as the one raised by these appeals.

[68] I agree that in many, if not most cases where a record is held by an entity other than an institution listed in the regulation, the real issue is whether the institution (here, Laurentian), has custody or control of the record at issue. A record-specific approach avoids unnecessarily broad findings about whether an entity is "part of" the listed institution for the purpose of the *Act*. In my view, such a finding, made in the context of an access request for specific records, could have unforeseen and/or unintended consequences for future requests relating to different records.

¹⁸ <https://www.universityaffairs.ca/features/feature-article/federated-affiliated-colleges-different-mainly-equal/>

[69] That said, in my view there are some cases where it is obvious that all records of an entity should be subject to the *Act* because of the entity's relationship with a listed institution. One example is found in a series of orders of this office, Orders MO-3141 through MO-3146. The issue in those cases was whether certain school bus consortiums were subject to the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*, the municipal counterpart to *FIPPA*. The role of the consortiums is to provide management and administrative support for the school boards to acquire transportation services for its students through third party providers. *MFIPPA* defines "institution" as including a school board, and also lists some specific entities. School bus consortiums are not listed.

[70] In finding that, for the purposes of the *MFIPPA*, the consortiums are each a part of the school boards that created them, the adjudicator noted that:

- The consortium is comprised of the school boards that created it. The very definition of a consortium, therefore, is that it is no more and no less than the school boards it serves.
- All approved costs and expenses relating to the consortium are financed by the participating school boards and each participating school board is liable for all financial obligations for which the consortium is legally liable.
- Ownership of the consortium is vested with the constituent boards. Each school board appoints three members to the Governance Committee of the consortium, consisting of a Trustee from each school board, the Director or designate from each school board, and the Senior Business Official from each school board.
- The consortium manages the provision of transportation on behalf of the school boards; however it is these school boards that have the legal responsibility under the *Education Act* for the provision of these services. It would be a perverse result if the establishment of a consortium, which is controlled and even staffed by school boards, resulted in the removal of records from access under *MFIPPA*.

[71] The adjudicator also referred to *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario (TEDCO)*,¹⁹ where the Ontario Court of Appeal found that the City of Toronto Economic Development Corporation (TEDCO) was subject to the provisions of *MFIPPA* because TEDCO was deemed to be part of the City of Toronto. That case concerned the interpretation of section 2(3) of *MFIPPA*. The Court stated at paragraph 39 that:

¹⁹ 2008 ONCA 366.

...a formal and technical interpretation of s. 2(3) runs contrary to the purpose of [MFIPPA]. We are dealing with a corporation whose sole shareholder is the City of Toronto, whose sole purpose is to advance the economic development of the City, and whose board of directors - at the time of the proceedings before the adjudicator - was populated by persons directly appointed by City Council, including the Mayor of Toronto (or his/her designate), the Chair of the City's Economic Development and Parks Committee, two City Councillors, and the Commissioner of Economic Development, Culture and Tourism (or his/her designate). In light of what La Forest J. observed in the above-cited passage from *Dagg*, it seems to me that TEDCO is just another example of a complex bureaucratic structure of public administration. In my view, it is contrary to the purpose of [MFIPPA] and access to information legislation in general to permit the City to evade its statutory duty to provide its residents with access to its information simply by delegating its powers to a board of directors over which it holds ultimate authority.

[72] If Laurentian is suggesting that there is no place for a finding, in any circumstance, that an entity is part of a listed institution for the purposes of the *Act*, then I disagree. The reasoning in the above examples, with which I agree, shows that there are some cases where treating an entity as part of a listed institution is the correct approach.

[73] However, for the following reasons, I find that the federated universities at issue here are not part of Laurentian for the purposes of the *Act*. As a result, whether the records of any one of the federated universities are subject to the *Act* must be determined on a case-by-case basis, applying the principles of custody and control.

Legislation, by-laws and federation agreements

The Laurentian Act

[74] The *Laurentian Act* grants Laurentian the power to offer degrees, except in Theology, and to offer instruction, except in religious knowledge. It expressly provides that its management and control are to be non-denominational and that no religious test is to be required of any student or employee (though the management and control are to be based on "Christian principles").

[75] Among Laurentian's powers is the power to admit church-related universities into federation as colleges of the Faculty of Arts and Science, which church-related universities have the right to give instruction in philosophy and religious knowledge and in such other subjects as may from time to time be approved by Laurentian. Laurentian is to accept such courses in partial fulfillment of the requirements for a Laurentian degree.

[76] The *Laurentian Act* further provides that its own Board of Governors has the power to appoint and dismiss its president and vice-presidents. It does not contain any provision allowing its Board to appoint or dismiss the presidents of the federated universities. That act further gives Laurentian the power, upon the recommendation of its president, to appoint and dismiss the heads and associate heads of its faculties, departments and colleges, but not those of federated universities. The same is true for Laurentian's appointment and dismissal of teaching staff and all other officers, servants, agents and employees.

[77] Members of the federated universities do sit on Laurentian's Senate, which is responsible for setting academic policy. Further, the degree-granting powers of a university that is federated with Laurentian (with the exception of those relating to the granting of theology degrees) are dormant so long as the federation continues. Finally, the governing body of each federated university has responsibility for, including discipline in respect of, the conduct of its students for matters arising or occurring in its building or on its grounds, while disciplinary action is vested in the Laurentian Court of Discipline²⁰ for all other matters.

The Huntington University Act

[78] Huntington explains that it was incorporated by private statute, *An Act to Incorporate Huntington University*.²¹ On my review of this piece of legislation, I note that it provides that Huntington's president is appointed by Huntington's Board of Regents.

U Sudbury's General By-law of the Board of Regents

[79] U Sudbury provided a copy of its General By-law of the Board of Regents. According to that by-law, the president of U Sudbury is appointed by U Sudbury's Board of Regents.

Federation Agreements

[80] The federation agreements between each of the federated universities and Laurentian are nearly identical, though the agreement with Sudbury, as the only pre-existing member of the federation, contains additional provisions, as described below in my findings. The provisions are described below in my findings.

The parties' representations

[81] I have also taken into account the parties' extensive representations, which are set out above.

²⁰ Which consists of Laurentian personnel as well as the president of each federated university.

²¹ S.O. 1960, c. 143.1. The Act was amended in 1966 and 1971. I have the 1971 version before me.

Findings

[82] As all the parties have noted, the federated universities are not listed in the schedule to Regulation 460. The question is whether they should nonetheless be subject to *FIPPA* on the basis they are a part of Laurentian for the purposes of *FIPPA*. I find that they are not part of Laurentian for the purposes of *FIPPA*.

[83] First, I easily distinguish the circumstances before me from those in the *TEDCO* decision and the school bus consortium orders. Unlike the circumstances in those decisions, where the purpose of the entity in question was to further the interests or carry out the mandate of an institution under *MFIPPA*, the evidence before me does not suggest that the federated universities were established by Laurentian for the purpose of fulfilling a Laurentian function. In fact, U Sudbury's existence predated that of Laurentian. Further, there is no evidence before me to suggest that Laurentian is liable for the financial obligations of the federated universities; the evidence is to the contrary, that each entity is responsible for its own finances. Finally, unlike the school bus consortium boards, I have no evidence before me to suggest that Laurentian controls the boards of the federated universities. Again, there is evidence to the contrary: U Sudbury explains that none of the members of Laurentian's Board or executive sit or are entitled to sit on U Sudbury's board of regents.

[84] The appellant's arguments fall into three main categories, which mirror the bases for the adjudicator's conclusion in Order PO-2775-R: the degree of integration between the federated universities and Laurentian, statutory interpretation, and funding, with her arguments on the latter two points overlapping. She urges me to find that the circumstances here are indistinguishable from those in Order PO-2775-R.

[85] I have considered the reasons of the adjudicator in Order PO-2775-R in support of his finding that Victoria is part of U of T for the purposes of the *Act*. In that case, the adjudicator relied heavily on what he saw as a high degree integration between the operations of Victoria and those of U of T. In my view, the level of integration here is less than that described in Order PO-2775-R. Therefore, assuming that Order PO-2775-R was rightly decided, I find the present situation distinguishable from that in Order PO-2775-R.

[86] As noted above, to make a finding that the federated universities are "part of" Laurentian for the purposes of the *Act* would be to find that all records of the federated university are subject to the *Act*. In my view, the level of integration in all the operations of Laurentian and each federated university must be very high in order to support such a result, and the evidence does not support the requisite level of integration here.

[87] I have carefully reviewed the parties' representations, the federation agreements and the other material before me. In my view, the universities, in an effort to distinguish this case from Order PO-2775-R, may have overstated their independence from one another. They have certainly downplayed the similarities between the instant case and some of the facts in Order PO-2775-R. For example, the universities before me stress that they own their own buildings and other assets, and have their own employees. However, this was also the case in the circumstances before the adjudicator in Order PO-2775-R. The universities also argue that the federated universities generate their own budget and revenue, and manage their own finances. Again, the facts in Order PO-2775-R were similar in that respect.

[88] It is clear to me that the federated universities have a close relationship with Laurentian on many levels, including academically and administratively. However, overall, I am not satisfied that the level of integration between the universities is sufficient to support a finding that the federated universities are part of Laurentian for the purposes of the *Act*. In my view, the contractual arrangements between Laurentian and the federated universities establishing the structure, administration and implementation of the federation are evidence of consistent and comprehensive measures designed to maintain a substantial level of separation and independence from Laurentian. Aside from the student registration and degree-conferring arrangements described above, the federation agreement between Laurentian and Sudbury provides as follows:

- (i) Laurentian assumed and continued all faculties, departments, chairs, and other academic structures within Sudbury, except those relating to its philosophy and theology functions.
- (ii) Laurentian assumed or entered into new contacts of employment with all Sudbury teaching staff, except in the departments of philosophy and theology.
- (iii) Sudbury sold to Laurentian all its library holdings, except in the areas of philosophy and theology, as well as all of Sudbury's laboratory equipment and supplies.
- (iv) Laurentian assumed Sudbury's leasehold interests in certain buildings.
- (v) Laurentian reserved land on its campus which Sudbury could acquire for the construction of buildings for its own purposes in accordance with arrangements to be agreed.
- (vi) Sudbury retained disciplinary jurisdiction over its students in relation to conduct on its own facilities, but not otherwise.
- (vii) Sudbury retained its own gifts, scholarships, endowments, bequests, and grants.
- (viii) Student enrolment fees for federated university students would be apportioned between Laurentian and the federated universities on an agreed upon basis.

[89] Except for the first two items above, which appear in the agreement with Sudbury as the only pre-existing member of the federation, the agreements with Huntington and Thorneloe follow the same pattern. In my view, these agreements reflect an intention to create a clear line of demarcation between the administration of the theology and philosophy programs and associated facilities of the federated universities on the one hand, and the purely secular programs and associated facilities of Laurentian on the other hand.

[90] This contrasts with Order PO-2775-R where the general undergraduate programs, together with academic staff, infrastructure and associated facilities, were retained by Victoria University but were then fully integrated within the University of Toronto under a single faculty of arts and science.²² That arrangement resulted in a corresponding flow-through of public funding commensurate with the secular undergraduate components of Victoria's academic programs, but not its theology programs.²³ While it is acknowledged that there is some level of flow through of public funds from Laurentian to the federated universities, there is no evidence before me of the level of funding or whether such funding would be at a level comparable with Victoria University given the evidence before me of the limited theology and other programs offered by the federated universities.

[91] In short, one of the principal reasons for the finding in Order PO-2775-R that Victoria University is part of the University of Toronto – namely, the integration of Victoria's undergraduate programs and operations within the faculty of arts and science and the corresponding flow-through of funding for those programs - does not appear to be present, at least to the same extent, in the arrangements between Laurentian and its federated universities. In my view, this is a qualitative distinction which, together with the other indicia of independence described above, supports my finding that the federated universities are not part of Laurentian for the purposes of the *Act*.

[92] As an aside, I have given no weight to the universities' submission to the effect that, unlike the situation in Order PO-2775-R the federated universities have not undertaken to respond to *FIPPA* requests collaboratively. In my view, this fact is of limited or no relevance since a non-institution cannot attorn (i.e. agree to be subject to) to the *Act's* jurisdiction simply by behaving as though the *Act* applies to it. In my view, therefore, this distinction between the facts before me and those in Order PO-2775-R is not helpful to my analysis.

²² Order PO-2775-R, paras. 18, 58-59, 62, 66.

²³ Order PO-2775-R. See the Ministry's submissions at para. 17: "... unlike universities that are currently listed in Ontario Regulation 460 made under [the *Act*], Victoria and other universities federated with the University of Toronto do not receive direct operating funding from the Ontario government. These organizations do receive grants from U of T, which may represent a flow-through of operating funds provided to the main university by the government of Ontario, to support undergraduate, but not divinity or theology programs.

And see paras. 25, 39, 47, 55-56, 60-62, 64.

[93] The appellant refers to an email she received from the Ministry of Government Services. In the email, she was told that staff in the Information, Privacy and Archives division were of the view that federated universities are not listed as separate institutions in the directory because they are considered to be under the umbrella of “their main institution” that is already listed (here, Laurentian).

[94] The appellant relies on this statement to support her argument that the federated universities are implicitly covered by the *Act*, even though they are not listed in the relevant schedule. In *Sullivan on the Construction of Statutes*, 6th Ed., the author discusses external aids to the interpretation of statutes. On the subject of administrative interpretation, she states:

It is well-established that administrative interpretation may be relied on by courts to assist in determining the meaning or effect of legislation. However, the opinion of administrative interpreters is not binding on the courts. Except in so far as they are empowered to do so by statute, administrators can neither make law (that is the job of the legislature) nor determine its true meaning (that is the job of the courts). All they can do is offer an opinion that is more or less persuasive.²⁴

[95] The appellant has submitted the opinion of an unnamed individual in the Information, Privacy and Archives division of the Ministry in support of her interpretation of Regulation 460 to include the federated universities at issue here. I have not been made aware of any written interpretation bulletin or other document setting out a formal opinion on the correct interpretation of the regulation. In my view, the second hand evidence of an unnamed person in the Information, Privacy and Archives division is unreliable evidence of the legislature’s intent, and I do not give it any weight.

[96] The appellant also refers to the fact that the federated universities receive public funding via flow-through funding from Laurentian. This is acknowledged by the federated universities in these appeals, but the legislature has not set up the *Act* in such a way that all entities receiving public funding are covered by the *Act*. The fact that the federated universities receive public funding does not, in my view, provide a standalone reason, absent the requisite level of integration between Laurentian and the federated universities, why the latter should be covered by the *Act* where they have not been listed.

[97] I find, therefore, that the federated universities are not part of Laurentian for the purposes of the *Act*.

²⁴ *Sullivan on the Construction of Statutes* at §23.118.

[98] Since I have found that the federated universities are not “part of” Laurentian for the purposes of the application of the *Act*, I must now decide whether the responsive records are in Laurentian’s custody or control.

B. Are the records at issue in Laurentian’s custody or control?

[99] At the outset, I note that there are various records that would be responsive to the appellant’s request. The federated universities’ presidents’ employment contracts themselves are the most obvious responsive records. However, institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, any ambiguity in the request should be resolved in the requester’s favour.²⁵ To be considered responsive to the request, records must “reasonably relate” to the request.²⁶

[100] In my view, and as the universities appear to acknowledge in this case, the salary and benefit information that Laurentian holds as a result of its role as administrator of certain benefit plans is also information that reasonably relates to the access requests.

[101] I will consider, therefore, whether Laurentian has custody or control of 1) the employment contracts themselves and b) the responsive information in the possession of Laurentian as a result of its administration of the benefit plans.

Factors relevant to determining “custody or control”

[102] As I mentioned above, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.²⁷ The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution?²⁸
- What use did the creator intend to make of the record?²⁹
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?³⁰

²⁵ Orders P-134 and P-880.

²⁶ Orders P-880 and PO-2661.

²⁷ Orders 120, MO-1251, PO-2306 and PO-2683.

²⁸ Order 120.

²⁹ Orders 120 and P-239.

³⁰ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

- Is the activity in question a “core”, “central” or “basic” function of the institution?³¹
- Does the content of the record relate to the institution’s mandate and functions?³²
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?³³
- If the institution does have possession of the record, is it more than “bare possession”?³⁴
- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?³⁵
- Does the institution have a right to possession of the record?³⁶
- Does the institution have the authority to regulate the record’s content, use and disposal?³⁷
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?³⁸
- To what extent has the institution relied upon the record?³⁹
- How closely is the record integrated with other records held by the institution?⁴⁰

³¹ Order P-912.

³² *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.) and Orders 120 and P-239.

³³ Orders 120 and P-239.

³⁴ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

³⁵ Orders 120 and P-239.

³⁶ Orders 120 and P-239.

³⁷ Orders 120 and P-239.

³⁸ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

³⁹ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.

⁴⁰ Orders 120 and P-239.

- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?⁴¹

[103] The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?⁴²
- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?
- Who owns the record?⁴³
- Who paid for the creation of the record?⁴⁴
- What are the circumstances surrounding the creation, use and retention of the record?⁴⁵
- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?⁴⁶
- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the institution?⁴⁷ If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?
- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

⁴¹ Order MO-1251.

⁴² PO-2683.

⁴³ Order M-315.

⁴⁴ Order M-506.

⁴⁵ PO-2386.

⁴⁶ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

⁴⁷ Orders M-165 and MO-2586.

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? Did the agent have the authority to bind the institution?⁴⁸
- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?⁴⁹
- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue?⁵⁰

[104] In determining whether records are in the “custody or control” of an institution, the above factors must be considered contextually in light of the purpose of the legislation.⁵¹

[105] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,⁵² the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

- (1) Do the contents of the document relate to a departmental matter?
- (2) Could the government institution reasonably expect to obtain a copy of the document upon request?

Representations of Laurentian, Huntington, U Sudbury and Thorneloe

Laurentian

[106] Laurentian submits that it does not have custody or control of the responsive employment contracts. It takes no position on whether it has custody or control of the salary and benefits-related information.

⁴⁸ *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) and *David v Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.).

⁴⁹ Order MO-1251.

⁵⁰ Order MO-1251.

⁵¹ *City of Ottawa v. Ontario*, cited above.

⁵² 2011 SCC 25, [2011] 2 SCR 306.

[107] Laurentian submits that the custody or control analysis must be informed by the context in which separate entities relate. It states:

This is the principle from the Court of Appeal for Ontario's recent *Children's Lawyer* decision, in which the Court held that the IPC erred in finding that the Ministry of the Attorney General was in custody or control of certain Children's Lawyer records. The Court said:

By starting from the assumption that the Children's Lawyer is a branch of MAG, the Adjudicator did not take into account the context in which the Children's Lawyer must operate, separate and distinct from MAG. Instead, she used the concept of a "branch" to cloak MAG with control over the Children's Lawyer.

[108] Laurentian submits that the principle from *Children's Lawyer* is important because it highlights that a custody or control finding can threaten independence that exists for legitimate and important purposes. In these appeals, Laurentian submits, independence is essential to Laurentian because it seeks to avoid the risk of any employment-related liability to the employees of the federated universities. A finding that Laurentian controls the federated universities' employment contracts would disrupt the desired *status quo* between parties.

[109] Laurentian addresses the factors listed above and notes that: the contracts were not created by an officer or employee of Laurentian and in fact, Laurentian has never seen them; it has no right to regulate their use; it does not possess them, and it has no express or implied right to demand the records; and the records do not relate to Laurentian's mandate and functions. To summarize, Laurentian states that it has dealings with the federated universities that are contemplated by the federation agreements, but none that relate to or invite custody or control of the records at issue in these appeals.

[110] As noted above, Laurentian takes no position on whether the information it possesses as a result of the benefits plans it administers is in its custody. In response to my inquiries, it provided the following additional information:

- Laurentian is the administrator of the Retirement Plan of Laurentian University of Sudbury and its Federated and Affiliated Universities (the Pension Plan). The federated universities have elected to participate in the Pension Plan with Laurentian's consent, and each federated university has a seat on the Pension Committee that oversees the operation of the Pension. The federated universities submit contributions (employer and employee) directly to the Pension Plan trustee. Laurentian receives a list of monthly

contributions from the federated universities, knows the salary and years of service of all participating employees and provides contribution data to the Pension Plan trustee.

- Laurentian holds two policies in which certain employees of the federated universities may participate: (a) an extended health and dental benefits policy; and (b) an insurance and accidental death and dismemberment policy with a different insurer. The federated universities make contributions directly to the insurers and Laurentian does not receive back information about any federated university employees or their dependents.
- Laurentian also maintains a retiree health benefit program in which retirees of the federated universities may participate. The federated universities make contributions directly to Laurentian University and Laurentian knows the salary and contributions of every participating employee.

[111] Laurentian provided me with a copy of the Pension Plan.

Huntington

[112] Huntington, like Laurentian, submits that Laurentian does not have custody or control of the employment contract of Huntington's president. Its executive employee contracts and related employment documents were created by Huntington and are not shared with Laurentian. Laurentian does not have, and has no power to obtain, the requested documents.

[113] Huntington reiterates that each university hires its own faculties and staff and each university pays its own salaries. Huntington's president receives no remuneration from Laurentian. Laurentian has no right to enter on Huntington's premises to seize the employment contracts and would not be able to comply with an order that it do so.

[114] Huntington notes that the only exception to the segregation of information between Laurentian and Huntington is in respect of employee information that Laurentian may be privy to as a result of the federated universities' employees participating in the same benefits plans. For example, certain Laurentian staff are privy to the pensionable earnings of Huntington staff in order to verify contribution levels and to determine entitlements, but they do not have any of the relevant supporting documentation sought by the applicant.

[115] Huntington submits that the pension information is not stored in Laurentian systems and is kept separate from Laurentian data. Further, it submits that to whatever extent Laurentian is in possession of any of requested documents as a result of participation in shared benefit plans, such possession is bare possession only, as those documents were not created by Laurentian employees in respect of matters within its mandate, they are kept in separate files and were never integrated with Laurentian files, and they are accordingly are not within Laurentian's custody or control.

U Sudbury

[116] U Sudbury says that for the purposes of its submissions, it considers the records to include both the president's employment agreement, and other records containing the terms and conditions of employment. U Sudbury acknowledges that Laurentian has possession of some information contained in the records related to Laurentian's role as the pension plan and group benefits administrator for U Sudbury. However, it argues that this does not in itself provide Laurentian with custody or control of those records under the *Act*.

[117] With respect to the factors for determining custody or control, U Sudbury argues that the records were created by an agent of U Sudbury, not Laurentian, and were created for U Sudbury's purposes – to govern the employment of its president. Laurentian has no statutory power or duty to carry out this function as the human resources functions of U Sudbury are not a mandate or function of Laurentian. Under

the Federation Agreement, U Sudbury maintains control over its human resources and other administrative operations.

[118] U Sudbury says that Laurentian does not have physical possession of U Sudbury's president's employment contract. Furthermore, Laurentian does not have, nor has it ever had, any access to the president's employment contract and therefore cannot have relied upon it. Also, Laurentian has only bare possession of the salary and benefits information of U Sudbury's president as a result of the benefits administration services Laurentian provides to U Sudbury. Further, Laurentian has no right to possession of the records as a whole. Its right to possession of part of the records is limited to its role as administrator of the Laurentian Pension Plan and Group Benefits Plan, pursuant to the contractual arrangement between U Sudbury and Laurentian. In this regard, Laurentian is only entitled to obtain, possess or use any information in the records for purposes relating to the administration of the Laurentian Pension Plan and Group Benefits Plan.

[119] U Sudbury also points out that the benefits offered under the U Sudbury policy are determined solely by U Sudbury. U Sudbury argues that Laurentian's reliance upon the records is limited to the administration of the Laurentian Pension Plan and Group Benefits Plan for U Sudbury's president. It says that the information is in a Benefits Chart summarizing the benefits of the various group insurance policies under the Laurentian Group Benefits Plan, which is created and provided by the insurance carrier to each participating entity, and that the chart applicable to U Sudbury can easily be separated from the charts applicable to Laurentian or other participating entities.

[120] U Sudbury also refers to the two-part test in *National Defence* for determining whether or not a record that is not in the physical possession of an institution is within its custody or control. First, U Sudbury says that the records do not in any way relate to Laurentian's operations or to any matters relating to its mandate. They relate to the independent operations of U Sudbury and to the administration of its own human resources, separate and apart from the human resources of Laurentian.

[121] Second, Laurentian could not expect to obtain a copy of the employment contract of the chief executive of an independent and separate entity upon request. Sudbury's president is not an employee of Laurentian. In the exercise of his duties and responsibilities, the president reports solely to U Sudbury's Board of Regents. Laurentian did not participate in the hiring of U Sudbury's president nor does it have a right to do so. Laurentian did not participate in determining the terms and conditions of employment of the president and had no right to do so. Although U Sudbury does receive some funding from Laurentian, Laurentian has no right to dictate how that funding is allocated, including what portion of the funding should go to the president's salary.

[122] U Sudbury says that the only right Laurentian has to part of the records is a contractual right limited to the terms of the arrangement between U Sudbury and Laurentian as the administrator of the Laurentian Pension Plan and the Laurentian Group Benefits Plan in which U Sudbury has chosen to participate. Laurentian has no right, statutory or otherwise, to require that U Sudbury provide more than confirmation of the president's salary pursuant to the terms of the Laurentian Pension Plan.

[123] Furthermore, U Sudbury relies on *City of Ottawa v. Ontario* and argues that in determining questions of custody and control, the purposes of *FIPPA* have to be considered.⁵³ These purposes are:

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

- (i) information should be available to the public,
- (ii) necessary exemptions from the right of access should be limited and specific, and
- (iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.⁵⁴

[124] U Sudbury says it is clear from not only the language of *FIPPA* itself, but from interpretation of the legislative intent that the *Act* is meant to entitle individuals to access to information in order to facilitate the democratic process and allow for scrutiny of government actions in respect of designated institutions. It also relies on Order P-239 for the proposition that custody requires some right to deal with the records and some responsibility for their care and protection.

[125] U Sudbury, like Laurentian, also relies on *Children's Lawyer* and submits that, in deciding the custody and control question, it is necessary to consider the context in which U Sudbury operates, as separate and distinct from Laurentian.

Thorneloe

[126] Thorneloe says that although it is a federated partner located on the Laurentian campus, both universities are substantially separate such that the employment contract sought by the appellant is not within Laurentian's custody or control, for reasons similar to those already set out above.

⁵³ *City of Ottawa v. Ontario*, cited above.

⁵⁴ *FIPPA*, s. 1.

Appellant's representations

[127] While the appellant focused her representations on the question of whether Huntington, U Sudbury and Thorneloe are part of Laurentian, and not on the custody or control issue, I have taken her representations into account in coming to my conclusions below.

Analysis and findings

[128] I will begin with the employment contracts themselves, which are not in Laurentian's possession, and then turn to the salary and benefit information that is in Laurentian's possession.

The employment contracts of the federated universities' presidents

[129] As a starting point, I have found above that the federated universities are separate from Laurentian for the purposes of the *Act*. Further, it appears to be common ground that Laurentian does not have physical possession of the employment contracts of the federated universities' presidents. Because the federated universities are not part of Laurentian, and Laurentian does not have possession of these records, the issue is whether it has control of them. If it does, these records are subject to the *Act*.

[130] I conclude, however, for the following reasons, that Laurentian does not have control of the employment contracts.

[131] It is undisputed that each of the federated universities hires its own faculty and staff, and pays their salaries. The evidence before me is that each president is appointed by the federated university's board of governors/regents, and the employment contracts were entered into between the presidents and their respective boards of governors/regents. The records were created by an agent of each federated university, not Laurentian, and were created to govern the employment of their respective presidents.

[132] I agree that Laurentian has no statutory power or duty to carry out the human resource function of the federated universities and in particular with respect to their presidents. The evidence is that the contracts are stored and used by the federated universities.

[133] It is also undisputed that Laurentian has not seen the contracts. Further, neither the *Laurentian Act* nor the federation agreements includes any provisions that expressly or by implication give Laurentian the right to possess or otherwise control the contracts. In fact, and as noted above, the *Laurentian Act* expressly states that Laurentian's Board of Governors has no power to hire or fire employees of the federated universities. I have not been pointed to any other agreements between Laurentian and the federated

universities that would allow Laurentian to require the federated universities to provide it with these contracts.

[134] I have specifically reviewed the Pension Plan agreement Laurentian provided to me, by virtue of which Laurentian administers the pension plan for its employees as well as employees of the federated universities. The Plan contains the following provision:

As a condition of participating in the Plan, it shall be the responsibility of each Employer other than the Principal Employer⁵⁵ to supply to the Principal Employer all such reports, records and information as are required to permit the Principal Employer to perform its duties and obligations under the terms of the Plan.

[135] While the federated universities must provide Laurentian with salary information of their staff in order for Laurentian to administer the plan, my review of the Pension Plan does not lead me to conclude that Laurentian could require the federated universities to provide it with the employment contracts themselves, or that the federated universities would voluntarily do so. Specifically, while the Pension Plan requires that Laurentian be provided with information to permit it to perform its duties under the Plan, I am not satisfied that this extends to the employment contracts themselves, which would likely include information over and above pensionable earnings, such as information relating to bonuses. I note that the Pension Plan itself states that pensionable earnings do not include bonuses.

[136] In determining whether records are in the “custody or control” of an institution, I am to consider these factors contextually in light of the purpose of the legislation.⁵⁶ I acknowledge that one of the purposes of the *Act* is to promote accountability for government expenditures, and that the federated universities are funded in part through public funds. I have also considered that generally, a broad and liberal approach to the custody or control question is appropriate.⁵⁷ In my view, however, this is not enough to bring the employment contracts in question under the control of Laurentian, in the face of the statutory context⁵⁸ and evidence in the federation agreements that the parties in question intended to keep their employment obligations separate.

⁵⁵ The Pension Plan defines the Principal Employer as Laurentian and the Employers as including the federated universities.

⁵⁶ *City of Ottawa v. Ontario*, cited above.

⁵⁷ *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.); and Order MO-1251.

⁵⁸ i.e., *The Laurentian Act, The Huntington University Act, 1971*. See also U Sudbury’s General By-Law of the Board of Regents.

[137] I conclude, therefore, that the employment contracts at issue are not in Laurentian's custody or control. I also reach the same conclusion applying the two-part test in *National Defence*.⁵⁹ As mentioned above, the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

- (1) Do the contents of the document relate to a departmental matter?
- (2) Could the government institution reasonably expect to obtain a copy of the document upon request?

[138] I find that the employment of the federated universities' presidents is not a Laurentian matter. The reasons are set out above but in short, the employment of the presidents of the federated university is not a Laurentian matter, as is clear from the legislation, the federation agreements and the parties' representations. Moreover, and again for the reasons stated above, I find that Laurentian could not reasonably expect to obtain a copy of the contracts upon request.

The salary and benefit information held by Laurentian

[139] I reach a different conclusion in respect of the salary and benefit information that relates to the presidents of the federated universities and which is in Laurentian's possession. For the following reasons, I find that this information is in Laurentian's custody under section 10(1) of the *Act*.

[140] I begin by agreeing that simple possession is not enough to establish custody. There must be some right on the part of the institution to deal with the records, and some responsibility for their care and protection.⁶⁰ I also agree that in deciding the issue of custody it is important to consider the *Act's* aim of promoting accountability in respect of government actions and expenditures of public funds.

[141] U Sudbury and Huntington argue that Laurentian has only bare possession of the benefit-related information they provide to Laurentian, while Laurentian takes no position on the issue.

[142] The evidence before me is that Laurentian is in possession of salary and benefit information of the presidents in order to administer the Pension Plan and other benefit plans.

[143] The Pension Plan document states:

⁵⁹ 2011 SCC 25, [2011] 2 SCR 306.

⁶⁰ Order P-239.

The Principal Employer⁶¹ shall keep records for each Member of the Plan showing the amount and date of all contributions made by the Member to the Member's Defined Benefit Account and all other records required to be maintained to perform its duties and obligations under the terms of the Plan...

[144] I am satisfied that Laurentian has some right to deal with this salary and benefit information, and some responsibility for its care and protection. Indeed, it was argued before me that Laurentian is subject to a duty of confidentiality in respect of this information. In my view, Laurentian's responsibilities in respect of this information do not support a finding that its possession of the information amounts to bare possession only.

[145] The circumstances here are distinguishable from those in *City of Ottawa*, relied on by the federated universities. In *City of Ottawa*, the record at issue was a personal email sent by a city employee from his work email account.

[146] I acknowledge that in *City of Ottawa*, the Divisional Court found that the mere possibility that the city had the authority, pursuant to its IT policy, to monitor the employee's email account for misuse, was not sufficient to bring the employee's personal emails at issue within the city's custody under the *Act*. The federated universities appear to argue that in a similar vein, Laurentian's limited role in holding the salary information for benefit administration purposes is not sufficient to bring that information into Laurentian's custody for the purposes of the *Act*.

[147] However, in this case, and unlike the *City of Ottawa* situation, Laurentian has the responsibility to protect the very information at issue – that is, the substance of the information, not just the server or filing cabinet where the information happens to be held.

[148] I have also considered other factors related to custody or control. Laurentian has a duty pursuant to the Pension Plan to handle the information in its possession resulting from its role as administrator. While administering benefit plans for employees other than its own may not be a "core", "central" or "basic" function of Laurentian, it is a function that Laurentian has undertaken pursuant to agreement with the federated universities.

[149] The federated universities argue that there are limits on the use to which Laurentian may put the records, due to the confidentiality of the salary information. While this may be, in my view this fact does not detract from the finding of custody, though it may support one or more exemption claims.

⁶¹ i.e., Laurentian.

[150] According to the evidence of U Sudbury, the salary and benefit information of the federated universities' presidents is found in a chart that contains both the information relating to the federated universities' employees and employees of Laurentian itself. I note that in Order PO-1725, the IPC found that the electronic agenda of an employee in the Premier's office was in the control of the Premier's office, notwithstanding that it contained both personal and professional entries.

[151] However, this is not a critical fact since in my view, and for the reasons above, Laurentian has custody of the federated universities' presidents' salary information even where it may be found in a document separate from the information relating to Laurentian's own employees. Laurentian has assumed the responsibility for administering the benefits plan and the information, therefore, relates to a Laurentian matter.

[152] I do not agree that the fact that Laurentian is acting as a benefits administrator somehow means that these records are in its bare possession only. Institutions under the *Act* perform many functions and routinely hold the information of other parties.

[153] On balance, I am satisfied that Laurentian has custody of the salary and benefit information in its possession as a result of its administration of the benefit plans. In coming to this conclusion, I have considered the above factors and have also considered whether a finding of custody on Laurentian's part is consistent with the *Act's* purpose of enabling citizens to scrutinize government activity so as to participate more fully in democracy. As I have noted, the records, unlike those at issue in *City of Ottawa*, are related to the activities of Laurentian, as opposed to the personal activities of an employee unrelated to the institution's mandate. Moreover, the records reveal the salaries of senior officials at the federated universities – the presidents – who are paid, in part, from public funds.

Exemption claims

[154] In the alternative to its position on custody and control, Huntington argues that the records contain information that is exempt from disclosure under the mandatory exemptions in sections 14 (personal privacy) and 17 (third party information) of the *Act*. The parties were not asked to make representations on the application of any exemptions to the records and I make no finding about the application of any exemptions to the salary and benefit information in Laurentian's possession. Instead, I will order Laurentian to make an access decision with respect to the records in its possession containing the salary and benefit information of the federated universities' presidents. I note that Laurentian is obligated under section 21(8) to notify any affected parties if its decision is to disclose the information.

ORDER:

1. I uphold Laurentian's decision that the employment contracts of the presidents of the federated universities are not in its custody or control.
2. I order Laurentian to issue an access decision for the salary and benefit information in its possession relating to the presidents of the federated universities for the time period stated in the appellant's request. For the purposes of the procedural requirements of the access decision, the date of this order should be treated as the date of the request.

Original signed by: _____
Gillian Shaw
Senior Adjudicator

September 16, 2020 _____