Information and Privacy Commissioner,
Ontario, Canada

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

FINAL ORDER PO-3009-F

Appeal PA07-119

University of Ottawa

November 7, 2011

Summary: The appellant made a request to the University of Ottawa under the *Freedom of Information and Protection of Privacy Act* for records mentioning himself. Some of the responsive records would be in the possession of professors at the university, who are members of the Association of Professors of the University of Ottawa (APUO). The university asked APUO members to turn over potentially responsive records to it so it could make an access decision under the *Act*. In response, APUO filed a grievance. The arbitrator hearing the grievance issued three awards, and in those awards he reached several determinations about whether the responsive records held by APUO members are in the university's custody or control, as required for them to be subject to the *Act*. This order determines that, in the context of a dispute arising from an access request under the *Act*, this office has exclusive jurisdiction to determine the question of custody or control of responsive records. This order also establishes criteria for determining whether records held by APUO members are in the university's custody or control. The university is ordered to request that APUO members produce responsive records in the university's custody or control to it and to issue an access decision to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 1, 10(1), 24, 26, 28, 47(1), 50(1), 52(1),(3),(4),(8),(13), 54(1),(3), 65(6),(8.1); *Labour Relations Act*, S.O. 1995, c. 1, Sch. A., s. 48(12)(j); *University of Ottawa Act, 1965*, S.O. 1965, c. 137, s. 4(a).

Orders and Investigation Reports Considered: PO-2776-I, PO-1868, P-120, P-239, PO-2536, MO-1285, MO-1283, MO-1251.

Cases Considered: *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal denied, Doc. M39606 (C.A.); *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185; *Bonner v. Via Rail Canada* 2009 FC 857; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners,* [2000] 1 S.C.R. 360; *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666; *McNeil v. Brewers Retail Inc.*, 2008 ONCA 405; *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20 (reversing [2007] O.J. No. 2441); *Reference re Municipal Freedom of Information and Protection of Privacy Act,* 2011 ONSC 1495; *Ontario (Minister of Health) v. Holly Big Canoe*, 1995 CanLII 512 (C.A.); *Ministry of Attorney General and Toronto Star and Information and Privacy Commissioner of Ontario*, 2010 ONSC 991; *St. Joseph Corp. v. Canada (Public Works and Government Services*, [2002] F.C.J. No. 361 (T.D.); *Brookfield LePage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, [2003] F.C.J. No. 348 (T.D.); *Canadian Tobacco Manufacturers' Council v. Canada (Minister of National Revenue - M.N.R.*, [2003] F.C.J. No. 1308 (F.C.); *Ontario (Ministry of Transportation*, [2004] O.J. No. 224 (Ont. Div. Ct.); affirmed (Ont. C.A.), [2005] O.J. No. 4047; application to Supreme Court of Canada for leave to appeal dismissed [2005] S.C.C.A. No. 563; *Laurentian University Faculty Association v. Laurentian University*, 2010 CanLII 32256 (ON LRB), *Amalgamated Transit Union Local 1587 v. GO Transit*, 2010 CanLII 45247 (ON GSB); *John Doe v. Ontario* (1993) 13 O.R. (3d) 767; 1993 CanLII 3388; *Reynolds v. Binstock*, 2006 CanLII 36624 (ON SCDC); *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, 1999 CanLII 3805, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.); *Dagg v. Canada (Minister of Finance)* 1997 CanLII 358 (S.C.C.), [1997] 2 S.C.R. 403.

BACKGROUND:

[1] The University of Ottawa (the university) received a detailed request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for all records, written or electronic, that mention or refer to the requester, specific courses, a named website, or a specific radio show, dated on or after September 1, 2004. In response, the university issued an interim access decision and fee estimate under section 57(3) of the *Act*, in which it estimated a total fee of $28,488.20 to respond to the request. The requester, now the appellant, appealed the university's decision.

[2] As mediation was not successful in resolving the issues in this appeal, the file was transferred to the adjudication stage, in which an adjudicator conducts an inquiry under the *Act*. Initially, I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the university and to the Association of Professors of the University of Ottawa (APUO), a party whose interests may be affected by disclosure of the information at issue in this appeal. In response, I was informed that the university was in the midst of a grievance proceeding with the APUO, which arose from a request by the university for APUO members to turn over records that are responsive to the request in this appeal. The grievance was heard by Arbitrator Philip Chodos (referred to in this order as "Arbitrator Chodos" or "the arbitrator"). It concerned a determination

of which types of responsive records were within the custody and/or control of the university, and which types of records were exclusively controlled by APUO members. As explained in more detail below, the arbitrator ultimately required the university to withdraw its request for the records.

[3] Because of the arbitration proceeding between the university and the APUO, I decided to proceed to adjudicate the issue of access to responsive records that were not subject to the arbitration proceedings. As a result, I decided to put on hold the portion of the appeal that concerns the records that may be in the custody or control of APUO members until after the arbitration proceeding had concluded. I advised the parties that my decision to await the arbitrator's decision was being made without prejudice to my right to adjudicate under *FIPPA* any and all matters in this appeal.

[4] In response to the Notice of Inquiry, I received representations from the university concerning the responsive records, except for the records that could be in the custody or control of APUO members. I sent a copy of the university's representations to the appellant, along with a Notice of Inquiry. In response, the appellant provided representations. After review of the appellant's representations, I sought clarification from the appellant as to the scope of his request. The appellant provided me with the following clarified request, which seeks:

> (1) All (e.g., letter, fax, and email) communications about [the appellant] (other than messages sent by him), sent by or received by all professors (APUO members) at the University of Ottawa.
>
> (2) All (e.g., letter, fax, and email) communications about [the appellant] (other than messages sent by him), sent by or received by all non-APUO member executive officers of the University of Ottawa. These executive officers include: the non-APUO member vice-deans of faculties, the deans of all faculties, the vice presidents of the University, the Secretary of the University (including Legal Counsel's office), the President of the University, and the non-student and non- APUO member members of the Board of Governors of the University.

[5] After receipt of the appellant's clarified request, I placed part 1 of that request on hold pending the outcome of the arbitration proceedings because it clearly relates only to records that were the subject of the ongoing arbitration.

[6] I dealt with part 2 of the clarified request in interim Order PO-2776-I, in which I upheld the university's fee estimate of $4,141.56 concerning part 2 of the appellant's clarified request. The appellant then sought a waiver of this fee on the basis that section 57(4)(b) (payment will cause financial hardship) of the *Act* applies. His application for a fee waiver was denied by the university. The appellant appealed this decision, which is the subject of Order PO-2937.

[7] After the issuance of Order PO-2776-I, part 1 of the appellant's clarified request remained outstanding. As set out above, part 1 concerns communications about the appellant sent by or received by all professors at the university. The request for these types of records, as outlined in the appellant's original request, had been the subject of the grievance proceeding referred to above, which was filed by the APUO against the university. In its grievance, the APUO stated the following:

> 1) records of APUO members are not in the control or under the custody of the University;
>
> 2) the University does not have the right to demand, or the right of access to, copies of all documents, whether in printed or electronic form, which are in the possession of an APUO member, including those at a location other than the University;
>
> 3) emails sent and received using the University email system are not documents for which the University has custody or control;
>
> 4) in response to a request under [the *Act*], the University does not have the unilateral right to change existing working conditions nor to violate the established principles of privacy which prohibit the interference in the professional activities of an APUO member or any action that would inhibit the free exchange of information and ideas between academics;
>
> 5) the actions of the University contravene, inter alia, articles 5.1, 5.3, 9 and 10.3 of the collective agreement [the agreement], Policy 90, past practice at the University, generally recognized practice in the university sector and academic freedom.
>
> Remedy
>
> As remedy for the above noted grievance, the [APUO] seeks a withdrawal of the claims made by the employer respecting members' records and communications and a retraction of the demand for access to said documents, and/or declarations from an arbitrator accordingly, cease and desist orders, as well as damages, or such other orders as may be deemed appropriate by an arbitrator.

[8] After receiving evidence over the course of several hearing dates, the arbitrator issued an award on September 29, 2008. In that decision, the arbitrator stated:

> As employees of the University it is conceivable that academic staff may be in possession of documents which are neither subsumed by the exemptions under the *Act*, nor can be characterized as being strictly

related to University administrative matters. For example, in some circumstances student evaluations may fall into this gray zone. In fact, academic staff can be required in the course of the exercise of their responsibilities to provide information to the administration for certain limited and specific purposes. One example is the requirement to submit information concerning research to the Ethics Committee when human subjects are involved. In a number of contexts (e.g. applications for tenure, sabbaticals, internal funding of research) professors are expected (and have complied with this requirement) to submit [sic] fairly detailed information concerning their activities, mostly regarding research projects. It is at least arguable that these requirements are not entirely subsumed under the rubric of "administrative matters".

However, I do agree with the [APUO] that in particular the provisions of the collective agreement such as section 20 that describe in detail the scope of teaching and research activities should be used to put flesh on the bare bones of the exemption provisions of section [65(8.1)]…

Counsel for the University has readily acknowledged that there are a number of types of documents, including emails, research papers, etc. in the possession of academic staff that are not in the custody and control of the University. The documents [falling] into this category are summarized in detail above under the heading of Arguments for the Employer. One obvious example [is] communications between the [APUO] and its members. Other examples are exchanges between professors and persons outside the University sphere relating to their private work…

The [APUO] acknowledges that documents related to the administrative functions of certain academic staff, such as chairs of departments; vice-deans, etc., can be considered within the custody and control of the University. I would agree with this assertion. As to what may specifically constitute documents of this nature, I would suggest that it includes correspondence with the Administration between these individuals concerning these functions including minutes of meetings and documentation of conclusions reached, subject always to the protection of "personal information" as that term is used in the *Act*.

In conclusion, I find that [the University's request to APUO members for the provision to it of information responsive to the appellant's request] is contrary to the collective agreement and should be withdrawn. I appreciate that some of the observations made above with respect to documents that may be in the custody and control of the University are far from comprehensive or definitive. Accordingly, I shall remain seized of this matter in the event that the parties need to seek further guidance

> with respect to the application of the access request to specific types of documentation.
>
> To the extent noted above, this grievance is upheld.

[9] The APUO then sought further direction from the arbitrator with respect to the question of which specific documents fell outside the custody or control of the university administration, but are within the custody and control of academic staff, and are, therefore, not subject to the *Act*. A hearing was held on February 10, 2009, at which time the parties made further submissions to the arbitrator on this matter. In his award following this hearing, issued on May 11, 2009, the arbitrator stated (at paragraph 21) that the issue he was "seized with as an arbitrator" is "whether, *pursuant to the collective agreement* between the parties, the university administration has custody or control over documents that are normally in the possession of members of the APUO bargaining unit." (Emphasis added.)

[10] In that same award, the arbitrator determined that the APUO's proposal to him concerning a "final remedy" provided a "useful starting point" in addressing the issues that remained in dispute, and went on to state as follows:

> In its proposal, the [APUO] acknowledged that certain documents, which are identified therein, are in the custody or control of the University administration. The nature of these documents is fully addressed in the proposal as well as in the submissions of Counsel for the [APUO] in these proceedings and requires no further elaboration on my part. Counsel for the [University] has taken the position that the University administration has responsibility for making at least an initial determination as to the custody and control issue with respect to, for example, the personal notes and notations from academic staff. I agree with the [APUO] that the former Counsel to the University, who represented it throughout the lengthy series of hearings leading up to the September 29, 2008 award, had acknowledged that personal notes and annotations are not within the custody or control of the University.
>
> In my view, the University is bound by that acknowledgement, and in light of that, pursuant to my jurisdiction, I find that the University administration has no custody or control over personal notes or annotations made by academic staff. I therefore conclude that the [APUO's] position, as reflected in paragraph A.2) of its proposal [the Proposal], is correct. The [APUO] has taken the position that a number of other types of documents (for example, those related to "career path and performance evaluation", and in some cases "student exams") are exempt pursuant to section 65 of the Act. In my view, this question is best left to determination by the IPC pursuant to its authority under the *Act*.

[11] The APUO proposal for a "final remedy" to the grievance was appended to the arbitrator's final award of May 11, 2009, and is also set out in Appendix A to this order. It sets out categories of records that "are subject to a request by the person designated as head under [the *Act*] to the members of the bargaining unit", as well as categories of records that may be in the university's custody or control "unless related to research or teaching as generally described in article 20 of the collective agreement, as *FIPPA* would not apply according to section 65 of the *Act*."

[12] It is notable that the arbitrator states that his ruling is made "pursuant to the collective agreement" rather than under the *Act*. He also finds that the university is "bound" by an "acknowledgement" by the university's former counsel that "personal notes or annotations" of professors are not in the university's custody and control, and as a consequence, such notes and annotations may not be accessed by the university in relation to request under the *Act*. As explained later in this order, however, the *Act* is a statutory instrument and its application or lack of application is not a matter to be determined "pursuant to the collective agreement," or on the basis of "binding acknowledgement" made by counsel. Legislation cannot be superseded by contract or acknowledgement.

[13] Moreover, in the context of the acknowledgement by the university's former counsel, it is significant that the term "personal" is used without reference to the definition of "personal information" in section 2(1) of the *Act*. This purported exception to custody or control is accepted by the arbitrator without qualification. On this basis, its scope would include records relating to "administrative duties," "committees within the university regarding general policies," and "personnel or peer review committees." In other words, it purports to exclude notes or annotations made by an individual professor on any subject whatsoever, including professional and university-related matters, from the university's custody or control.

[14] Thus the arbitration award and the proposal purport to definitively exclude potentially responsive information relating to a wide range of matters from the university's custody or control, simply on the basis that the notes or annotations were made or added by a professor. As a consequence, a significant number of records relating to university administrative matters would fall outside the university's custody or control if this approach is followed.

[15] As well, other than examination-related records, the proposal does not contemplate that any teaching or research-related materials held by individual professors could ever be within the university's custody or control.

[16] I also note that the APUO proposal that is appended to the arbitrator's final award of May 11, 2009 purports to apply sections 65(6) and 65(8.1) to a significant number of record categories without any detailed review of the requirements articulated under those exclusions, or any examination of the meaning or reach of those sections.

[17] Following the issuance of the arbitrator's final award on May 11, 2009, I took the appeal off hold relating to records responsive to part 1 of the appellant's clarified request. I then asked the university to provide me with a copy of the decision letter concerning part 1 of the appellant's request as clarified during the course of this appeal. On August 26, 2009 the university wrote to the appellant, as follows:

> As you are aware, the above-referenced part of your request was the subject of a policy grievance filed by the Association of Professors of the University of Ottawa ("APUO") on January 18, 2007 wherein the APUO objected to the University of Ottawa's request for its members to produce records in response to your request for information. The APUO had earlier indicated to its members, in a memorandum dated November 13, 2006, of this objection and advised its members not to respond to such request for information. In the Arbitrator's award of September 29, 2008 in respect of the policy grievance, the Arbitrator ordered the withdrawal of the University of Ottawa's communication of November 6, 2006 regarding this request.
>
> Due to the lack of clarity in the September 29, 2008 arbitral decision as to what categories of records could be sought from APUO members in respect of requests for information generally, the APUO requested a supplemental hearing before the Arbitrator on February 10, 2009 to consider its proposal in that regard. The Arbitrator's decision of May 11, 200[9], in respect of the supplemental hearing, did not provide sufficient direction to the parties in this matter. As a result, it is not clear what categories of records could be sought from APUO members by the University of Ottawa in response for requests for information under *FIPPA*.
>
> The University of Ottawa is disappointed with the latest decision and, therefore, is considering all of its options in this matter, including, but not limited to, pursuing further discussions with the APUO and/or commencing additional legal proceedings.
>
> The issue that needs to be resolved is whether the issuance of a request for APUO records pursuant to a … request [under the *Act*] invokes a breach of the APUO Collective Agreement thereby restricting access to records.
>
> Accordingly, access is denied with respect to the first item of your request for information as presently there are no responsive records.

[18] The appellant appealed this new decision of the university to this office. Because this new appeal arose from part 1 of the clarified request, this new appeal was rolled into Appeal PA07-119 and all of the remaining issues are addressed in this order.

[19] I then sent a Notice of Inquiry seeking the representations of the university and the APUO respecting the following issues: the scope of part 1 of the appellant's request; which records are responsive to part 1 of the appellant's request; which responsive records are in the university's custody or control; and which records the university claims are excluded from the application of the *Act* by reason of sections 65(6) and 65(8.1). Because responsive records have not been identified, and no express claim applying section 65(6) or 65(8.1) is before me, this order does not expressly address the application of those provisions.

[20] I received representations from the university and the APUO, copies of which were sent to the appellant, along with a Notice of Inquiry. I received representations from the appellant, a copy of which was sent to the university and the APUO, seeking their reply representations. The appellant also raised the issue of whether the university's Freedom of Information Coordinator (FOIC) was in a conflict of interest position vis-à-vis the university. Therefore, this was added as an issue in this appeal. I received representations from both the university and the APUO in reply.

[21] Subsequently, I sought representations from all parties on the applicability of two recent Ontario Divisional Court decisions: *City of Ottawa v. Ontario* (hereinafter referred to as *City of Ottawa*),[1] and *Ministry of the Attorney General v. Information and Privacy Commissioner* (hereinafter referred to as *Ministry of the Attorney General*).[2] I received representations from the university and the APUO. I then provided a copy of the APUO's representations to the university and a copy of the university's representations to the APUO. As well, I provided a copy of the APUO's and the university's representations to the appellant. I received representations in response from the APUO only.

DISCUSSION:

PRELIMINARY ISSUES:

[22] There are two preliminary issues raised by the parties in their representations, which I will consider at the outset of this order:

A. Whether the FOIC is in a conflict of interest position vis-à-vis the university; and

B. Jurisdiction to determine the question of custody or control of APUO members' records in the context of a request under the *Act*.

[1] 2010 ONSC 6835 (Div. Ct.), leave to appeal denied, Doc. M39606 (C.A.).
[2] 2011 ONSC 172.

A. Is the FOIC in a conflict of interest position vis-à-vis the university?

[23] The appellant's representations raised the issue of an alleged conflict of interest because the university's FOIC has also held the positions of the university's Vice-President Governance (formerly the Secretary) or Legal Counsel working under the Vice-President Governance of the university. He states that:

> Under academic freedom, a university employer cannot collect and use even publicly available information about a professor (or information about a professor volunteered by a third party) in a way that is contrary to academic freedom and/or inconsistent with the strict procedures outlined in the Collective Agreement.

[24] Based on certain arbitration and court rulings, the appellant describes academic freedom of individual professors as including:

- freedom of expression both inside and outside the classroom without reprisal or interference
- independence in research and in professional communication
- professional independence in teaching methods
- guaranteed right to participation in collegial governance of the institution
- right to political expression and agency without interference
- right to full community and societal participation without interference

[25] In reply, the university submits that it is apparent from the structure of the *Act* that there is no inherent conflict of interest even where authority for compliance with the *Act* and authority as the employer vests in the same individual. It states that the role of the FOIC, while common to many institutions, is not set out in the *Act*. Rather, under the *Act*, the authority for responding to access requests rests with the "head" of the institution. Furthermore, the university argues that, because a head may delegate the power and duty to respond to access requests to an officer of the institution, or of another institution [under section 49(1)], the FOIC therefore exercises her powers and responsibilities pursuant to authority delegated by the head of the institution. It submits that:

> While the "employer" is defined in the Collective Agreement as the Board of Governors of the University and not the [FOIC], it is not clear how this distinction gives rise to the appellant's assertion that the individual carrying out the function of the [FOIC] is in a conflict of interest.
>
> Furthermore, it is clear that even if the individual in an institution is exercising the powers under [the *Act*] on behalf of the head and is also exercising a role as the employer, this in of itself does not establish a conflict of interest under [the *Act*].

> As the appellant recognizes, any other use by the University of information collected pursuant to [the *Act*] can be addressed through the grievance process contained in the collective agreement.
>
> The Head of any [institution under the *Act*] may be both the directing mind of the institution in its capacity as an employer and the statutory holder of the responsibility for compliance [with the *Act*].
>
> Any "conflict of interest" in this dual role must have been contemplated by the drafters of [the *Act*].

[26] The APUO submits that:

> It is the duty of the Head to make a disclosure decision following a request of access to a record.
>
> Public institutions must fulfill various obligations and duties prescribed by external statutes, for example, laws related to taxes, employment benefits, health and safety.
>
> These laws provide that institutions must fulfill specific obligations. These laws do not provide that institutions shall designate a member of the administration whose sole duty would involve answering access to information requests or applying employment laws or laws against discrimination.
>
> The *Act* does not impose such an exclusivity of duties: the costs for public institutions to have the obligation to nominate as "head" a person exclusively dedicated to the administration of *FIPPA* would be onerous and unreasonable.

Analysis/Findings

[27] Previous orders of this office have considered when a conflict of interest may exist with respect to decision-making under the *Act* by an institution. In general, these orders have found that an individual with a personal or special interest in whether the records are disclosed should not be the person who decides the issue of disclosure. In determining whether there is a conflict of interest, these orders looked at (a) whether the decision-maker had a personal or special interest in the records, and (b) whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the decision-maker.[3]

[3] See, for example, Orders PO-1868, PO-2536, MO-1285 and MO-1283.

[28] The question of conflict of interest encompasses both real conflicts, based on a personal or special interest, and reasonably perceived conflicts. The concern underlying the concept of conflict of interest is that a person making a decision on access to records should be free of extraneous influences that may prevent an impartial decision.

[29] In this case, the appellant suggests that the FOIC was in a conflict of interest position since she also acted as the Vice-President Governance or as legal counsel working under the Vice-President Governance. On the university's website, the role of the Vice-President Governance is described as follows:

> The Vice-President Governance oversees the secretarial and administrative services required for the operation of the Board, the Senate and their committees.
>
> The Vice-President Governance is the official secretary to the Board and Senate and is an ex-officio member of the Administrative Committee, of the Senate and of all Senate committees. The Legal Services, the University Archives and the Sexual Harassment Office report to the Vice-President, Governance.
>
> Finally, the Vice-President, Governance is one of the University's official signing authorities, including all diplomas conferred by the institution.

[30] The collective agreement defines the employer as the university's Board of Governors, rather than the FOIC or another person employed by the university. In the collective agreement, the parties agree to neither infringe nor abridge the academic freedom of the members of the bargaining unit, the APUO. The parties to the agreement are defined as the APUO and the university's Board of Governors.

[31] As pointed out by the appellant in his representations, the FOIC has the authority under the *Act* to request records only for the purpose of satisfying the requirements of the *Act*. Any other and incorrect use of the records requested by the FOIC would potentially be subject to several possible avenues of complaint, including a privacy complaint to this office; a grievance based on the terms of the collective agreement; an internal investigation and possible disciplinary action by the university; or, in the case where the FOIC is also a lawyer or another professional, a complaint about professional ethics to the Law Society of Upper Canada or other professional body.

[32] In this case, the FOIC may hold another position within the university's administration, such as Vice-President Governance or as legal counsel working under the Vice-President Governance. Even if the FOIC in her other position may find herself in an adversarial relationship to the appellant, I find that the FOIC may still make

decisions under the *Act* on the appellant's request for disclosure of records.[4] Any such interest does not inherently affect the ability of the FOIC to make an impartial decision on the appellant's access request. The issues to be decided in each role are entirely separate from each other. In addition, on the evidence, I find that the FOIC has no personal or special interest in the request or its subject matter.

[33] In my view, no well-informed person would have a reasonable apprehension that the FOIC would be in a conflict of interest, or would not make an impartial decision. Accordingly, I find that the FOIC is not in a conflict of interest because of her duties as the Vice-President Governance or as legal counsel in providing assistance to the Board of Governors of the university in fulfilling its obligations as an employer under the collective agreement. The work performed in the role of FOIC is entirely distinct, and I am unable to discern how these various roles create any reasonable perception of a conflict of interest.

[34] Therefore, I conclude that the FOIC is neither in an actual nor reasonably perceived conflict of interest, in deciding on the appellant's access request.

B. Jurisdiction to determine the question of custody or control of APUO members' records in the context of a request under the *Act*.

[35] Section 10(1) of the *Act* provides a right of access "to a record or part of a record *in the custody or under the control of an institution …*" unless the record is subject to an exemption under the *Act* or the request is frivolous or vexatious. Section 47(1) creates a corresponding right of access to one's personal information in the custody or under the control of an institution.

[36] As described above, the arbitrator has issued several awards relating to the question of custody or control, which is also raised in this appeal. Accordingly, it is necessary to decide whether the arbitrator and this office have concurrent or overlapping jurisdiction to determine the question of custody and control of APUO members' records that are the subject of an access request under the *Act*, or alternatively, whether either the arbitrator or this office has exclusive jurisdiction to do so.

[37] The representations provided by the university and the APUO in this appeal take markedly different positions in this regard.

[38] The APUO submits that:

> Arbitrators and statutory tribunals could have concurrent jurisdiction in matters involving the interpretation of a statute such as the [*Act*], as

[4] See Order PO-1868.

acknowledged in *Calgary Health Region v. Alberta (Human Rights and Citizenship Commission)*, 2007 ABCA 120, application for leave to appeal dismissed, [2007] S.C.C.A. No. 280 and *Amalgamated Transit Union, Local 583 v. Calgary (City)*, 2007 ABCA 121, application for leave to appeal dismissed, [2007] S.C.C.A. No. 294.

However, in this appeal, to render a decision on custody and control of the documents in the possession of the members of the bargaining unit, it is essential to interpret the collective agreement between the employer and the APUO. Where the essential matter of the dispute arises out of an interpretation, application or potential violation of the collective agreement, according to *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, the arbitrator has exclusive jurisdiction to consider and determine the dispute. The analysis developed in *Weber* has been applied in numerous decisions since 1995, as illustrated in *Cherubim Metal Works Limited v. Nova Scotia (Attorney General)*, 2007 NSCA 38 (Application for leave to appeal to the Supreme Court dismissed, [2007] S.C.C.A. No. 278) …

… These decisions have been rendered by an arbitral tribunal acting according to the arbitration process governed by the *Ontario Labour Relations Act* …

APUO submits that the University is trying to avoid the application of a valid arbitration decision by asking a different tribunal under a different Act to decide the very matter submitted to the arbitrator …

The decision of Arbitrator Chodos was not done in isolation or ignoring the principles behind *FIPPA*. In fact, at paragraph 232 of his award, he has explicitly included in his analysis the principles of interpretation of [the *Act*] ...

APUO respectfully submits that the IPC has the authority to render a decision on disclosure of records following an appeal filed by the requester. However, the interpretation given by Arbitrator Chodos could not be submitted for review by the University in this Appeal process. Arbitrator Chodos' awards are determinative of matters arising under the collective agreement, and should be considered a significant and persuasive determinant in this appeal.

[39] The university submits that:

The Professors are employees of the University and are represented by their union, the APUO. The APUO and the University are party to a

collective agreement which they have negotiated and renewed over many years including before [the *Act*] applied to the University.

The employer-employee relationship between a university and a professor is not like the typical employment relationship. The university-professor employment relationship is unique because the philosophical principle of academic freedom has institutional and individual aspects and it lies at the core of university life and activities. The collective agreement and time honoured customs and practices within the university community support and promote the academic freedom of professors ...

[The May 11, 2010 award] seems to suggest that the University may seek from professors only documents falling within the listed categories and not exempted by s. 65. By implication, it would be a violation of the collective agreement negotiated by the parties for the University to seek any other documents.

In practice, Arbitrator Chodos' award is unworkable. It would have the effect of insulating large categories of records from potential disclosure, excluding the University, the "institution" in this case, from the process of determining whether the statutory exemptions are applicable, and preventing the IPC from fulfilling its obligation to provide independent review of the disclosure decisions of the University …

The APUO suggested [to the arbitrator] that s. 65 [of the *Act*] would be applied not only to insulate records related to research and teaching from disclosure upon an access request, but also to prevent the Head of the University or his Delegate themselves from requesting the documents in the course of responding to an access request …

The University would agree that the determination of the applicability of the s. 65 exemption is a matter which should be left to the University and the IPC. Arbitrator Chodos did adopt the body of the Association's submissions, however, and did not expressly reject its suggestion that professors are not obliged to disclose exempted documents to the Head of the University.

The APUO may assert that the Chodos Awards bar the University from even requesting that professors who are employees of the institution provide documents which fall under the exemptions in s. 65. If this is determined to be the case, professors would be required to make the determination on a record by record basis as to whether those statutory exemptions apply. This is true not only in respect of the research and

teaching exemption, but also in respect of the labour relations exemption. This raises two significant problems.

First, professors are generally not knowledgeable about [the *Act*]. The application of the s. 65 exemptions draws on a large body of case law from the courts and IPC, case law of which professors will generally be unaware. Professors are more likely to make errors in applying the exemptions than the delegate of the Head of the University, who must apply the exemptions in light of the jurisprudence on a regular basis as part of her employment responsibilities. Leaving such decisions in the hands of individual professors would also lead to inconsistent decisions between professors. The problem is exacerbated in this case by the fact that the request is for records held by all professors, in this case approximately 1200 individuals.

Secondly, if professors would not be obliged to provide the records to the Head of the University or his delegate where an exemption allegedly applies, the University would be left unaware of whether or not responsive records exist. The University would therefore be required to inform the requester that it was unable to locate responsive records, and the requester would not be able to appeal the determination that exemptions apply. This is a serious problem.

[The *Act*] does not offer a mechanism for independent review of the decision of an individual that a record in their possession is: a) not in the custody and control of their employer, and b) exempted from [the *Act*] in any event. [The *Act*] contemplates review of those determinations only where they are made by the institution, in this case the University.

Where individual professors are making these determinations, and the University is unaware the records even exist, a requester may receive a response from a professor denying that a certain record exists, and have absolutely no recourse for review of this decision. All the University can say to an Inquiry is that it asked, and none of the professors produced responsive records. The IPC might sanction the university, but without some centralized, institutional ability to review responsive records and determine the applicability of exemptions, the University can do little to remedy the error. The IPC would therefore be unable to fulfill its obligation to review the disclosure decisions of the University, while the University would be placed in an untenable position.

In combination with the high probability that individual professors will make errors and inconsistent decisions in applying the exemptions, the lack of an effective review mechanism for their decisions means that the

> Chodos Awards and the collective agreement they are based on potentially could act as an impenetrable barrier to access to information under *FIPPA* in the broader University sector. *The University submits that a collective agreement on its own should not be permitted to restrict the right to, and processes for access to, information set out in FIPPA…*
>
> The application of *FIPPA* to universities was intended to promote transparency and accountability in these public institutions. *If employees, with the support of their union and relying on a collective agreement, are permitted to exclude the University from custody and control over all but the most mechanical of records relating to the day-to-day operation of the University, this intended purpose will be defeated at this university and others.*
>
> The collective agreement between the University and the Association is the foundation of the relationship between the University and its professors, as represented by their union, the APUO. However, *the collective agreement as a contract cannot supersede the statutory obligations imposed on the University. The Chodos Awards have the potential to do just that.*
>
> Individual professors, unacquainted with and untrained in the statutory exemptions in *FIPPA*, cannot be permitted to be the final and unreviewable arbiters of access and disclosure at the University. Such an outcome would prevent not only the University, but also the office of the IPC itself from fulfilling their obligations under *FIPPA*, and would be contrary to both the spirit and intent of the legislation. It would be tantamount to the University having contracted out of its obligations under *FIPPA*, something the University is not permitted, and indeed has no wish to do. [Emphases added]

[40] In *Weber v. Ontario Hydro,*[5] the Supreme Court of Canada discusses three possible approaches with respect to competing jurisdiction as between a labour arbitrator and another tribunal or a court. The three approaches in *Weber* are summarized by McLachlin C.J in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General),*[6] as follows:

> There is no easy answer to the question of which of two possible tribunals should decide disputes that arise in the labour context where legislation appears to permit both to do so. As explained in *Weber v. Ontario Hydro*, [cited above], three outcomes are possible.

---

[5] [1995] 2 S.C.R. 929.
[6] 2004 SCC 39, [2004] 2 S.C.R. 185.

> The first possibility is to find jurisdiction over the dispute in both tribunals. This is called the "concurrent" jurisdiction model. On this model, any labour dispute could be brought before either the labour arbitrator or the courts or other tribunals.
>
> The second possibility is the "overlapping" jurisdiction model. On this model, while labour tribunals consider traditional labour law issues, nothing ousts the jurisdiction of courts or other tribunals over matters that arise in the employment context, but fall outside traditional labour law issues.
>
> The third possibility is the "exclusive" jurisdiction model. On this model, jurisdiction lies exclusively in either the labour arbitrator or in the alternate tribunal, but not in both.
>
> *Weber* holds that the model that applies in a given situation depends on the governing legislation, as applied to the dispute viewed in its factual matrix. In *Weber*, the concurrent and overlapping jurisdiction approaches were ruled out because the provisions of the *Ontario Labour Relations Act*, R.S.O. 1990, c. L.2, when applied to the facts of the dispute, dictated that the labour arbitrator had exclusive jurisdiction over the dispute. However, *Weber* does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes. Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction; see, for example, *Goudie v. Ottawa (City)*, 2003 SCC 14 (CanLII), [2003] 1 S.C.R. 141, 2003 SCC 14; *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, 1996 CanLII 215 (S.C.C.), [1996] 2 S.C.R. 495. As stated in *Weber*, supra, at para. 53, "[b]ecause the nature of the dispute and the ambit of the collective agreement will vary from case to case, it is impossible to categorize the classes of case that will fall within the exclusive jurisdiction of the arbitrator."…

[41] *Weber* provides a two-step approach to determining which tribunal has authority, requiring consideration of (1) the "essential character" of the dispute and (2) the ambit of the collective agreement.

[42] In *Bonner v. Via Rail Canada,*[7] (*Bonner*) Martineau, J discusses the proper application of this two-step approach, which was initially developed by the Supreme Court of Canada in *St. Anne Nackawic Pulp and Paper Co. v. Canadian Paper Workers*

[7] 2009 FC 857.

Union, Local 219,[8], refined in *Weber v. Ontario Hydro,*[9] and more recently reaffirmed in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners,*[10] (*Regina Police Assn.*) and *Bisaillon v. Concordia University*,[11] (*Bisaillon*). *Bonner* deals with a competing jurisdiction issue in relation to the *Official Languages Act* [*OLA*]. Justice Martineau stated:

> In deciding which of the competing statutory regimes should govern the dispute, the Court should first consider the nature of the dispute to determine its essential character, *the key question being whether in its factual context the essential character of the dispute arises either expressly or inferentially from a statutory scheme* (*Regina Police Assn.*)….
>
> Secondly, in addition to determining whether the facts of the dispute fall within the ambit of the collective agreement, the Court must also determine if the legislature intended the dispute to be governed by the collective agreement or by the OLA, as revealed by the relevant legislation....
>
> … [W]hile the labour arbitrator certainly has legal authority to interpret and apply both the Charter and external statutes (including the *OLA*) in the case of staffing actions coming under the collective agreement, *the ultimate question is which forum is a "better fit", taking into account the intent of the legislator and the particular nature of the dispute.* Here, the issue raised by the applicant is whether VIA can impose, with the concurrence of CAW, bilingual requirements in the staffing of front-line service positions on-board trains not "designated" bilingual by TBS. This goes far beyond the simple interpretation or application of the text of the on-board collective agreement or the 1998 Memorandum. In the case at bar, VIA's policies and staffing actions are to be measured against any applicable provisions of the OLA and the Regulations. This certainly exceeds the usual expertise of the grievance arbitrator in labour relations matters…
>
> As a final note on the jurisdictional issue and as affirmed by the Supreme Court of Canada in *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paragraph 27, "[i]t is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences"… [Emphasis added].

---

[8] [1986] 1 S.C.R. 704 at paragraphs 15, 16, 19 and 20.
[9] Cited above at footnote 5.
[10] [2000] 1 S.C.R. 360.
[11] [2006] 1 S.C.R. 666.

[43] From my review of these authorities, it is clear that two somewhat different but inter-related questions need to be addressed, namely: (1) whether one or both of the arbitrator and this office have the authority to determine the question of custody or control of records that have been requested under the *Act*; and (2) whether the jurisdiction to make this determination is concurrent, overlapping or exclusive. Answering these questions requires consideration of the two-part test in *Weber*, as further explained in *Bonner*. Question 2 also requires consideration of the governing legislation in the factual matrix of the dispute, as stated by McLachlin C.J. in *Quebec (Commission des droits de la personne et des droits de la jeunesse).*[12]

[44] I will begin with question 1, which requires consideration of the test in *Weber*, as further explained in *Bonner*. This test asks the following questions:

1. What is the "essential character" of the dispute?

2. Did the legislature intend the dispute to be decided by the collective agreement or by the statute in question?

What is the "essential character" of the dispute?

[45] In this case, the dispute clearly arises out of a request for access to information made to the university as an institution under the *Act*. That request is at the core of the dispute. The issues of whether responsive records are within the custody or control of the institution, whether they are included or excluded from the ambit of the *Act*, and ultimately whether the requester will be granted or refused access to the records, all arise from that request. The essential character of the dispute is one of access to information under the *Act*.

[46] The university, in responding to the request, directed the faculty to search for and produce potentially responsive records, to enable the university to make a decision regarding access to the information. The nature of the records raised the issue of whether some of them may or may not be excluded from the *Act* under the exclusion in section 65(8.1), which is intended to protect academic freedom.

[47] Without the request under the *Act*, there would have been no direction by the university to APUO members to search for potentially responsive records and produce them to the university, and absent that direction, there would have been no grievance and no series of arbitration awards.

[48] The arbitration awards purport to apply the collective agreement to a great many types of records as a means of superseding and avoiding the application of the *Act* on

[12] Cited above at footnote 6.

the ground of academic freedom. Article 9 of the collective agreement discusses academic freedom as follows:

> The parties agree neither to infringe nor abridge the academic freedom of the members. *Academic freedom is the right of reasonable exercise of civil liberties and responsibilities in an academic setting*. As such it protects each member's freedom to disseminate her opinions both inside and outside the classroom, to practice her profession as teacher and scholar, librarian, or counsellor, to carry out such scholarly and teaching activities as she believes will contribute to and disseminate knowledge, and to express and disseminate the results of her scholarly activities in a reasonable manner, to select, acquire, disseminate and use documents in the exercise of her professional responsibilities, without interference from the employer, its agents, or any outside bodies. All the abovementioned activities are to be conducted with due and proper regard for the academic freedom of others and without contravening the provisions of this agreement. Academic freedom does not require neutrality on the part of the member, but rather makes commitment possible. However, academic freedom does not confer legal immunity, nor does it diminish the obligations of members to meet their duties and responsibilities [Emphasis added].

[49] I note that the collective agreement makes no reference to the issue of who has custody or control of a record that has been created, prepared, maintained or used by a professor in the course of his or her employment with the university. Rather, the agreement focuses on the right of professors to the reasonable exercise of their civil liberties and responsibilities in an academic setting.

[50] The agreement protects a professor's freedom to ". . . select, acquire, disseminate and use documents in the exercise of his or her professional responsibilities, *without interference from the employer, its agents, or any outside bodies* [emphasis added]."

[51] Therefore, the collective agreement seeks to protect professors from interference from the university or any outside bodies in the exercise of their duties as a professor. It does not discuss access requests under the *Act*, or who has custody or control of records that are the subject of such a request.

[52] I also note that the collective agreement does not purport to oust, by contract, the potential application of the *Act*. As explored in more detail below, such an exclusion would be impossible. Even more fundamentally, it would be contrary to public policy if the application of duly enacted statutes could be avoided by simple contract, thereby ousting the statutory rights of third parties, without hearing from them.

[53] Concerning part 1 of the test set out above, I find that the essential character of the dispute concerns an access-to-information request made under the *Act*. The questions to be decided arise from the interpretation of the provisions of the *Act*. It should be noted in this regard that the Ontario Court of Appeal has stated that, the "essential character" analysis must be applied to the dispute as a whole and not to its constituent elements.[13]

Did the legislature intend the dispute to be decided by the collective agreement or by the statute in question?

[54] The university is an institution under the *Act*. Section 69 provides that the *Act* applies to any record in the custody or under the control of an institution. Where an access to information request is made under the *Act*, the statute requires an institution to disclose any responsive information in its custody or under its control that is not excluded from the *Act* or subject to an exemption from disclosure.

[55] In *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*,[14] the Ontario Court of Appeal recently affirmed the strong public accountability purposes served by the *Act* and the need to "ensure that citizens have the information required to participate meaningfully in the democratic process." This is reflected in the purposes of the *Act* and that under section 54(1) of the *Act* the Commissioner may make orders regarding disclosure of information that are binding on institutions (see also Order PO-2917).

[56] In particular, concerning the public accountability purposes served by the *Act*, section 1 states that the purposes of the *Act* 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

[13] See *McNeil v. Brewers Retail Inc.*, 2008 ONCA 405 at paragraph 39.
[14] 2009 ONCA 20 (reversing [2007] O.J. No. 2441).

[57] Concerning an individual's right of access, section 10(1) of the *Act* provides that:

> 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,
>
> (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or
>
> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[58] Section 47(1) of the *Act* contains similar provisions conferring on individuals a right of access to their personal information in the custody or under the control of an institution. It states:

> Every individual has a right of access to,
>
> (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and
>
> (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

[59] The *Act* contemplates that the head will make determinations concerning the application of exemptions from the right of access and exclusions from the scope of the *Act*. The head is responsible to provide an access decision to a requester and notice to potential affected parties. It is also noteworthy that the *Act* expressly confers on the Commissioner the power to hear an appeal of a denial of access or any other decision of the head in relation to an access request made under the *Act*, with no exceptions. Section 50(1) states:

> A person who has made a request for,
>
> (a) access to a record under subsection 24(1);
>
> (b) access to personal information under subsection 48(1); or
>
> (c) correction of personal information under subsection 47(2),
>
> or a person who is given notice of a request under subsection 28(1) may appeal any decision of a head under this Act to the Commissioner.

[60] In addition, section 52(1) of the *Act* empowers the Commissioner to conduct an inquiry to determine the issues in an appeal, and the remainder of section 52 confers a variety of powers on the Commissioner for this purpose including the power to order production of records and to enter premises for the purposes of inspecting records [section 52(4)]; to summon and examine any person on oath [section 52(8)]; and to solicit and receive representations [section 52(13)]. Once the inquiry concludes, section 54(1) states that the Commissioner "… shall make an order disposing of the issues raised by the appeal," and section 54(3) indicates that "[s]ubject to this Act, the Commissioner's order may contain any terms and conditions the Commissioner sees fit."

[61] It is clear from these provisions that the Legislature has provided the Commissioner with wide-ranging powers to deal with issues in relation to access to information requests and appeals. Since the inception of the *Act*, the Commissioner has issued over 5,000 orders dealing with access to information appeals under the *Act* and its companion legislation, the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*).

[62] In *Reference re Municipal Freedom of Information and Protection of Privacy Act* (hereinafter referred to as *Reference re MFFIPA*),[15] the Court ruled that the City cannot by direct application to the Court circumvent the process set out in *MFIPPA*. In doing so, the Court stated as follows:

> Part III of *MFIPPA* sets out a comprehensive procedure for appealing a decision to the Commissioner. The process is convenient and inexpensive. The appeal is in writing. The parties have the right to file evidence, make submissions and be represented by counsel. The Commissioner has broad powers to compel witnesses and require the production of documents, giving her the ability to conduct a wide-ranging inquiry into all of the evidence. The Commissioner is required to conduct a de novo hearing on the appeal: *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.); aff'd [2005] O.J. No. 4047 (Ont. C.A.). At the conclusion of the hearing, the Commissioner shall make an order disposing of all of the issues raised on the appeal.

[63] I agree with this analysis, which supports the conclusion that an appeal to the Commissioner is the appropriate forum for a determination of issues arising from an access request under *FIPPA*. Because of these statutory powers, the Commissioner is in a better position to adjudicate upon an appeal concerning access to records under *FIPPA*.

---

[15] 2011 ONSC 1495.

[64] In addition, the process of determining whether a record is within an institution's custody or control, or whether an exemption from the right of access, or an exclusion from the application of the *Act,* might be applicable, is a complex one. The Commissioner's expertise in this area far outweighs that of the arbitrator. The Commissioner is empowered under the *Act* to determine, as a preliminary issue going to the Commissioner's jurisdiction to continue the inquiry, whether records sought by a requester are within an institution's custody or control, and/or whether they might fall within the scope of one of the exclusionary provisions in section 65 of the *Act*.[16]

[65] Furthermore, the weight of judicial authority is to the effect that it is not possible to contract out of the *Act*.[17] In the context of an access request under the *Act*, in order to be withheld from disclosure, a record must fall outside the institution's custody or control, or alternatively, it must be excluded from the application of the *Act* under section 65 or an analogous provision, or qualify for an exemption according to its terms.

[66] If, relying on the arbitrator's awards and the collective agreement, university professors are empowered to determine, without further review, whether disputed records are subject to the *Act*, and the related question of whether the university has custody or control of these records, the university and the IPC will be left unaware as to whether responsive records that may be in the university's custody or control even exist. Moreover, the university's decision-making power under section 10(1) of the *Act* would be unlawfully delegated to individual professors, and the IPC would be unable to fulfill its statutory obligation under section 52(1) of the *Act* to conduct an inquiry to review the university's access to information decisions. This would defeat or unlawfully restrict the legislative mandate of both the university and the Commissioner.

[67] It is also significant that the collective agreement does not provide a mechanism for access to records under the custody or control of the university by members of the public. Similarly, there is no provision in the *Labour Relations Act* establishing a public right of access to records in the custody or control of an employer that is also an institution under the *Act*.

[68] The legislature has expressly conferred on the head of an institution the authority to make access decisions and on the Information and Privacy Commissioner the authority to hear access appeals under the *Act* (see sections 10(1) and 50(1) of the

---

[16] See *Ontario (Minister of Health) v. Holly Big Canoe*, 1995 CanLII 512 (C.A.) and *Ministry of Attorney General and Toronto Star and Information and Privacy Commissioner of Ontario*, 2010 ONSC 991.

[17] See, in this regard *St. Joseph Corp. v. Canada (Public Works and Government Services)*, [2002] F.C.J. No. 361 at paragraphs 51-55 (T.D.); *Brookfield LePage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, [2003] F.C.J. No. 348 at paragraphs 14-19 (T.D.); *Canadian Tobacco Manufacturers' Council v. Canada (Minister of National Revenue - M.N.R.)*, [2003] F.C.J. No. 1308 at paragraphs 122-124 (F.C.); *Ontario (Ministry of Transportation)*, [2004] O.J. No. 224 at paragraph 33 (Ont. Div. Ct.); affirmed (Ont. C.A.), [2005] O.J. No. 4047; application to Supreme Court of Canada for leave to appeal dismissed [2005] S.C.C.A. No. 563.

Act, reproduced above). The *Act* provides a detailed code for establishing and determining public rights of access to information. It establishes the Commissioner as an independent arbiter of those rights, and as an essential part of the legislative scheme, as expressed in the purposes of the *Act* set out in section 1, reproduced above. The *Labour Relations Act* does not contain a provision that operates to oust the application of the *Act*, or the Commissioner's authority to conduct an appeal under the *Act*.

[69] Upon review of the statutory provisions of both the *Freedom of Information and Protection of Privacy Act* and the *Labour Relations Act*, I find that, in the context of an access-to-information request made under the *Act*, the legislature intended that the question of custody or control should be decided under the *Act*. A labour arbitrator is not statutorily empowered to make a determination under section 10(1) of the *Act* as to whether a record is within the custody or control of the university. Rather, under the *Act*, the head of the university or his or her lawful delegate have jurisdiction to make this determination, which decision may be appealed to this office.

[70] Therefore, I find under part 2 of the test that the legislature intended that the issue was to be decided under the *Act* and not under the collective agreement. The *Act* stipulates that this determination is to be made by the university, at first instance, and on appeal, by the Commissioner. The university has the statutory authority to determine whether records responsive to an access request are in its custody or control. The university's decision is then subject to review by this office. The collective agreement cannot supersede the statutory obligations imposed under the *Act* on the university and the Commissioner.[18]

Concurrent, overlapping or exclusive jurisdiction?

[71] The next question to consider is whether the arbitrator could be found to have concurrent or overlapping jurisdiction with the Commissioner in deciding the issues that arise from an access-to-information request made under the *Act*, including the question of custody or control. For the reasons outlined below, I find that this is not an appropriate case for concurrent or overlapping jurisdiction. On appeal, the Commissioner has exclusive jurisdiction to make these determinations.

[72] In determining whether a model of concurrent or overlapping jurisdiction is appropriate in this case, the words of McLachlin, C.J. in *Quebec (Commission des droits de la personne et des droits de la jeunesse)*[19] provide guidance. As noted above, she states that "the model that applies in a given situation depends on the governing legislation, as applied to the dispute viewed in its factual matrix." In my view, the submissions of the university about the non-workability of Arbitrator Chodos' award,

[18] See the authorities listed at footnote 17.
[19] Cited above at footnote 6.

and the problems it faces in administering requests under the *Act,* are an important aspect of the "factual matrix" to be considered in making this determination.

[73] With respect to the governing legislation, which as regards an access-to-information request is clearly the *Act*, it is important to note that the "head" is responsible for decision-making in relation to access requests made under the *Act*. Under section 10(1)(b), it is the "head" who determines whether a request is frivolous or vexatious; the "head" is also responsible for determining the application of exemptions as is made clear by the introductory wording of sections 12 through 22, and section 49; and the "head" is responsible for notifying the requester of whether access will be granted (section 26) and for notifying affected persons before making a disclosure that could affect their interests (section 28).

[74] As noted above, any decision of the head regarding an access request under the *Act* may be appealed to this office [section 50(1)], which is given the authority to make binding orders in relation to the issues raised [section 54(1)], subject only to judicial review. It is apparent from a review of these provisions that the Legislature has clearly conferred the authority to determine such matters on the Information and Privacy Commissioner, not on the arbitrator.

[75] In addition, the *Act* specifically provides that the person who requested access to a record (the requester – in this case, the appellant) shall be given an opportunity to make representations to the Commissioner.[20] In an arbitration, there is no provision in the *Labour Relations Act* for the requester to participate in the arbitration, and in this case, the appellant, as a requester under the *Act*, was not a party to the proceedings before the arbitrator. By contrast, in an appeal under the *Act*, the appellant is a party, and is entitled to provide representations on all issues. Accordingly, an appeal to the Commissioner is a fairer process for a determination of issues that arise from an access request under the *Act*.

[76] Moreover, the following submissions by the university support a view that concurrent or overlapping jurisdiction would not be appropriate in this case:

- the application of the *Act* to universities is intended to promote transparency;

- the award of Arbitrator Chodos would have the effect of insulating large categories of records from potential disclosure, excluding the university from the process of determining whether the statutory exemptions are applicable, and preventing this office from providing independent review of decisions concerning disclosure;

[20] *Act*, section 52(13).

- in the model established under the Chodos award, individual professors would be responsible for determining issues of custody and control and/or the potential application of exemptions, and individual professors are not generally knowledgeable about the *Act*;

- if professors are not required to provide potentially responsive records to the university, then not only would the university and this office be deprived of any meaningful oversight, but the university (and, by extension, this office) would be left unaware of whether responsive records exist.

[77] From a review of the award and the APUO's proposal about which records are subject to the *Act* and subject to requests for access by the university administration, which was essentially adopted by the arbitrator in his third award, it is evident that the arbitrator's decisions apply a broad brush approach to the questions of custody and control and access to records by the university after it receives a request under the *Act*. As explored later in this order, this broad brush approach appears to capture records concerning which there may, in fact, be a dispute about custody and control.

[78] Notably, the arbitrator characterizes his decision as "whether, *pursuant to the collective agreement*, the university administration has custody or control over documents that are normally in the possession of members of the APUO bargaining unit."[21] (Emphasis added.) On this basis, the award suggests that decisions made by professors about custody or control are not subject to review by either the university administration or this office, in contrast to the decision-making and review processes established under the *Act*. As already noted, the collective agreement cannot supersede the *Act*.

[79] On this point, the university submits:

> … [*T*]*he collective agreement as a contract cannot supersede the statutory obligations imposed on the University. The Chodos Awards have the potential to do just that.*
>
> Individual professors, unacquainted with and untrained in the statutory exemptions in *FIPPA*, cannot be permitted to be the final and unreviewable arbiters of access and disclosure at the University. *Such an outcome would prevent not only the University, but also the office of the IPC itself from fulfilling their obligations under FIPPA, and would be contrary to both the spirit and intent of the legislation.* It would be tantamount to the University having contracted out of its obligations

[21] at paragraph 21 of the award of May 11, 2009.

> under *FIPPA*, something the University is not permitted, and indeed has no wish to do. [Emphases added.]

[80] I agree with these submissions. In the circumstances of this case, it is apparent that not only is there the potential for an arbitral award having the consequences outlined by the university; in fact, such an award (or awards) has actually been made. Given that the arbitrator's authority arises under the collective agreement, and implementation of the award would in fact have the consequences outlined herein by the university, I conclude that concurrent or overlapping jurisdiction is not appropriate in this situation. Concurrent or overlapping jurisdiction is also not consistent with the fact that, in disputes arising from a request under the *Act*, the legislature has conferred express appellate authority on the Commissioner.

[81] Simply stated, decision-making in relation to access-to-information requests made to the university must be made under the *Act*. Such decisions are *not* made under the collective agreement, and therefore the awards of the arbitrator, which purport to draw their authority from the collective agreement, are not determinative of the issue of custody or control arising from an access-to-information request made under the *Act*.

[82] In addition, as noted earlier in this order, in the description of the arbitrator's final award of May 11, 2009, it is evident that the arbitrator simply accepted an acknowledgement by the university's counsel that "personal notes or annotations" of professors are excluded from the university's custody or control, finding that the university was "bound" by this acknowledgement without any analysis of this proposition as a question of law. What this represents, in fact, is an action which, like a decision-making process that gives the collective agreement primacy over the *Act*, has the effect of settling matters that should be dealt with under the *Act* by means of a private contract or agreement. This approach is not sustainable in law. This issue must be decided under the *Act*, and not by means of a "binding acknowledgement" or a finding made under the collective agreement. Moreover, this decision purports to exclude a very broad category of information that pertains to the university's business, based on the collective agreement and/or by simply accepting a position taken by counsel.

[83] It is also to be noted that, unlike the arbitrator, the Commissioner is an established and ongoing tribunal whose purpose is to address issues under the *Act*. This means that if and when future issues arise with respect to custody and/or control of records by the university, the application of exclusions under section 65, and the application of exemptions, they are subject to determination by way of further appeals to the Commissioner.

[84] The Commissioner's exclusive jurisdiction is confirmed by comments of the Divisional Court in *John Doe v. Ontario*:[22]

> The Commissioner exercises a supervisory function in respect of compliance by government institutions with provisions of the Act and has exclusive jurisdiction to review the decision of a head of an institution under the Act relating to a request for access (ss. 4, 50).

[85] Applying the two-part test in *Weber*, it is clear that the legislature intended that issues arising from requests and appeals under the *Act* be determined by the head, and on appeal, by the Commissioner, and not by a labour arbitrator. Considering the governing legislation (that is, the *Act*) as applied to the dispute in the relevant factual matrix, as outlined in the foregoing analysis, and bearing in mind that the arbitrator's authority only arises under the collective agreement, an instrument that is not determinative of the issue of custody or control, I find that, in the context of an access-to-information request made under the *Act,* the Commissioner has the exclusive jurisdiction to determine this issue.

[86] This conclusion is not impacted by the fact that, on occasion, a labour arbitrator, like any other adjudicator, may have occasion to consider and apply sections of the *Act* that may arise as a constituent part of a dispute which, under the *Weber* analysis, is properly before an arbitrator.[23]

[87] I will now turn to the issue of whether the responsive records are within the university's custody or control within the meaning of the *Act*.

CUSTODY OR CONTROL

Introduction

[88] In his clarified request, the appellant is seeking the following records:

> All (e.g., letter, fax and email) communications about [him] (other than messages sent by him), sent by or received by all professors (APUO members) at the University of Ottawa.

---

[22] (1993) 13 O.R. (3d) 767; 1993 CanLII 3388; see also *Reynolds v. Binstock*, 2006 CanLII 36624 (ON SCDC).

[23] See, for example, *Laurentian University Faculty Association v. Laurentian University*, 2010 CanLII 32256 (ON LRB), and *Amalgamated Transit Union Local 1587 v. GO Transit*, 2010 CanLII 45247 (ON GSB). See also section 48(12)(j) of the *Labour Relations Act.*

[89] Under section 10(1), the *Act* applies to records that are in the custody or under the control of an institution. Section 10(1) (reproduced above, but repeated here for convenience) 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,
>
> (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or
>
> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[90] 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.[24] 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 (Order PO-2836). 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 though 22 and section 49).

[91] The courts and this office have applied a broad and liberal approach to the custody or control question.[25]

[92] Based on the above approach, 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.[26] 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? [Order P-120]
- What use did the creator intend to make of the record? [Orders P-120 and P-239]

---

[24] Order P-239; *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[25] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, 1999 CanLII 3805, [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.
[26] Orders 120, MO-1251, PO-2306 and PO-2683.

- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)* (1999), 47 O.R. (3d) 201, 1999 CanLII 3805]

- Is the activity in question a "core", "central" or "basic" function of the institution? [Order P-912]

- Does the content of the record relate to the institution's mandate and functions? [*Ministry of the Attorney General v. Information and Privacy Commissioner*, cited at footnote 2, above; *City of Ottawa v. Ontario*, cited at footnote 1, above; Orders P-120 and P-239]

- 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? [Orders P-120 and P-239]

- If the institution does have possession of the record, is it more than "bare possession"? [Order P-239; *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited at footnote 2, above]

- 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? [Orders P-120 and P-239]

- Does the institution have a right to possession of the record? [Orders P-120 and P-239]

- Does the institution have the authority to regulate the record's content, use and disposal? [Orders P-120 and P-239]

- 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? [*Ministry of the Attorney General v. Information and Privacy Commissioner*, cited at footnote 2, above]

- To what extent has the institution relied upon the record? [*Ministry of the Attorney General v. Information and Privacy Commissioner*, cited at footnote 2, above; Orders P-120 and P-239]

- How closely is the record integrated with other records held by the institution? [Orders P-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? [Order MO-1251]

[93] In considering the issues of custody or control in the circumstances of this case, it is important to bear in mind that these are different issues than whether records are excluded under section 65(6) or 65(8.1). Those sections exclude particular classes of records that *are* in an institution's custody or under its control from the scope of the *Act*. Custody or control is the essential threshold question for determining whether, at first instance, records may be the subject of an access request. A decision to rely on section 65, or one of the exemptions in the *Act*, need only be made for records in an institution's custody or control.

[94] Several recent decisions of the Divisional Court have expressly addressed the issue of custody and control.

[95] *City of Ottawa v. Ontario*[27] applied a purposive approach in deciding that e-mail communications of an employee that related to non-work related volunteer activities of the employee, found on the city's server, were not in the city's custody or under its control. In this decision, made under the equivalent of section 10 of *MFIPPA*, the Court emphasized the importance of analyzing the purposes of the *Act*, and in particular, its purpose of transparency and accountability, in determining the issues of custody or control.

[96] *Ministry of the Attorney General*[28] found that court statistical records prepared by Ministry staff at the request of the Chief Justice of the Ontario Court, which had been used by the Ministry for planning and other purposes, were in its "custody". The Court reached this conclusion because the Ministry had physical possession, and based on its use of the records and their relation to its mandate, this was more than "bare possession" and sufficient to constitute "custody" under the *Act.*

[97] It is evident from both *City of Ottawa* and *Ministry of the Attorney General* that, where there is reason to question whether an institution has more than bare possession of records that appear to be in its physical possession, as is the case in this appeal, the relationship between the institution's public mandate and the records is a crucial one to consider, as is the question of whether a finding that the records are in the institution's custody and/or control would advance the transparency purposes of the *Act*. In addition, the other factors set out above must be considered.

[27] Cited at footnote 1, above.
[28] Cited at footnote 2, above.

[98] This analysis will turn to a very significant degree on the nature and purpose of the records. In this case, the request is quite broad, seeking access to "all (e.g., letter, fax, and email)" communications" about the appellant, other than messages sent by him, sent by or received by all APUO members at the University of Ottawa.

[99] As already discussed, the university's request that APUO members produce responsive records in their possession to the university administration in order to deal with this request is the basis of the grievance that led to the three arbitration awards. The arbitrator ruled that this request by the university should be withdrawn. Therefore, no search for records responsive to part 1 of the request has ever been conducted. Neither the university administration nor this office has seen the records or even a list of them.

[100] In these circumstances, the only way to proceed is to evaluate the available evidence as to what types of responsive records might exist, and then evaluate whether any of these could be expected to fall within the university's custody or control.

Responsive Records

[101] The appellant's representations indicated that the responsive records would include e-mails exchanged among APUO members about him. These would relate to projects he spearheaded, and would be exchanged as part of these professors' collegial governance responsibilities in evaluating projects and proposals. These e-mails would also contain comments about him personally, but under the collegial governance umbrella.

[102] As already noted, after he provided his representations, I invited the appellant to clarify his request, and he did so. With respect to the portion of his request that relates to records held by APUO members, which is the portion at issue in this order, he indicated that he seeks access to all (e.g. letter, fax and email) communications about him, (other than messages sent by him), sent by or received by all professors at the university. [29]

[103] Earlier, in an e-mail attached to the university's request for responsive records that it sent to APUO members, which led to the eventual grievance, the university had identified a number of categories of responsive records that could mention the appellant, including the following:

> … copies of all documents, written or electronic, which mention or refer to any of the following:

[29] As discussed at the beginning of this order, the other part of the request, dealing with non-APUO members, was dealt with in Order PO-2776-I.

a) [the appellant] (all documents, including complaints, grievances, privileges, etc.)

b) [seven courses offered by the University, identified by subject and course number]

c) [the appellant's] research direction in [a named article] including the graduate student …

[104] The e-mail went on to refer to a website and several other media-related items in which the appellant appears to have had some involvement.

[105] In its initial representations, the university submits that responsive records would include faxes, letters, e-mails, notes in hard and soft copy, as well as recorded notes of telephone calls or voicemails, about or referring to the requester.

[106] The APUO, relying on its proposal appended to the arbitrator's award, submits that the appellant's request is "too broad" because it encompasses records that are outside the university's custody or control. I disagree with this submission. Unless the request is frivolous or vexatious within the meaning of the *Act* and its accompanying regulation, which no party has argued it is, as long as a request is clear, it is a proper request under the *Act*. Custody or control is a separate question.

[107] The APUO submits that the categories of responsive records are set out in its proposal that was attached to the third arbitration award of May 11, 2009, which is also set out in Appendix A to this order.

[108] Although it is not possible to be definitive about the nature of the responsive records, it is clear that they encompass electronic and paper records that mention the appellant, including e-mails, correspondence, meeting notes, teaching-related materials and committee documents.

Representations and Analysis

Transparency, academic freedom, and "customary practice"

[109] The representations of the APUO, the university and the appellant all address the relationship between academic freedom and the transparency purposes of the *Act*. As already noted, one of the factors involved in the custody/control analysis is the "customary practice" of the institution with respect to records of the type that are under consideration. Other factors mentioned above that are also inherent in this analysis include whether academic freedom imposes limits on the university's access to or use of the records, and the customary practices of other institutions of a similar nature.

[110] All three parties submit that academic freedom is important, and all of them refer to historic practices intended to protect it. The principle of academic freedom and the practices that protect it are reflected in the collective agreement, but they were not newly created there; rather, it is clear that the principle of academic freedom has a long history. As already noted, the collective agreement does not supersede the *Act*, nor is it determinative of the question of custody or control. However, as discussed in more detail below, it is clear that the principle of academic freedom, quite independent of the collective agreement, is a significant factor in relation to custody and control.

[111] The university refers to academic freedom and its impact on the nature of a professor's employment in the following passage from its initial representations, which is quoted above but repeated here for convenience:

> The employer-employee relationship between a university and a professor is not like the typical employment relationship. The university-professor employment relationship is unique because the philosophical principle of academic freedom has institutional and individual aspects and it lies at the core of university life and activities. The collective agreement and time honoured customs and practices within the university community support and promote the academic freedom of professors.

[112] The APUO makes a similar submission, arguing that the analysis in Order 120 does not necessarily apply in the present circumstances because of the unique employment relationship between the university and its professors which is informed by the dictates of academic freedom.

[113] The APUO also quotes from the first arbitration award, which explains the relationship in the following way:

> … the academic staff are indeed employees of the University. Nevertheless, in light of the collective agreement and the age-old customs and practices of academic institutions, including the University of Ottawa, it can hardly be argued that university professors are typical employees who are subject to the close scrutiny of management. In general, the evidence demonstrates that in the context of the various governing structures of the University, which are described in detail above, the academic staff have a considerable degree of independence in the exercise of their academic functions, i.e. teaching, research and community activities. Indeed, it is hard to conceive how they could fulfill those functions without such latitude and independence.

[114] The APUO also references the portions of the collective agreement that deal with the "customary practices" of the university as regards the three main duties of professors – teaching activities, scholarly activities and academic service activities

(sections 20.1, 20.2, 20.3.1, 20.3.2, 20.3.3 and 20.4 of the agreement), which are set out in Appendix B to this order. However, in my view, the description of these activities as part of the duties of a professor does not necessarily mean that all related records in the possession of faculty members are beyond the university's custody or control in order to protect academic freedom; in fact, from some of the descriptions of what happens to such records, it is clear that some of them *are* in the university's custody and/or control (e.g. examinations where a student contests the grade awarded). I therefore conclude that although relevant, these descriptions of professors' duties are not definitive in determining the boundaries of academic freedom or the customary practices of the university.

[115] In a further implicit reference to the "customary practices" of the university, the APUO also submits that the application of the *Act* to the university does not give it custody or control over records which were not in its custody or control before the *Act* began to apply. I agree that the regulatory change that brought the university into the definition of "institution," thus making its records subject to the *Act*, did not have the effect of broadening the classes of records over which the university has custody or control. Thus the question to be determined is, taking customary practice and the other relevant factors into account, which records that may be responsive are in the university's custody or under its control?

[116] On the subject of academic freedom, the university refers to *McKinney v. University of Guelph.*[30] In this case, in finding that actions of the University of Guelph imposing mandatory retirement on its professors did not invoke section 15 of the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada acknowledged the importance of academic freedom in a vibrant and functioning democracy:

> Excellence in our educational institutions, and specifically in our universities, is vital to our society and has important implications for all of us. Academic freedom and excellence is essential to our continuance as a lively democracy.

[117] The university expands upon this in its representations, stating that:

> … through professors' exercise of academic freedom universities have an important function as a check on government action. Academic freedom allows professors to question government action, to dissent from predominant perspectives and to advocate even for unpopular points of view all critical to a healthy democracy. The Court noted that universities would strenuously resist government intrusion on these freedoms.

[30] [1990] 3 S.C.R. 229.

[118] The APUO states that:

> Academic freedom has been recognized as a fundamental value in universities and a basic principle in democratic societies. Academic freedom provides academic staff with the conditions required to fulfill their duties free from threats to their career and independence, including the ability to conduct unconventional lines of inquiry and to engage in critical commentary on their own institution and society at large. …
>
> APUO submits that failing to take into consideration the principle of academic freedom would have the effect of undermining a significant principle that is at the foundation of University institutions and democracy.

[119] The appellant refers to the "statement of purpose" of the University of Toronto, which also affirms the importance of academic freedom. It states, in part, as follows:

> Within the unique university context, the most crucial of all human rights are the rights of freedom of speech, academic freedom, and freedom of research. And we affirm that these rights are meaningless unless they entail the right to raise deeply disturbing questions and provocative challenges to the cherished beliefs of society at large and of the university itself.
>
> It is this human right to radical, critical teaching and research with which the University has a duty above all to be concerned; for there is no one else, no other institution and no other office, in our modern liberal democracy, which is the custodian of this most precious and vulnerable right of the liberated human spirit.[31]

[120] The meaning of the term "academic freedom" is explained in paragraph 9 of the Collective Agreement:

> Academic freedom is the right of reasonable exercise of civil liberties and responsibilities in an academic setting. As such it protects each member's freedom to disseminate her opinions both inside and outside the classroom, to practice her profession as teacher and scholar, librarian, or counsellor, to carry out such scholarly and teaching activities as she believes will contribute to and disseminate knowledge, and to express and disseminate the results of her scholarly activities in a reasonable manner,

[31] Available on the University of Toronto website at http://www.governingcouncil.utoronto.ca/policies/mission.htm. Also, as cited by the APUO, see the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel, November 1997, paras. 27-29, found at http://portal.unesco.org/en/ev.php-URL_ID=13144&URL_DO=DO_TOPIC&URL_SECTION=201.html.

> to select, acquire, disseminate and use documents in the exercise of her professional responsibilities, without interference from the employer, its agents, or any outside bodies.

[121] The importance of both academic freedom and transparency is noted in the legislative debates that preceded the enactment of section 65(8.1), the exclusion from the *Act* that applies to records related to research and records of teaching materials. M.P.P. Wayne Arthurs, speaking on behalf of the government, stated:[32]

> . . . [T]his bill proposes to make Ontario's universities subject to the provisions of the Freedom of Information and Protection of Privacy Act and ensure that Ontario's publicly funded post-secondary institutions are even more transparent and accountable to the people of Ontario. That will be both our universities and our colleges of applied arts and science. *So as not to jeopardize the work being done at these institutions, though, the freedom-of-information provision would take into account and respect academic freedom and competitiveness. Clearly we understand the importance of the university post-secondary sector when it comes to doing research and innovative study programs.* Thus we wouldn't want to jeopardize that academic freedom, or the competitive environment that is created accordingly [my emphasis].

[122] Although this is a reference to the underlying purpose of section 65(8.1) and other amendments to the *Act* made at that time, it is also noteworthy as a statement of legislative intent, in a general sense, to protect both transparency and academic freedom.

[123] From these authorities, it is clear that academic freedom is an important right, and one with a vital role to play in a democracy such as Canada. These authorities also support the view that academic freedom does not arise solely from the collective agreement; rather, it is a pre-existing and independent right that informs the university's ability to access, use and regulate information and records in the possession of its faculty members.

[124] The appellant takes quite a different approach to the question of academic freedom and its impact on custody and control than either the university or the APUO. In his view, despite the guarantee of non-intrusion into the work of professors that academic freedom provides, the *Act* creates what would, in effect, be an exception to the rule of non-interference that is at the heart of academic freedom. He states:

---

[32] Third reading of Bill 197, on November 21, 2005 (also quoted in Order PO-2693).

> Under the protection of academic freedom, a professor's dean or chairman and the University administration cannot arbitrarily or unilaterally request records (from professors) that nonetheless are subject to FIPPA. Outside of a FIPPA request managed by a professionally-bound FIPPA Coordinator, such university administration requests would constitute undue interference and would be violations of academic freedom.

[125] In response, the APUO submits that the effect of this approach would be that, by submitting an access request under the *Act*, outsiders could potentially gain access to records to which the university itself has never had access. Though the force of this submission is somewhat blunted by the exclusions provided by section 65(8.1) and the possible application of exemptions, I agree that this analysis significantly undermines the appellant's position.

[126] In a related argument, the appellant submits that the definition of the university's role under the collective agreement, and the restrictions on its activities, do not impinge on its right to gather and make access decisions about information when a request is received under the *Act*. In his words, "the FIPPA coordinator is *not* the 'employer' of the collective agreement."

[127] On this point, the university submits that although its relations with the APUO are governed by the collective agreement, that agreement cannot supersede the *Act*. This submission has already been applied in the discussion of jurisdiction, above. Rather than the collective agreement, it is the historic practice of academic freedom, and the consequent limits on the ways in which the university can access or use information in the possession of professors that must be considered in assessing custody and control.

[128] For all these reasons, I disagree with the appellant's view that the *Act* creates a sort of carve-out from academic freedom in a manner that excludes the latter from consideration in the custody and control analysis. The question of academic freedom is vital to this whole analysis, and will have a significant impact on what records are, in the end, found to be in the university's custody or control.

[129] Accordingly, I find that the principle of academic freedom, and the practices that exist to protect it at the university and at other similar institutions, and the limits that this places on the university's ability to access and use particular records, must be considered as important factors in assessing the question of custody or control. In the analysis of these factors related to academic freedom, neither the collective agreement nor any other agreement between the university and the APUO are determinative; to find so would contradict the important principle that an institution cannot avoid its statutory obligations under the *Act* by entering into contracts with third parties. Nevertheless, I find that the terms of the collective agreement provide relevant information about academic freedom.

[130] I now turn to consider the principle of transparency, which is reflected in the purposes of the *Act* in section 1, which states, in part, as follows:

> The purposes of this Act 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; …

[131] As noted in *City of Ottawa*[33] above, this principle was explained by the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)*[34], which found that that the "overarching purpose" of access to information is to "facilitate democracy" and stated (at para. 63) that "rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable." LaForest J. held at paras 61-62:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 Can. J. of Econ. and Pol. Sci. 479, at p. 480:
>
> > Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.

---

[33] Cited above at footnote 1, above.

[34] 1997 CanLII 358 (S.C.C.), [1997] 2 S.C.R. 403 per LaForest J. at paras. 61-62, adopted by the majority on this point at para 1.

[132] In its submissions responding to the Divisional Court decisions in *City of Ottawa* and *Ministry of the Attorney General*,[35] the APUO submits that applying a purposive approach, as was done in *City of Ottawa*:

> … would not result in a conclusion that access to these documents is necessary to enhance the democratic process, or that refusing that access would interfere with the citizens' right to participate in democracy….

[133] It is to be noted, however, that "accountability" is also cited as a purpose of access to information legislation by the Supreme Court in *Dagg*, in a passage quoted with approval by the Court in *City of Ottawa.*[36] Thus it is clear that the goal of transparency is also vitally important to the question of custody and control. As noted in the legislative debates quoted above, the addition of the universities as institutions under the *Act* was intended to make them "… even more transparent and accountable to the people of Ontario."

[134] Because transparency is so clearly the legislative rationale underlying the inclusion of universities, which are important publicly-funded bodies, as institutions under the *Act*, it must not be given short shrift in this analysis. Consequently, the impact of academic freedom must not be overstretched. Its effect on custody and control must be confined to records or information that it truly protects.

[135] The importance of both academic freedom and transparency in the analysis of custody and control is reflected in the university's initial representations, which in my opinion accurately summarize the balance that must be struck in deciding the issue of custody or control in this case:

> The University respectfully submits that the legislature intended [the *Act*] to be applied to the university community in a manner that does not impair this freedom that is so fundamental to the effective operation of Ontario's universities. Though perhaps difficult in practice to achieve, a balance needs to be found that respects the two legitimate public policy objectives of institutional transparency and academic freedom.

The university's statutory mandate

[136] Among the purposes of the University of Ottawa stipulated by its governing statute, the *University of Ottawa Act*, *1965*[37], section 4(a) provides as follows:

> The objects and purposes of the University are,

---

[35] Cited at footnotes 1 and 2, above.
[36] at para. 27 of *City of Ottawa*, cited at footnote 1, above.
[37] S.O. 1965, C.137.

> (a) to promote the advancement of learning and the dissemination of knowledge.

[137] Accordingly, the professional work of APUO members as employees of the university, including their teaching activities, scholarly activities and academic service activities, all relate to the university's statutory responsibilities to promote the advancement of learning and the dissemination of knowledge. However, this does not inevitably lead to a conclusion that all records related to those activities are within the university's custody or control; rather, this is one factor to consider.

The university's "core", "central" or "basic" activities and its "mandate and functions"

[138] The relationship between the contents of records and the university's core, central or basic activities, and/or its mandate and functions, are identified above as factors to consider in assessing the question of custody or control. For the sake of simplicity, I will refer to these concepts, collectively, as the university's "mandate."

[139] As I have already noted, the *University of Ottawa Act, 1965*, provides that the university's objects and purposes include promoting advancement of learning and the dissemination of knowledge. Accordingly, it is clear that the university's mandate includes teaching and research, and related administrative functions.

[140] As outlined in *City of Ottawa*,[38] the relationship between an institution's mandate and the records at issue is a key factor to be considered when applying a purposive approach to custody or control. There, the Court excluded the records from custody or control because they did *not* relate to the City's mandate:

> The communications between CAS and [a named city's employee] have no connection whatsoever to the functioning of government nor to the business affairs of the City of Ottawa. It follows that providing public access to such documents does nothing to enhance participation in municipal affairs and prohibiting access does nothing to impair democratic values. Quite simply, these documents have nothing to do with municipal government and are not remotely connected to anything the legislation was intended to encompass.

[141] The other side of the equation, however, is that where records *do* relate to an institution's mandate, this points to a strong transparency purpose in finding them to be in its custody or under its control.

---

[38] Cited at footnote 1, above.

[142] While academic freedom and customary practice are countervailing factors with respect to the university's custody or control of many records pertaining to teaching and research, it is, nevertheless, evident that in some cases, the university must have access to such records to carry out its duties, and in that case, they would be in its custody and control. This applies most forcefully to administrative records that relate to the university's basic functions.

[143] On a more specific note, the APUO's initial representations refer to records created or held in connection with the APUO itself. On this point, I conclude that records held by professors that relate to their status as members of the APUO, or relating to the business and affairs of the APUO, would generally be outside the university's custody and control for the reasons articulated in *City of Ottawa*.

[144] On the other hand, if APUO-related records are held by a professor who *represents the university administration* in connection with APUO matters, these would be an exception to the finding in the preceding paragraph. They would, in my view, be in the university's custody and control because of their relation to its mandate. I would also expect that such records would not impinge on the professor's academic freedom.

Personal v. administrative records

[145] The university also submits that a useful distinction can be made between personal records and those of an administrative nature. Records of a "purely" personal nature would not be in its custody or control, while those relating to the university's administration would be.

[146] The APUO refers to and agrees with the arbitrator's view that "personal exchanges among staff" and "personal notes or annotations" are not within the university's custody or under its control. However, as I have already noted, both the arbitrator and the APUO appear to give a broad definition to "personal," and one that goes beyond the meaning of "personal information" in section 2(1) of the *Act*; "personal" exchanges and "personal" notes and annotations both appear to refer to the fact that they are generated, or occur between, individual professors. Many such notes, annotations or exchanges would encompass matters pertaining to the university's mandate, and most of those would therefore not constitute "personal information" within the meaning of the *Act*.

[147] In *City of Ottawa*,[39] the Court ruled that personal e-mails unrelated to the city's mandate were not in its custody or control despite being stored on the city's server, and in my view, analogous "personal" records held by professors are similarly not within the university's custody or control. In order to be excluded from custody or control on this basis, records or portions thereof in the possession of an APUO member would have to

[39] Cited at footnote 1, above.

relate to personal matters or activities that are wholly unrelated to the university's mandate.

[148] However, where records, including notes, annotations and exchanges between individual professors relate to the university's mandate, the question of custody or control would have to be determined by looking at the other factors examined in this order, and in particular, the questions of transparency, academic freedom and "customary practice."

[149] With respect to "administrative" records, the APUO appears to adopt the arbitrator's conclusion that "consultations with colleagues [and] exchanges related to committee work outside the University" are beyond the university's custody or control.

[150] The university argues that Arbitrator Chodos' determinations concerning the kinds of "administrative" records that would be within custody and control are too narrow, and suggests further that the APUO and its members could use the awards to argue that if 65(8.1) and 65(6) of the *Act* apply, the university's freedom of information staff cannot require such records produced to them. The APUO disputes this assertion, arguing that the arbitrator properly applied a two-step approach, recognizing that a record within custody or control might, under a separate analysis, be excluded from the scope of the *Act* under section 65.

[151] The university further submits that:

> Subjecting records relating to the administrative or operational functions of the University to [the *Act*] does not infringe academic freedom because those records are not related to APUO members' exercise of their academic freedom, but rather to the APUO members' actions as administrative employees of the University, taken in furtherance of their administrative duties and the operations of the University.

[152] In response, APUO argues that:

> …By excluding [administrative duties] from the analysis, the University is depriving APUO members of any control of documents in their possession which were created while fulfilling academic service activities. Pursuant to article 20.4 of the collective agreement, academic service activities include, but are not limited to, specific activities such as: administrative activities, contributing to the effective operation of the Association, participating on CAUT [Canadian Association of University Teachers] and OCUFA [Ontario Confederation of University Faculty Association] committees, counseling students, serving as a chair of a thesis committee, editing scholarly activities, and contributing to the effective operation of granting agencies…

> [I]t is essential that the analysis used to determine whether a document is in custody or control of an institution shall include an examination of the "nature of the document" and the nature of the institution's conduct in relation to the document [as appears at paragraph 42, *City of Ottawa*].

[153] I have already addressed the role of the collective agreement in relation to the issue of custody or control; that is, it can provide guidance as to the meaning of academic freedom and customary practices, but it is not definitive; the real question relates to the extent of academic freedom and any consequent customary practices that may restrict the university's custody and/or control. I therefore do not accept the APUO's submission which, in effect, argues that if the activity in question is contemplated as part of a member's duties under the collective agreement, even duties of an administrative nature, then any associated records are, by definition outside the university's custody and control.

[154] The APUO also argues that the university seeks to create a "class" of administrative employees. I disagree; in my view, what the university suggests does not create a new class of employees, but simply confirms that professors may function in a variety of ways, and that these may be determinative of whether particular records are in the university's custody or control. It is, moreover, consistent with my conclusion above that academic freedom must not be overstretched, and only impacts the question of custody or control for records or information that it truly protects. There may be administrative records that are protected by historic custom based on academic freedom, but that must be decided on a case-by-case basis.

[155] In my view, administrative records concerning university-related matters are, *prima facie*, connected to the university's mandate and less likely to be impacted by customary practices relating to academic freedom. Unless the latter is the case, such records would, in my view, be in the university's custody and control. As regards records relating to external committees, consideration must be given to how these relate to the university's mandate, as discussed above, and to customary practices pertaining to academic freedom.

[156] With respect to the university's comment about section 65, there is ample evidence in the awards that, as argued by the APUO, the arbitrator correctly viewed custody and control (and hence the ability to require records produced to university administrative staff) as separate from the exclusions found in section 65, which relate to the question of whether records can be requested under the *Act*.

[157] To be clear on this point, some categories of records that would otherwise be subject to sections 65(6) or 65(8.1) may be beyond the university's custody or control, but this would be on the basis of customary practices intended to protect academic freedom that pre-dated the application of the *Act* to the university, and *not* because of sections 65(6) or 65(8.1). The application of these sections, by itself, does not directly

affect the question of custody or control, and does not prevent the university from requiring records that are in its custody or control to be produced to it, even if these sections apply. Once it is determined that a record is within the university's custody or control, the determination as to whether this record is subject to the exclusions in sections 65(6) or 65(8.1) is to be made by the head, which may be subject to an appeal to the Commissioner under the *Act*.

[158] In summary, records or portions of records in the possession of an APUO member that relate to personal matters or activities that are wholly unrelated to the university's mandate, would not be in the university's custody or control for the reasons articulated in *City of Ottawa*. With respect to other potentially responsive records, the factors of transparency, academic freedom and "customary practice" must be considered. A record relating to purely academic matters is more likely to be outside custody or control, based on customary practice, than a record relating to administrative matters. Records pertaining to administrative matters are, *prima facie*, in the university's custody and control, subject to falling outside the university's custody or control based on customary practices relating to academic freedom.

Whether the records were created by an officer or employee of the university

[159] The APUO acknowledges that many of the records that could be responsive were created by employees of the university, but argues that this is not determinative in the present appeal because of the nature of the relationship between the university and its academic staff, and the impact of academic freedom and customary practice as discussed above. While the creation of a record by an employee supports the university having custody and control of that record, I conclude that this factor must be considered in light of the customary practice/academic freedom analysis outlined above. Where a record would, by customary practice, have been outside the university's authority to inspect or require produced to it, because of academic freedom, this would not be overridden on the sole basis that it was created by an employee.

Physical possession, "bare possession" and right to possess

[160] It is clear that many of the records would be on the physical premises of the university, or accessible to it on its computer or e-mail systems. For example, in its initial letter to professors asking for them to provide responsive records, the university stated:

> Please note that the University has the capacity to search your email accounts for the documents requested. If you would like to avail yourself of this service, please provide your consent to have your emails searched using the keywords outlined in the request. Should you opt for this service, you would still be responsible under the Law to search your computer for other types of electronic documents (e.g. word processor

> files, spreadsheets, etc.) that refer to the keywords indicated in the request, as well as searching all your filing cabinets for paper files and documents.

[161] The APUO submits that the format or transmission medium of a record, or the ability to have physical access to it, is not determinative of the custody and control question in the circumstances of this case. I agree with this submission; although physical access can be a persuasive indicator of custody or control, it can be overridden by more important factors in a given case, as occurred in the *City of Ottawa* case, where a purposive approach did not support a finding of custody or control even for records on the city's e-mail server just because the city had the ability to access them. In this appeal, the fact of mere physical accessibility is less significant than the question of whether they relate to the university's mandate, and if so, whether there was a customary practice of non-access by the university in keeping with academic freedom.

[162] Referring to *City of Ottawa*, the university submits that records in the sole possession of APUO members relating to the exercise of professorial (as opposed to administrative) responsibilities or personal academic pursuits would not be in its custody or control. Referring to the *Ministry of the Attorney General* case, the university submits that if such records are in its possession, this amounts to no more than "bare" possession, and therefore insufficient to bring them within its custody, and that this conclusion applies to both electronic and paper records. Again, in my view, the question comes down to what would be available to the university by customary practice aimed at protecting academic freedom; to the extent that the principle applies, records relating to professorial responsibilities or personal academic pursuits, would not normally be in the university's custody or control.

[163] The APUO submits that, except to the extent described in its proposed categories of records that were appended to the third arbitration award (and attached to this order as Schedule "A"), the university does not have a right to possession of records created, received or disseminated in the exercise of professional responsibilities of academic staff members.

[164] For reasons already outlined above, I do not agree with this statement as regards administrative records, and I also find it to be subject to significant exceptions with respect to other records generated in relation to teaching and research. Where, by customary practice, there is a right to possess or access such records for administrative purposes, such as where a student contests an awarded grade, that is a relevant factor that strongly suggests that such records are in the university's custody or control.

[165] On the other hand, physical possession does not, in and of itself, mean that records or portions of records in the possession of an APUO member that relate to personal matters or activities that are wholly unrelated to the university's mandate, being in its custody or control. Similarly, mere physical possession does not mean that

records to which the university does not have access, by customary practice, based on academic freedom, are in its custody or control.

Regulating content, use and disposal

[166] The right to regulate content, use and disposal often comes up with respect to electronic records. In *City of Ottawa*, the e-mails that were found to fall outside the City's custody and control were e-mails located on its server, which had been designated as City property. Staff had been advised that such e-mails were not private, and that the e-mail system could be monitored and inappropriate content deleted. Notwithstanding all these indicia of control, the Divisional Court found that because they were personal, and wholly unrelated to the institution's mandate, they were not in its custody or control.

[167] In this case, extracts from the university's policies about use of its electronic systems, including e-mail, are found in Appendix "C" to this order, and like the situation in *City of Ottawa*, they do provide that the university owns the system and has the right to regulate content.

[168] Based on *City of Ottawa*,[40] and taking into account the circumstances of this appeal, I conclude that the right to regulate the contents of the university's electronic systems, while relevant, is not sufficient to support a finding of custody or control. Rather, with respect to records held by APUO members, a purposive interpretation must be applied that takes into account academic freedom and the related historic practice of whether the university has access to various records that may be found in such systems.

[169] With respect to disposal, the evidence provided to the arbitrator, as described in the first award, suggests that when a professor retires, he or she would take their paper files with them, erase the computer hard drive and leave a CD ROM copy of it for the university. While that may be so, I do not find it to be conclusive; leaving a copy of the professor's hard disk for the university's use implies some degree of control by the university, and the contents of the disk might well overlap the contents of the paper records. In my view, this evidence is too general to be of much use in determining the question of custody or control.

[170] On this point, the APUO submits that, except to the extent described in the appendix to the third arbitration award (reproduced as Appendix "A" to this order), the university does not have a right to possession of, or to regulate the use and disposal of, or regulate the content of the records created, received or disseminated in the exercise of professional responsibilities of academic staff members. Again, I do not agree with this statement as regards administrative records, and I also find it to be subject to

[40] Cited at footnote 1, above.

potentially significant exceptions with respect to other records generated in relation to teaching and research. As already stated, where there is a right to possess or access such records based on customary practice, for example, where a student contests an awarded grade, that is a relevant factor that strongly suggests that related records are in the university's custody and control.

Integration with other records

[171] The APUO submits that, except to the extent described in its proposed categories of records, attached to the third arbitration award and also set out in Appendix A to this order, records relating to the exercise of professional responsibilities of academic staff members are not integrated with other records of the university.

[172] The APUO submits further that the university has never claimed it needs the requested records in connection with its normal operations. In this regard, I note that no definitive list of responsive records has been created, and in my view, this submission is entirely speculative.

[173] On the overall question of the impact of "integration with other records" I have concluded that, like physical possession of the records, this does not dictate a finding that the university has custody or control. Again, the important question in the university context is which of these records would be available to the university administration by custom or practice, after taking academic freedom into account. Such records would, in my view, be in the university's custody and control.

Conclusions re: custody and control

[174] From the foregoing analysis, the following conclusions emerge:

- academic freedom is a historic principle practised in university communities that has an impact on what records of professors have, by custom or practice, been available to university administrative staff;

- academic freedom exists independently of, and pre-dates the collective agreement, and is an important principle in a democracy;

- the relationship between a university and its academic staff is different from the standard employer-employee relationship because of the impact of academic freedom;

- the principle of academic freedom, and the practices that exist to protect it at the university and at other similar institutions, and the limits that this places on the university's ability to access and use particular records, must be considered as important factors in assessing the question of custody and control;

- neither the collective agreement itself, nor other agreements or acknowledgements is determinative on the issue of custody and control, but the collective agreement is relevant as a source of information about academic freedom;

- a purposive approach to custody and control must consider the principle of transparency, and in this case, the principle of transparency dictates that academic freedom only limit custody and control to the extent that it actually applies based on customary practice;

- the inclusion of the university as an institution under the *Act* does not broaden the records over which the university has, by custom or practice, had custody or control; which would depend on pre-existing practices arising from academic freedom;

- the *Act* does not create a "carve-out" from limits on custody or control that result from custom or practice arising from academic freedom;

- the university's statutory powers and duties are "to promote the advancement of learning and the dissemination of knowledge," and the university's "mandate" to be considered in determining custody or control therefore includes teaching, research, and related administrative functions;

- records or portions of records in the possession of an APUO member that relate to personal matters or activities that are wholly unrelated to the university's mandate are not in the university's custody or control;

- the question of whether records that are "personal exchanges among staff" or "personal notes or annotations" are in the university's custody or control will depend on whether they relate to the university's mandate and all other relevant factors, and in particular, the questions of transparency, academic freedom and customary practice;

- administrative records are *prima facie* connected to the university's mandate and unless they are impacted by customary practices relating to academic freedom, they are in the university's custody and control;

- academic freedom will impact many records relating to teaching and research but in some cases the university must have access to them to carry out its mandate; where this is the case, such records are in its custody and control;

- records pertaining to APUO activities are only in the university's custody or control where the APUO member who holds the records was representing the university administration;

- where a record would, by custom or practice, have been outside the university's authority to inspect or require produced because of academic freedom, this would not be overridden on the sole basis that it was created by an employee;

- in this appeal, the right to regulate the contents of the university's electronic systems, while relevant, is not sufficient to support a finding that the University has custody or control of records held by APUO members; in this case, a purposive interpretation must be applied that takes into account academic freedom and the related historic practice of whether the university has access to various records that may be found in such systems.

[175] From the foregoing conclusions, several primary points may be drawn. The application of the *Act* does not extend the university's custody or control over records of academic staff beyond the scope that existed prior to the university becoming an institution. The historic principle of academic freedom, and the customary approach to custody and control that this engendered, as well as the limits on the university's access to records held by its professors, are therefore primary factors to consider with respect to custody and control. The collective agreement may provide useful guidance on the extent of academic freedom but it is not determinative of the question of custody and control. In addition, administrative records are, *prima facie*, in the university's custody and control. This includes administrative records in the possession of academic staff, unless academic freedom provides a basis to conclude that they would not, historically, have been subject to access by the university.

[176] As a consequence of this analysis, I do not accept the overall position taken by the APUO in this appeal. The APUO essentially submits that the awards of the arbitrator should be taken as definitive. In particular, based on the principle of academic freedom, the APUO submits that:

> … except to the extent described in the Appendix to Arbitrator Chodos' third award, the University does not have a right to possession of, or to regulate the use and disposal of, or regulate the content of the records created, received or disseminated in the exercise of professional responsibilities of academic staff members. Nor are such records integrated with records held by the University except to the extent described in the Appendix to the third arbitration award.

[177] As already noted, the third arbitration award describes custody and control as being determined "pursuant to the collective agreement,"[41] and essentially adopts the APUO's proposal concerning which records would be within the university's custody or control (also set out in Appendix A to this order). More significantly, the arbitrator's findings on custody or control are largely based on the professional responsibilities of

[41] See paragraph 21 of the third award dated May 11, 2009.

professors, which include administrative matters, as set out in the collective agreement. As already noted, the arbitrator's conclusions regarding "personal notes or annotations" are problematic with respect to notes or annotations relating to administrative matters, given that academic freedom may not require them to be excluded from the university's custody or control.

[178] The university submits that the arbitrator interprets custody and control too narrowly, failing to take into account the principle that custody and control must be determined on a broad and liberal basis. For this reason, the university disagrees with the arbitrator's characterization of the categories of records proposed by APUO (set out in Appendix A to this order) as being within the university's custody or control as an "appropriate starting point."

[179] More particularly, the university submits that:

> … it has neither custody nor control, for the purposes of [the *Act*], over records in the possession of APUO members which are created, received or disseminated in the exercise of their professional responsibilities, including teaching, research, or other scholarly activities, but not including activities relating to the administration or operation of the university. The recent Divisional Court decisions suggest that the university does have custody or control, for the purposes of [the *Act*], over records that are in the custody of APUO members and which in their essential character relate to the administrative functions or operations of the university, rather than to the exercise by those members of their personal academic pursuits or professional responsibilities.
>
> …
>
> However, subjecting records to [the *Act*] that are in the sole possession of APUO members, relating to the exercise of a professor's professional responsibilities or personal academic pursuits would be inconsistent with academic freedom, and thereby inconsistent with the underlying purposes of [the *Act*]. In accordance with the Divisional Court decision in *City of Ottawa*, the university submits that the test of custody or control over such records is not met.

[180] I have already found that, as an issue arising from an access-to-information request made under the *Act*, the question of custody and control is to be determined under the *Act* and not under the collective agreement. The arbitrator states that he is determining this question "under the collective agreement," and, based on the foregoing analysis, he has taken an overly restrictive approach to custody and control. In any event, in the circumstances of this appeal, it is this office, rather than the arbitrator, that has the exclusive jurisdiction to make this determination.

[181] Accordingly, I conclude that the arbitral awards are not determinative with respect to the custody or control of records that may be responsive in this case. Rather, the determination is to be made based in the principles enunciated in this order. The significant conclusions I have reached in this regard are:

1. records or portions of records in the possession of an APUO member that relate to personal matters or activities that are wholly unrelated to the university's mandate, are not in the university's custody or control;

2. records relating to teaching or research are likely to be impacted by academic freedom, and would only be in the university's custody and/or control if they would be accessible to it by custom or practice, taking academic freedom into account;

3. administrative records are *prima facie* in the university's custody and control, but would not be if they are unavailable to the university by custom or practice, taking academic freedom into account.

[182] Accordingly, the next steps should be for the university to request that APUO members produce records to it that would be responsive to the clarified request and are in the university's custody or under its control, taking these three criteria into account. The decision as to whether exclusions or exemptions apply to such records is for the university to make, subject to appeal to this office.

[183] Given the lack of information about exactly which records would be responsive to the appellant's request in this case, some practical difficulties may arise, such as the potential over-exclusion of records from custody and control based on individual professors' interpretation of academic freedom. In order to resolve such doubts, without handing over the records or disclosing their specific contents, APUO members may wish to provide lists or indices of records or portions of records for which the question of custody or control may be in dispute, including a brief explanation of why a record or records would not be in the university's custody or control. This approach respects both academic freedom and the transparency purposes of the *Act*.

ORDER:

1. I order the university to request by **November 30, 2011** from its professors (APUO members) all written communications about the appellant (other than messages sent by the appellant) dated between September 1, 2004 and October 31, 2006 inclusive, sent by or received by all professors (APUO members) during the course of their employment at the University of Ottawa, that are in the university's custody or under its control, taking into account the three criteria enumerated in paragraph **181**, above.

2. I order the university to issue an access decision to the appellant within 60 days from the date of its request to the professors (APUO members).

Original Signed by: November 7, 2011
Diane Smith
Adjudicator

Appendix "A"

APUO "Proposal with respect to final remedy" attached as Appendix to Third Arbitration Award, May 11, 2009

A. The Question of Custody or Control by the University

The University may have custody or control of documents in possession of bargaining unit members only with respect to the following categories of documents, whether in hardcopy or electronic format:

1) *Administrative duties:*
documents held by members of the bargaining unit acting in an administrative role such as chairs or directors of schools, vice-deans, associate deans, program directors, and which are related to those administrative duties, but excluding any personal notes or annotations (para. 207 & 235 of the award).

2) *Committees within the University regarding general policies:*
documents received by a member of the bargaining unit, acting in his or her capacity as a member of a department, faculty or University committee when the committee plays an official role in the University, such as Ethics in research committee, Internal research grants committee, parking committee, or space committee, etc, but excluding any personal notes or annotations added by the member. However, [the *Act*] does not apply to those documents if related to research or teaching as generally described in sections 20.2 and 20.3 of the collective agreement (i.e. to which [the *Act*] does not apply according to section 65 of the *Act*).

3) *Personnel or peer review committees:*
documents received or consulted by a member in his or her capacity as a member of a department, faculty or University committee, such as hiring committee, personnel committee, and tenure or promotion committee, excluding any personal notes or annotations added by the member. However, [the *Act*] does not apply to those documents as they are employment related documents under section 65 of the *Act*.

4) *Career path and performance evaluation:*
documents submitted to the University (i.e. to the personnel committees, deans, or Joint Committee) by the member, such as an application for tenure, promotion, or sabbatical leave. These documents, once sent by a member to the University in order to obtain those rights, are in the custody and control of the University.

However, [the *Act*] does not apply to those documents as they are employment related documents under section 65 of the *Act*.

5) *General University communications:*
(documents sent to all members or a large group of members) the original is in the custody and control of the University. So far as the application of [the *Act*] is concerned, this is all that is needed. No access request to members is required.

6) *Student Exams:* (this category, depending on the different stages, could be qualified as a "transformed custody or control category".)

   a) draft of the exam (custody and control of academic staff)

   b) original as printed by the University (custody and control of academic staff)

   c) collected for and received by the academic staff for grading (shared custody or control between academic staff and student)

   d) annotated copy kept by academic staff (shared custody or control between academic staff and student)

   e) marks sent to Department (marks, not exams, in custody and control of the University)

   f) appeal by student, individual exam sent to Department (in University custody and control once received)

7) *Exam Copies that are Submitted to the University by the Member:*

   a) submitted under category 4 by faculty member (see above)

   b) University or departmental policy whereby exam copies are maintained in a "bank" or are used for accreditation purposes (those copies are in the custody and control of the University). Since the actual copy is in the custody and control of the University, no further action by the individual member is required. However, [the *Act*] likely does not apply according to section 65 of the *Act* (teaching materials).

[Note: issue of control and custody is separate from the issue of copyright of exam material, which is not being addressed in this arbitration.]

B. Which of the above documents are subject to the application of an access request under [the *Act*]?

Category 1

Category 2, unless related to research or teaching as generally described in article 20 of the collective agreement, as [the *Act*] would not apply according to section 65 of the *Act.*

Category 5

Category 6, (e) and (f)

C. Which of the above documents are subject to a request by the person designated as head under [the *Act*] to the members of the bargaining unit?

Category 1

Category 2, to the extent noted above

Appendix "B"

Extracts from the Collective Agreement

Section 20.1

General provisions

The functions of a member of the academic staff include, varying proportions:

(a) teaching activities;

(b) scholarly activities revealed by research, artistic or literary creation or professional work;

(c) academic service activities.

Specific activities corresponding to those 3 functions are listed in the next 3 sections, it being understood that these lists are not exhaustive and are not in order of priority.

Section 20.2 - Teaching

Teaching includes the following activities:

(a) giving courses, conducting seminars, guiding tutorials and laboratories, and supervising individual study projects;

(b) preparing and correcting assignments, tests and examinations;

(c) guiding the work of teaching assistants, markers and laboratory instructors;

(d) supervising, guiding and evaluating students' individual work, such as theses and papers;

(e) granting individual consultations outside of class or laboratory time;

(f) participating in the development of teaching methods, programs or course content,

(g) preparing instructional material, laboratory exercises and course notes for the member's own students;

(h) writing textbooks; and

(i) serving as a thesis examiner at the University of Ottawa.

All other activities in which the member engages for the purpose of preparing page courses and seminars, including those undertaken to ensure that her teaching is in keeping with the current state of the subject taught, are considered teaching activities.

Section 20.3 - Scholarly Activities

20.3.1 General provisions

20.3.1.1 Scholarly activities are those which contribute:

(a) through research, to the advancement of knowledge in a discipline;

(b) through artistic or literary creation, to the advancement of the arts and the letters;

(c) through various professional activities, to the advancement of a profession.

20.3.1.2 Scholarly activities referred to in this agreement are those whose form makes peer evaluation possible and those which aim at being communicated in a form permitting peer evaluation.

20.3.13 It is understood that the existence of scientific, artistic or literary works, or professional activities is not- in and of itself-proof of competence or satisfactory performance in scholarly activities.

20.3.2 Research

20.3.2.1 Research includes the following activities:

(a) conceiving, developing and carrying out research projects, individually or with others;

(b) conceiving, developing and carrying out critical analyses of existing knowledge;

(c) presenting the results of research or critical studies at, or actively participating in, scholarly meetings, colloquia, or research groups;

(d) preparing reports, articles, chapters or books presenting results of the member's research or critical studies, including works published in collaboration with others;

(e) guiding master's and doctoral theses, provided such guidance contributes to the advancement of knowledge;

(f) preparing innovative textbooks, and developing innovative teaching materials or methods, which may be used by others;

(g) work done under contract, provided it contributes to the advancement of knowledge, and the results are accessible in a form permitting peer evaluation;

(h) editing of a scholarly publication, where there is evidence that the member's work extends beyond customary editorial duties and includes a significant contribution to the advancement of knowledge.

20.3.2.2 Any work related to the immediate and normal preparation of courses is not considered part of research activities, in the sense of this collective agreement.

20.3.3 Artistic or literary creation Artistic or literary creation includes the following activities:

(a) producing original works or forms of expression;

(b) conceiving, developing and carrying out for publication artistic projects or literary criticism.

20.3.4 Professional activities Professional activities include:

(a) making contributions to the practice of a profession beyond those normally required of a practitioner who is not a university professor;

(b) making valuable contributions to the advancement of the profession itself.

Section 20.4 Academic service

Academic service activities include specific activities such as the following:

(a) administrative activities such as chairing a department, or coordinating undergraduate studies within a department;

(b) participating in the work of committees of a department, a faculty, or the university, or otherwise contributing to the effective operation of the University of Ottawa or one of its constituent parts;

(c) contributing to the effective operation of the Association by serving as an officer of the Association or on its Board of Directors, or participating in the work of one of its committees or constituent parts;

(d) contributing to the effective operation of AUCC, CAUT or OCUFA by serving on their governing bodies or participating in the work of their committees;

(e) counselling or advising students;

(f) serving as chair of a thesis committee at the University of Ottawa or thesis examiner or supervisor elsewhere;

(g) referring submissions for scholarly publications;

(h) editing scholarly publications;

(i) contributing to the effective operation of learned or professional societies by serving on their governing bodies or participating in the work of their committees;

(1) contributing to the effective operation of granting agencies or evaluation organizations, such as MRC, SSHR, NSERC or OCGS, as examiner or committee member;

(k) contributing to community projects which are related to the role of the university.

Appendix "C"

University of Ottawa Policies re: Use of Electronic Systems

Extracts from "Policy 80 - Computing and Information Processing"

Definition of Information Processing

2. The term "information processing" refers to the use of general purpose computing systems and special purpose systems that process electronic digital data and have the capability of transmitting, receiving or storing such data. The terms "computing" and "information processing" are used interchangeably in this policy and related policies and procedures.

Ownership and Control

17. No matter which faculty, school or service budget is involved, all computing equipment and software procured through University funds, either by purchase or rental, belong to the University, subject to any conditions specified by the supplier.

18. In cases of necessity, the University may exercise control over such equipment, software, or services through the Computing Centre and not through the faculty, school or service in which they may be located or which provided the funds originally.

19. All computing equipment and software acquired under a research grant becomes the property of the University unless the terms of the grant specifically state otherwise. However, the use of the equipment or software remains under the control of the recipient of the grant for the duration of the research project insofar as this is feasible.

User Responsibilities

24. The University reserves the right to impose academic sanctions (for students) or disciplinary measures (for employees) and/or to revoke a user's access privileges, and/or to pursue legal remedies against anyone abusing the computing facilities and services.

Extracts from "User Code of Conduct for Computing Resources"

Guiding Principle

The University of Ottawa's computing resources are intended to support its educational and research activities.

…..

Definitions

1. Account: Any account number, access code, user identification code or authorization code granted for a computing resource.

2. Computing Resource: Includes, but is not limited to, computers, peripherals, software, data, network infrastructure, other hardware owned or managed by the University of Ottawa.

3. User: Any person who has been provided with an account or computing resources.

User Commitment and Responsibility

Users accept and agree that they are responsible for all use of their account and computing resources and further accept to abide by the User Code of Conduct set out below.

Rights of the University of Ottawa

The University reserves the right to remove material from an account or computing resource and to suspend access to an account or computing resource pending investigation into suspected violations of the User Code of Conduct.

Extracts from "Account Management - Guidelines and best practices"

… The University of Ottawa uses access control and other security measures to protect the confidentiality, integrity, and availability of the information handled by computers and communications systems. In keeping with these objectives, management maintains the authority to:

1. restrict or revoke any user's privileges,

2. inspect, copy, remove, or otherwise alter any data, program, or other system resource that may undermine these objectives,

3. take any other steps deemed necessary to manage and protect its information systems. This authority may be exercised with or without notice to the involved users….