

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4176

Appeal PA17-528

University of Toronto

August 12, 2021

Summary: In this order, the adjudicator concludes that records responsive to an individual's request under the *Freedom of Information and Protection of Privacy Act* regarding his doctoral studies in Theology at Knox College and the Toronto School of Theology are not in the University of Toronto's custody or under its control. As the requester has no right of access to the responsive records under section 10(1) of the *Act*, the adjudicator dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31, as amended, section 10(1).

Orders and Investigation Reports Considered: Orders PO-2775-R, PO-3894 and PO-4066.

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559 (CanLII).

OVERVIEW:

[1] This appeal decides the issue of the University of Toronto's custody or control over email records held by the Toronto School of Theology and Knox College related to the appellant's Doctor of Theology studies. In this order, I find that these records are not in the custody or under the control of the University of Toronto for the purpose of section 10(1) of the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*). It follows that there is no right of access to the records under *FIPPA*.

[2] As background, the Toronto School of Theology (TST) is a federation of seven Christian theological colleges with degree-granting powers, of which Knox College (Knox) is one. The appellant was a student at Knox College, a seminary of the Presbyterian

Church of Canada, and was enrolled in a Doctor of Theology (ThD) program, which was administered in conjunction with TST.¹ The appellant had to leave the program as a result of the grade he received in a major examination. He subsequently submitted a *FIPPA* request to the University of Toronto (the university) for access to emails between several named professors affiliated with TST,² dated from November 1, 2015 to August 30, 2016 and from January 1, 2017 to October 4, 2017, about his "second major exam."

[3] The next day, the appellant submitted another request under the *Act* to the university seeking access to emails between one of the professors named in the first request and the Registrar of Knox College (Knox), dated from July 25, 2017 to August 16, 2017, regarding his "second major exam." The appellant also sought emails between the same two individuals relating to the mailing of his enrollment history and transcript to another named seminary college.

[4] The university responded to the two access requests in one decision letter,³ and stated the following about the first one:

The University of Toronto (the university) has made confidential enquiries of the Toronto School of Theology (TST) to enquire whether any of the records responsive to your request might be under the university's custody or control. We have been advised that there are no records in that category.

However, we have also been advised that if your request is transferred to TST, that school is prepared to provide you with the records even though it is not covered by the *Freedom of Information and Protection of Privacy Act* [.]

[5] The university offered to send the first access request to TST and, as an alternative, provided the appellant with the contact information for the Director of TST to pursue access to the records himself.

[6] For the second request, the university provided the appellant with contact information for the Principal of Knox College to pursue access to Registrar's records about the sending of his enrollment history and transcript to the named seminary college.

[7] The appellant appealed the university's decision to the Information and Privacy Commissioner of Ontario (IPC), which opened Appeal PA17-528 to deal with both requests and appointed a mediator to explore resolution.

[8] The appellant subsequently contacted TST to follow up on the university's suggestion of obtaining the records directly from TST and appears to have received paper copies of the records TST had located. However, the appellant was not satisfied with paper copies of the records and wanted TST to send him the emails electronically for "forensic" purposes. TST declined to do so, claiming that it no longer had electronic copies.⁴

¹ The appellant's ThD program was provided through the Graduate Centre for Theological Studies at TST.

² But also employed by other member institutions of TST governed by the Memorandum of Agreement between them at the university, as described further below.

³ The university identified the first request as 17-0060 and the second one as 17-0061.

⁴ Knox's representations suggest that these records were, in fact, provided to the appellant by TST. However, this is not affirmatively established by the information before me. Regardless, whether or not TST

[9] During the mediation of the appeal, the university clarified that its position is that the records responsive to the appellant's access requests are not in its custody or under its control for the purpose of section 10(1) of *FIPPA*. The university also claimed, in the alternative, that the records fall outside the *Act*, because they are "ecclesiastical records" as defined in section 2(1), and are excluded from the *Act* under section 65(5.3). The university provided the mediator and the appellant with a letter further explaining its position. The university explained that, in the IPC's 2008 Annual Report:

... the IPC clearly called for the scheduling of federated and affiliated universities. The Government then carefully consulted. It amended FIPPA to exclude ecclesiastical records of a church or religious organization affiliated with an educational institution, but it did not proceed to schedule these organizations as institutions. It is the position of the University that the individual members of TST such as Knox are religious organizations, each with close connections to a parent church, as described in FIPPA s. 65(5.3). Their own constituting documents, and the general description of them on the TST website, make this clear. In addition, the TST itself exists solely to support the activities of those religious educational institutions that are its members, and that in turn are supported by, and support, the churches to which they are connected. Therefore, FIPPA does not apply to the records of Knox or TST.

In addition, and in the alternative, as stated previously, neither Knox nor TST has been designated in the Schedule to Regulation 460 as being covered by FIPPA. Moreover, TST is not a "university" within the meaning of s. 2 of FIPPA's definition of "educational institution", and Knox, while obviously involved in education, is not covered because it has not been designated under Regulation 460.

[10] As the university's explanation of its position in that correspondence did not resolve the appellant's concerns, he decided to proceed to the adjudication stage of the appeal to pursue access to the records. Accordingly, the appeal was transferred to the adjudication stage where an adjudicator may conduct an inquiry.

[11] Upon review of the appeal, I decided to conduct an inquiry and to bifurcate the appeal to decide the custody or control issue first and then proceed with a determination of the application of the ecclesiastical records exclusion in section 65(5.3) only if required.

[12] I began my inquiry by sending a Notice of Inquiry to the university, initially, to seek representations on the custody or control issue. Shortly thereafter, I also sent Notices of Inquiry to TST and Knox as parties whose interests might be affected by the outcome of the appeal. After receiving representations from the university and Knox, and learning that TST adopted the university's position, I invited the appellant to provide representations on the custody or control issue. The representations I received from the appellant were subsequently provided to the university and both affected parties to seek their reply. The university, Knox and TST provided reply representations, and I shared them with the appellant who submitted sur-reply representations.

[13] In this order, I find that responsive records, if any exist, are not in the university's custody or under its control for the purpose of section 10(1) of the *Act*. As the appellant has no right of access to the records under the *Act*, it is unnecessary for me to determine whether the exclusion in section 65(5.3) of the *Act* would apply to them, and I dismiss the appeal.

RECORDS:

[14] The university says that it does not have copies of the records that would be responsive to the requests. Accordingly, no records have been provided to the IPC.

[15] The records that would be responsive to the request are 1) emails exchanged between the TST-affiliated professors named by the appellant regarding the specified exam, and 2) emails between the Knox Registrar and one of those same named professors about the specified exam or the mailing of the appellant's enrollment history and transcript to a named seminary college.

ISSUES:

- A. Are TST or Knox part of the University of Toronto for the purposes of the *Act*?
- B. Are the records at issue nevertheless in the custody or under the control of the University of Toronto under section 10(1) of the *Act*?

DISCUSSION:

[16] Based on the circumstances of this appeal and my review of the mediator's report, the issues are whether TST or Knox are part of the university for the purposes of the *Act*, and if not, whether the university nevertheless has custody or control of the records under section 10(1). The actions of the university, TST or Knox in relation to the appellant and his graduate studies program are not issues before me.

[17] The right of access under the *Act* is established in section 10(1), which 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 . . .

[18] Under section 10(1), the *Act* applies only to records that are in the custody or under the control of an institution.

[19] 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.⁵

[20] A finding that a record is in the custody or under the control of an institution does

⁵ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

not necessarily mean that a requester will be provided access to it.⁶ A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 65, or may be subject to a mandatory or discretionary exemption (found at sections 12 through 22 and section 49).

[21] The courts and the IPC have applied a broad and liberal approach to the custody or control question.⁷ The IPC has developed a non-exhaustive list of factors to consider in determining whether or not a record is in the custody or control of an institution,⁸ and I will address these factors below under Issue B.

[22] The university, TST and Knox all take the position that any responsive records are not in the custody or control of the university for the purposes of *FIPPA*. TST and Knox adopt the university's representations that describe the legal, administrative and business relations between them, as well as the university's arguments specific to custody or control that respond to the questions I set out in the Notice of Inquiry sent to the parties.⁹

[23] Knox states that when the appellant sought the above-noted records from the University of Toronto, the university referred him to TST in respect of the first request and to Knox in respect of the second. Knox notes that its representations therefore only address the second request related to emails exchanged between professors at Knox College. In addition to adopting the university's position that it does not have custody or control over such records, Knox also takes the position that no responsive records even exist. Knox states, specifically, that:

In this case, there were no records to produce, and therefore the appeal in respect of Knox is moot; but if there had been such records, Knox was prepared to produce them on a voluntary basis. In either case, such records would not have been in the custody or control of the University of Toronto.

[24] As I explain below, I do not need to decide whether the appeal is moot respecting Knox, because I find that records responsive to either request, if such records exist, are not in the custody or under the control of the university.

Background

[25] As context for the parties' positions in this appeal, I set out below certain facts about the relationship between Knox, TST and the university that are not in dispute.

FIPPA

[26] As stated, under section 10(1), the right of access in the *Act* applies only to records that are in the custody or under the control of an institution. The part of the definition of "institution" in section 2(1) that is relevant in this appeal states as follows:

⁶ Order PO-2836.

⁷ *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.); and Order MO-1251.

⁸ Orders 120, MO-1251, PO-2306 and PO-2683.

⁹ TST states: "The University of Toronto has accurately described the nature of the relationship between the University of Toronto and the Toronto School of Theology, which are separate and distinct institutions."

"institution" means,

...

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

[27] Regulation 460 under *FIPPA* includes a schedule that lists designated institutions. The University of Toronto appears at number 174 of this list, with the Head identified as the Executive Head. Neither TST nor Knox appear in the list of designated institutions.

***University of Toronto Act, 1971*¹⁰**

[28] The University of Toronto is a corporation without share capital continued under the *University of Toronto Act, 1971*.

[29] The *University of Toronto Act* defines "the University" in section 1(1)(n) as the University of Toronto. Further, as the university points out, the *University of Toronto Act* does not assign to the President any powers in respect of TST or Knox, even if the act does include provisions about TST and Knox. For example, the definition of "teaching staff" in section 1(1)(m) of the *University of Toronto Act* includes the teaching staff of the arts and science faculties of the federated universities; there is no mention of theological teaching staff of the federated universities.¹¹

[30] Section 2a allows the university (the Governing Council), TST and any or all of its members to "enter into agreements for the purpose of enabling the University to participate in the direction of theological education programs offered by the said School and its member institutions, for: (a) the conjoint registration of students; (b) the granting and conferring of conjoint earned degrees in theology; (c) the disciplinary jurisdiction of the member institutions over their students and teaching staffs; and (d) the relationships between the member institutions and their teaching staffs."

[31] Sections 10(4)¹² and 10(6) continue the university's federation with Knox College, one that dates back to the late 1800s, and affirms that the federation may be brought to an end.

[32] Section 11(2) provides that although the *University of Toronto Act* grants academic status at the university to students of federated universities, this is not true of students at federated colleges like Knox.

[33] Section 13 of the *University of Toronto Act* establishes the university's secular mandate. Under section 13(1), no religious test shall be required of teaching or

¹⁰ SO 1971, Ch 56, as am. by the *University of Toronto Amendment Act, 1978*, SO, 1978, Ch 88.

¹¹ "teaching staff" means the employees of the University, University College, the constituent colleges and the arts and science faculties of the federated universities who hold the academic rank of professor, associate professor, assistant professor, full-time lecturer or part-time lecturer, unless such part-time lecturer is registered as a student, or who hold any other rank created by the Governing Council and designated by it as an academic rank for the purposes of this clause[.] (emphasis added) "Constituent college" means a college established by the Governing Council or any predecessor thereof, under section 1(1)e.

¹² Section 10(4) states, in part, that "The following colleges are federated with the University: 1. Knox College."

administrative staff, or students, and no religious observances of any denomination can be imposed on them. An exception is created under section 13(2) for "a federated university or college to make such provision in regard to religious instruction and religious worship for its own students as it may deem proper, and to require the same to be observed as a part of its own discipline," except where the federated university or college declares itself to be non-denominational, in which case section 13(1) applies to it.

Toronto School of Theology

[34] Because the University of Toronto did not historically have authority to grant degrees in theology, the Toronto School of Theology was created in 1969 as a consortial arrangement of seven theological schools that did have independent authority to grant theology degrees.¹³ TST is a corporation without share capital¹⁴ governed independently by a board of trustees and led by a CEO. TST and its member schools make up one of the largest ecumenical centres for theological education in the English-speaking world and has the largest graduate theology program in Canada.

[35] The seven member schools of TST are Emmanuel College (United Church of Canada),¹⁵ Knox College (Presbyterian Church in Canada), Regis College (Jesuit, Roman Catholic), St. Augustine's Seminary (Diocesan, Roman Catholic), St. Michael's College (Basilian, Roman Catholic), Trinity College (Anglican Church of Canada), and Wycliffe College (Evangelical, Anglican). Each member of the consortium has its own authority to admit students, create programs, appoint faculty, and grant degrees. Faculty members of TST are appointed by TST itself, by any of its member schools or by any of its affiliated members, who are approved by TST to give instruction in any of the conjoint degree programs of TST. TST's seven member schools offer several basic master's degrees in theology, which provide students with an introduction to theological study as well as preparation for professional ministry. Most TST degrees are awarded conjointly by a TST member college and the University of Toronto, while a few degrees, certificates and diplomas are solely awarded by a TST college.¹⁶ The ThD program in which the appellant was registered falls into the former category and would have been granted conjointly by the University of Toronto and Knox, as the TST member school.

Knox College

[36] Knox is also a corporation and was chartered in 1858 by the province to grant degrees.¹⁷ Knox is governed by its own governing council and has its own CEO. As stated above, it is "federated college" under section 10(4)1 of the *University of Toronto Act, 1971*. Knox's mission is to teach theology and to prepare students for Christian ministry. In addition to basic degrees such as the Master of Divinity, Knox also offers graduate degrees in Theology and Ministry, degrees that formerly included a Doctor of Theology (ThD) program, which the appellant was registered in. All of Knox's graduate theology degree programs are administered in conjunction with TST.

¹³ The 1964 Letters Patent created the Toronto Graduate School of Theological Studies, while the 1970 Supplementary Letters Patent changed the name to the current name, Toronto School of Theology.

¹⁴ TST was incorporated under the *Corporations Act of Ontario* by Letters Patent dated November 24, 1964, as supplemented by Supplementary Letters Patent dated April 30, 1970.

¹⁵ Emmanuel College is a college of Victoria University in the University of Toronto.

¹⁶ <https://www.tst.edu/academic/programs/graduate-degree-programs>

¹⁷ Knox was incorporated by the *Statutes of the Province of Canada, 1858*, 22 Victoria, Ch 69.

The 2014 Memorandum of Agreement

[37] An important document in this appeal is the Memorandum of Agreement between the University of Toronto, TST and its member schools,¹⁸ dated July 1, 2014 (the MOA).¹⁹

[38] As the university explains, a change in provincial policy in the mid-1970s led to the need for the university to grant theology degrees conjointly with TST and its member schools. This is because, as noted above, its charter as a secular institution did not include the power to grant theology degrees, which was solely the purview of other institutions, such as the University of Trinity College and Knox College.²⁰ The former federation agreements between these institutions and the university allowed these federated universities to retain independent authority respecting degrees in theology while suspending their authority to grant all other degrees.

[39] The MOA was provided to me by the university as part of its representations. It includes provisions that:

- a. confirm that students, teaching staff and administrative staff of the member schools will not, by virtue of the MOA, become students, teaching staff or administrative staff of the university within the meaning of the *University of Toronto Act, 1971* (paragraph 6);
- b. establish that TST and its member schools are solely responsible for conjoint degree program delivery and academic support (paragraph 8);
- c. address new programs of the member schools, program changes, program closures and program reviews (paragraphs 11-15);
- d. invite the joint formal conferral of earned conjoint degrees (paragraph 16). In particular, subparagraph 16.iv confirms that conjoint degrees are awarded by the conjoint exercise of the authority of the university and the member school concerned, and shall be signed by the university's chancellor, the head of the member school and the director of TST;
- e. confer "conjointly registered" status and alumni status on TST students and graduates, such that they are considered both a student of the university and of the TST member school. Conjointly registered students are not eligible for university funding, including research and teaching assistantships (paragraphs 17-20);
- f. confirm that enrollment of students in the conjoint degree programs will be carried out by TST and its member schools. TST is required to maintain comprehensive records of all such students and will either provide or make available to the

¹⁸ Although the "member schools" are also referred to as "member institutions," "member universities" and "member colleges" by the parties, I avoid use the first term, in particular, in this order to avoid possible confusion with the defined term "institutions" in *FIPPA*.

¹⁹ TST and its member schools entered into the first MOA in 1978 for the granting of conjoint degrees in theology by the university and the member schools of TST. In August 2020, the parties to the MOA signed an Extension Amendment Agreement providing for a one-year extension of the term of the July 1, 2014 MOA to June 30, 2022. This amendment has no bearing on my findings in this order.

²⁰ I take the university to be using "institution" here in the broader sense, not as that term is used under the *Act*.

University and its external auditors all data required by the Ontario Operating Funds Distribution Manual: A Manual Governing the Distribution of Ontario Government Operating Grants to Ontario Universities and University-Related Institutions (Formula Manual) in relation to grants received by the U of T on behalf of the TST (paragraph 21);

- g. leave grading and grading policy to TST, but requires that grading policy and procedures on petitions and appeals to be consistent with university policy and procedures (paragraph 22);
- h. make the university solely responsible for academic discipline for conjointly registered students and gives conjointly registered students a right to appeal academic standing decisions of a TST divisional appeal body to the Academic Appeals Committee of Governing Council (paragraphs 24 and 25);
- i. affirm that the teaching staff in theology of the TST and its member schools will be appointed by and hold their contracts of employment with their respective schools and be subject to the procedures and disciplinary jurisdiction of those schools, not the university (paragraph 27);
- j. impose quality standards and related procedural requirements to ensure that TST teaching staff have research, scholarly and pedagogical profiles consistent with both the standard of the university and the employing TST member school (paragraphs 28- 32);
- k. establish a governance committee to consider issues arising under the agreement and make changes to the MOA' s schedules to facilitate operation of the MOA (paragraph 33);
- l. provide for limited university representation on TST boards and committees and consultation with the university regarding the selection of a TST director (paragraphs 34 and 35); and
- m. vests full responsibility with TST and its member schools for their own capital and operating budgets and expenditures, with no obligation for the university to deal with the TST or member schools on any financial basis other than the flow-through of provincial monies from it to TST (only) for conjoint degree program students and the receipt of reimbursement funds from TST for the cost of specified services provided to conjoint degree students (paragraphs 37-39).
- n. lists, in Schedule B to the MOA, the conjoint degrees offered by TST and its member schools, including (as of the time of the appeal) the Doctor of Theology degree at Knox.
- o. sets out, in Schedule C to the MOA (8 pages), administrative guidelines for Financial Transactions under the MOA between the university and TST. Schedule C describes the calculations of income transfers and expense charges referred to in paragraph 39 of the MOA for the cost of administrative, academic and student services provided to students registered in Schedule B conjoint degree programs. Under Schedule C, the university remits government grants to TST and TST is responsible

for allocating funds to the member schools. The schedule also describes which services TST must pay for, and this includes Information Technology, including email, network connectivity, security, student information system access and learning management system access.

[40] According to TST's Program Handbook for the ThD program, most doctoral graduates are appointed either to teaching positions or to roles of theological leadership in the Church.²¹

A: Are TST or Knox part of the University of Toronto for the purposes of the *Act*?

[41] The appellant relies on Order PO-2775-R. In that order from 2009, the adjudicator held that Victoria University was part of the University of Toronto for *FIPPA* purposes and concluded that a report that had been prepared for Victoria and the United Church of Canada was in the custody or under the control of the university. The appellant submits that the issue as to the university's relationship with its federated colleges has been resolved and the doctrine of *res judicata* applies.²² The appellant argues that the reasoning in that order applies in the circumstances in this appeal and that, therefore, TST and Knox are both part of the University of Toronto for the purposes of the *Act*.

[42] The university provides a pointed critique of Order PO-2775-R, claiming that it is both wrongly decided and unreasonable because "it rests almost entirely on the Government's stated intention, which [the adjudicator] relies upon instead of construing the relevant text." The university says that if I do "not reconsider and expressly overrule Order PO-2775-R, [I] ought to distinguish it based on its facts." Regarding the appellant's *res judicata* argument in respect of Order PO-2775-R, the university says that although the order addresses a relevant point of law, it is not the same matter: the parties were different, the request and the records at issue were different and the affiliated entity at issue was Victoria University, not TST and Knox. Therefore, the doctrine of *res judicata* is inapplicable to the present circumstances.

[43] I agree with the university that the doctrine of *res judicata* does not apply in the circumstances. The facts of this appeal are considerably different from those before the adjudicator in Order PO-2775-R. In any event, having considered the parties' arguments about Order PO-2775-R, I find that order distinguishable on the facts from the appeal before me and there is therefore no need to make any finding about whether it was wrongly decided.

Representations of the university, TST and Knox

[44] As stated, TST and Knox adopt as their own the representations provided by the university that describe the legal, administrative and business relations between them.

[45] The university begins by stating that it has not seen the records at issue and that it cannot obtain the records because the appellant is "not a student of the university." The university states that the requester is a student of TST and Knox, which are

²¹ October 2019; accessed https://www.tst.edu/resources/ThDPhD_Handbook_2019-2020_0.pdf

²² Relying on *British Columbia (Workers' Compensation Board). v. Figliola* 2011 SCC 52.

... legally distinct and autonomous entities affiliated with the University pursuant to an agreement that has limited scope and applies to a limited number of programs, that is premised on the independent legal status of each institution and that intentionally preserves operational independence, including independence concerning "day-to-day" matters such as those that appear to relate to the two requests at issue in this appeal.

[46] TST and Knox are entities "that are organized and exist for and because of their connections and commitment to religion and theological education." The university submits that the emails at issue in this appeal are about a student enrolled at TST and Knox, who is participating in a program of study that is "developed and directed by Knox to meet Knox's distinctly theological mandate."

Neither TST nor Knox are designated as "institutions" in Regulation 460 and the reference in the regulation to the University of Toronto does not include them

[47] Observing that *FIPPA* defines "institution" to include designated institutions that are listed in Regulation 460, the university submits that the reference to the "University of Toronto" in Regulation 460 does not include and is not meant to include the TST or Knox. The university maintains that "University of Toronto" for the purpose of the *Act* means the Governing Council of the University of Toronto alone, the university's "common name" as set out in the *University of Toronto Act, 1971*. The university says there is significance to the absence of the words "and its federated colleges and universities" beside its common name in the list of designated institutions in Regulation 460.

[48] The university states that its designated head is the "executive head", the university's President, who has the powers and duties of the President's office as established by the *University of Toronto Act*. The university adds that the *University of Toronto Act* does not assign to the President any powers in respect of TST or Knox. The university maintains that the intent behind the "University of Toronto" designation in the schedule to Regulation 460 was to designate the University of Toronto alone. The university adds that:

First, making TST, Knox or any other federated university or college subject to *FIPPA* requires a simple designation.

Second, the right of access to records applies to records in the "custody or control" of an institution; the *Act* already features a mechanism for addressing whether records belonging to a related or affiliated entity are subject to the right of access. This record-specific mechanism is the only mechanism contemplated by the Legislature to apply to matters such as the one raised by this appeal.

[49] The university also says that when the government amended *FIPPA* in 2005 to deem universities to be educational institutions and later designated all the major publicly funded universities, including the University of Toronto, as *FIPPA* institutions, it did not so designate TST and Knox. According to the university, the government's decision respecting these smaller, federated institutions "should be presumed to be a purposeful choice, consistent with government aims."

TST, Knox and the University of Toronto are separate legal entities

[50] The university submits that TST, Knox and the university are separate legal entities, with their own property, assets, employees, policies and practices, which is supported by their separate incorporation status. The university maintains that each have their own independent governance bodies, whether governing council or board of trustees, and each has a CEO that operates fully independently of the others.

[51] Knox submits that although the university, TST and Knox engage in joint projects, pursuant to contract, none of them "have the capacity to govern, direct or compel the record-keeping processes of the others; and each has a distinct relationship to the provincial government and the provisions of the *Act*."

[52] The university submits that while the *University of Toronto Act* establishes the legal relationship between the university, TST and Knox, it does not give the university any measure of control over TST or Knox, or their record holdings, and makes their independence clear. The university maintains that the *University of Toronto Act* does two things: empowers the university to enter into an agreement with TST, in part, "for the granting and conferring of conjoint earned degrees in theology";²³ and continues the university's federation with Knox College, unless brought to an end by the Governing Council of the university.²⁴ The university points out that although the *University of Toronto Act* grants academic status at the university to students of federated universities, this is not true of students at federated colleges like Knox.²⁵

The university's secular mandate and the Memorandum of Agreement

[53] The university explains that maintaining the insularity of the theological colleges is important to protecting the university's secular mandate,²⁶ and also contemplates that federated entities will engage in day-to-day matters autonomously. The university's secular status "is maintained by statutory delineations differentiating it from autonomous religiously-affiliated institutions such as Knox and TST."

[54] The university submits that in addition to the federation provided for in the *University of Toronto Act*, the relationship between it, TST and Knox is structured and governed by the terms of the 2014 MOA, which provides for the granting of conjoint degrees and for the delivery of services by the university to TST and its members, including Knox. The MOA, says the university, balances the need for sound governance and quality assurance with the need for day-to-day autonomy of TST.

[55] The university submits that under this framework, the MOA confirms several important measures of independence between it and TST and the member schools that are relevant to this appeal. For example, paragraph 21 of the MOA makes clear that TST and its members own and control student records and information, while being responsible for maintaining comprehensive records of all students enrolled in conjoint degree programs. The university states that paragraph 21 gives it a limited right of access to "data" (not

²³ Section 2(a).

²⁴ Sections 10(4) and (6).

²⁵ Section 11(2).

²⁶ Based on the university's "Statement of Institutional Purpose" set out in the university's representations and section 13 of the *University of Toronto Act, 1971*.

student records) for the purpose of auditing the per student grant monies that the university flows through to TST.

[56] The university adds that paragraph 22 of the MOA leaves grading and grading policy, "a significant day-to-day matter", expressly to TST, while paragraph 27 confirms that teaching staff of TST and its members are not university employees. The university describes this provision as helping to ensure the quality of teaching and research without inviting any university control over TST and TST member teaching staff.

[57] The university submits that the MOA establishes what TST and its member schools have agreed they and their employees will do, but it does not establish TST as an institution that is acting for and on behalf of the university. The university adds that the MOA also does not otherwise give the university control over TST and its members with respect to the matters in issue in this appeal.

Reconsideration Order PO-2775-R is distinguishable

[58] The university argues that Order PO-2775-R is distinguishable on the facts because it addressed a federated university, which TST and Knox are not, and because the finding was based on "the operational and financial affairs" of the university and Victoria being integrated to a significant degree, including their academic affairs. The conduct of both universities indicated an acceptance that the *Act* applied to Victoria, including entering into an agreement regarding the administration of access to information requests received pursuant to the *Act*. Among other things, this agreement provided for the creation of mechanisms and structures to enable the administration of access requests.

[59] The university says that despite the IPC's call to amend Regulation 460 to include federated and affiliated universities, the provincial government consultations that followed, and the university's own support for scheduling Victoria University but not TST and Knox, no scheduling of any affiliated and federated universities happened.²⁷

[60] Knox, in addition to adopting the university's submissions on the structures and other features that separate them, submits that it is fundamentally different in character from Victoria University, and that even if Order PO-2775-R "had been correctly decided, the reasoning therein could not be applied to it by analogy." The main distinction, Knox argues, is that unlike Victoria, Knox is not a secular institution, but rather a religious one, with a mission to teach theology and to prepare students for Christian ministry. Knox points to the legislative recognition of the distinction between religious and secular education that is embodied by the "ecclesiastical records" exclusion in section 65(5.3).²⁸

[61] Referring to the evidence before the adjudicator in Order PO-2775-R that Victoria

²⁷ "Scheduling" refers to the designation and listing of an entity as an "institution" under Regulation 460 under *FIPPA*. The university and Knox both refer to the university's correspondence with the Ministry of Government Services at that time, which was attached to the university's representations. In this letter, the university described the federated institutions that it viewed as "similarly situated" to Victoria University for the purposes of the *Act*, identifying Trinity College and the University of St. Michael's College, and supported their being designated as "Institutions" under Regulation 460. Neither Knox nor TST were identified as candidates for scheduling.

²⁸ "Ecclesiastical records" are defined at Section 2 of the *Act* as the "operational, administrative and theological records ... of a ... religious organization".

had a created a policy on access and privacy protection internally and its integrated response to *FIPPA* requests with the university, Knox says that it has no comparable policy or agreement. It says that although it has a Privacy Policy, that policy specifically advises students and the public that *FIPPA* does not apply to its records.²⁹

Representations of the appellant

[62] The appellant explains that he was a student in the ThD program at the Graduate Centre for Theological Studies, Toronto School of Theology,³⁰ but had to leave the program as a result of the grade he received in the "major examination" that formed the basis of the request.³¹

[63] The appellant sets out the response given by TST when he inquired into the basis of his grade and says that it did not provide "sufficient particulars regarding his assessment by the three named examiners, including 'their score sheets or any communications between the examiners as it relates to his examination'." Having been refused this information and believing that his termination from the doctoral program represented a "clear abuse of his evaluators' supervisory powers," the appellant sought to obtain access through *FIPPA* to the information he says he requires to pursue his academic appeal.

[64] The appellant maintains that at the core of this matter is his entitlement to records related to an academic matter. The appellant argues that the Governing Council under the *University Of Toronto Act* includes Knox and TST where the matter or request is academic in nature. He submits that the Governing Council, established by the *University of Toronto Act, 1971*, is the final means of recourse for ThD students in respect to academic matters. He points to part 14.2.7 of the ThD Handbook, which provides a right of appeal to the Academic Appeals Committee of the Governing Council of the University of Toronto for the final result of a TST appeals process.

[65] The appellant submits that the emails and other communications he seeks are academic, not ecclesiastical, records as Knox claims and that they are relevant to an academic appeal because they will accurately portray what happened, including the reasons for the decision to terminate his registration in the ThD program. The appellant argues that these records are all related to academic matters that are governed by the University of Toronto's appeal process. The appellant also argues that for the purposes of the application of *FIPPA* respecting academic matters, the University of Toronto includes TST and Knox. He points out that all faculty identified in the requests are cross-appointed to the University of Toronto's Department for the Study of Religion. In response to this particular argument, the university states that although the three examiners at some point held a "status only" appointment at the University of Toronto, such appointments are without pay or other remuneration and are usually only available to individuals who hold a full-time academic employment relationship with another institution, such as Knox or TST.

²⁹ Dated August 24, 2018, Knox College Privacy Policy, online: <<https://knox.utoronto.ca/privacy-policy/>>, attached as Tab "B" to Knox's representations. The relevant part states: "As a church-related organization, Knox College is not bound by the Freedom of Information and Protection of Privacy Act (FIPPA, 2006, Government of Ontario) but in respect for our academic relationships within the University of Toronto, we strive to maintain consistent standards of privacy."

³⁰ As noted, the appellant was enrolled as a student at Knox College, but his ThD program was administered by TST.

³¹ The appellant notes that a minimum A- or 80% is required for continuation in the program.

[66] The appellant argues that the ThD Student Handbook is clear that student conduct is governed by the University of Toronto's Code of Behavior on Academic Matters, including discipline and complaints. He says that every ThD and PhD student registered at TST or one of the participating colleges is subject to the university's disciplinary jurisdiction in respect of academic matters including plagiarism, forging of academic documents and cheating on examinations or papers. The appellant relies on Knox and TST's internal dispute resolution mechanism respecting academic matters and its relationship with the university as an indicator of control over the responsive records.

Reply from TST, Knox and the university

[67] In reply, the university states that the academic matters referred to by the appellant are "operational, day-to-day matters that TST and Knox handle independently of the University," as confirmed by paragraph 8 of the MOA. The university points out that the three examiners are employees of TST member entities, not the university, and the university has no role in dealing with the kind of misconduct allegations made against them by the appellant.³²

[68] Regarding the MOA's provision for appeal to the university's Academic Appeals Committee for students in conjoint degree programs, Knox says that although TST member schools must pay a portion of the university's expenses to cover the costs of hearing those appeals, the MOA does not grant the university "any entitlement to custody or control of any TST member college's records."

[69] Regarding the appellant's argument that the requested records "are relevant to an academic appeal," TST maintains that he did not appeal that decision and "the time to do so has long lapsed." TST says that if the appellant had appealed the termination of his registration, he may have been able to obtain records that were relevant to that appeal because of the principles of procedural fairness, and outside the *Act*. In response, the appellant says that such an appeal was filed,³³ that there is nothing in the *Act* that would prohibit the disclosure of the records sought and that "TST or its privies" should disclose or be ordered to disclose such records.

Analysis and findings

[70] The university, TST and Knox are united in their opposition to a finding that TST or Knox are part of the university for the purposes of the *Act*. Based on my consideration of the circumstances and the representations of the parties, and for the reasons provided below, I agree.

Order PO-2775-R

[71] In Order PO-2775-R, the adjudicator found that the University of Toronto had custody or control of a consultant's report in the possession of Victoria University, a report that had been prepared for a United Church of Canada/Victoria University Archives Task Force as part of a program renewal exercise. The adjudicator was persuaded that Victoria, as a federated university operating "in the University of Toronto," was part of the

³² The university relies on paragraphs 27 and 31 of the MOA.

³³ The appellant did not provide documentation to support this assertion.

University of Toronto for the purposes of the *Act*. The appellant urges me to apply the reasoning in Order PO-2775-R to make a similar finding respecting TST and Knox in this appeal.

[72] As I said above, I find Order PO-2775-R distinguishable and I provide grounds for that conclusion below. Order PO-2775-R nevertheless provides a useful framework for my analysis in this appeal.

[73] As stated, section 10(1) of the *Act* provides that every person has a right of access to records in the custody or under the control of an "institution," a term that is defined in section 2(1) of the *Act*.³⁴ The relevant part of the definition of "institution" in this appeal is paragraph (b), which states that it "means ... any agency, board, commission, corporation or other body designated as an institution in the regulations[.]"

[74] The relevance of the definition and the reasons underlying the finding in Order PO-2775-R, were summarized in Order PO-4066 as follows:

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

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

The legislative history of the amendments that brought Ontario's universities under the ambit of the *Act* suggests that all universities receiving public funding were intended to be included. In the adjudicator's view, there is no principled reason why this would not include those universities whose largest source of public funding is derived from a flow-through of monies, like Victoria, from a scheduled university, like U of T.

The degree of integration of the administrative, financial and academic operations of Victoria and U of T supports a finding that Victoria is part of U of T for the purposes of the *Act*. Here, the adjudicator pointed to U of T's flow-through funding of Victoria, and the fact that Victoria suspended its degree-granting authority for all except divinity students, which results in its students receiving a degree not from Victoria but from U of T.

Victoria and U of T took various steps to prepare for their inclusion in the freedom of information and privacy protection regimes under the

³⁴ Under section 2(1) of the *Act*, an "institution" means: (0.a) the Assembly, (a) a ministry of the Government of Ontario, (a.1) a service provider organization within the meaning of section 17.1 of the *Ministry of Government Services Act*, (a.2) a hospital, and (b) any agency, board, commission, corporation or other body designated as an institution in the regulations.

Act at the time of the amendments. This showed that they considered Victoria to be subject to the requirements of the *Act*.³⁵

[75] Having applied this same framework in my analysis of the relationship between TST and Knox, on one hand, and the university, on the other, to determine whether the former two entities are part of the university, I find substantial evidence of an intention to create and maintain separation between the university on one hand and TST and Knox on the other.

[76] I have considered, in particular, the degree of integration of the administrative, financial and academic operations as between the university, on one hand, and Knox and TST on the other. Based on my review of the relevant governing statutes, the MOA (affiliation agreement) and the parties' representations, I find strong evidence of Knox and TST's independence from the university. TST and Knox pursue a mandate founded in Christian theological and religious education that is distinct from the university's secular mandate. I accept the university's evidence that TST and Knox each maintain their own governance structure, executive officers, capital assets (including property), employees, financial statements, policies (with some exceptions where there may be conflict between them and the university's) and records pertaining to their activities. In this way, I find TST and Knox to be entities operating, in most respects, autonomously and independently from the university.

The University of Toronto Act, 1971

[77] I accept that the *University of Toronto Act* affirms the university's secular mandate while at the same time enshrining the separate religious and theological mandate of TST and its member schools. Section 13 provides that "no religious test" will be required of any member of the university's teaching staff, administrative staff or any student, or any religious observances according to the forms of any religious denomination or sect imposed. Section 13(2) provides, however, that the right of a federated university or college to make such provision regarding religious instruction and religious worship for its own students is not to be interfered with.

[78] Further, section 2a.(b) of the *University of Toronto Act* ("Degrees in theology") allows the university to enter an agreement with TST, or any or all of its member schools "for the granting and conferring of conjoint earned degrees in theology".³⁶ Although students of federated universities are granted academic status under the *University of Toronto Act*, students at federated colleges like Knox are not given such status with the university.³⁷ I accept the position taken by Knox, in seeking to distinguish this appeal from Order PO-2775-R, that it is not similarly situated to Victoria because, unlike Victoria, it is not a secular institution that grants arts and science degrees. Knox is organized and exists for and because of its commitment to religious and theological education.

[79] In my view, these provisions affirm the separate and independent mandates of the university on one hand and Knox and TST on the other.

³⁵ Order PO-4066, paragraphs 16 and 17.

³⁶ Sections 10(4) and (6).

³⁷ Section 11(2).

The Memorandum of Agreement

[80] As outlined above, the relationship between TST, Knox and the university is defined in a 2014 Memorandum of Agreement between them and other Christian- affiliated colleges and universities operating within the University of Toronto. I agree with the university that the MOA does not establish TST as a body that is acting for and on behalf of the university in its dealings with Knox, a federated college, nor does it give the university control over TST or Knox with respect to their activities as educational institutions.

[81] The MOA creates a clear demarcation between the administration of theology programs at TST and Knox and the purely secular programs and associated faculties of the university. The MOA provides for the granting of conjoint degrees and for the delivery of services by the university to TST and its members, including Knox. Schedule B of the MOA confirms that the appellant's ThD degree program is a conjoint degree;³⁸ that is, he was jointly registered at Knox and the university and took classes and examinations through TST. Nonetheless, paragraph 6 of the MOA makes clear that he did not, by this conjoint registration, become a student of the university within the meaning of the *University of Toronto Act, 1971*.

Academic integration

[82] I find paragraph 8 of the MOA (Responsibility) to be a strong indicator of the independence of TST and Knox from the university in teaching and delivering conjoint theological degree programs. This part affirms that:

The TST and its Member Institutions are solely responsible for the delivery of the conjoint degree programs, for the academic support of students in these programs, and for faculty development in relation to the conjoint degree programs.

[83] As stated, the appellant was conjointly registered at Knox and the university. Paragraph 18 limits the scope of this joint registration to the purposes agreed to in the MOA only and subject, in particular, to the circumscription of paragraph 8. Paragraph 18 also states that students registered in conjoint degree programs are not eligible for U of T funding including any and all research or teaching assistantships.

[84] The responsibility given in paragraph 8 for the delivery of the conjoint programs also includes, under paragraph 22 (Grading Practices Policy), vesting in TST the authority for, and oversight of, grading and grading policy for all students registered in conjoint degree programs listed in Schedule B, like the appellant. I agree with the university that this is a significant indicator of the autonomy of TST with regard to its daily operations and functions.

[85] This is not to say that the MOA provides a complete code of policy and practice for students registered in conjoint degree programs with a TST member school. Under paragraph 24, as the appellant notes, the university's Code of Behaviour on Academic

³⁸ Or, at least, was. TST's website indicates that the conjoint Doctor of Theology (ThD) program in which he was registered has been replaced by a conjoint PhD in Theological Studies.

Matters applies to such students. Paragraph 25 (Academic Appeals) also provides that a student in a conjoint degree program listed in Schedule B may have access to the university's Academic Appeals Committee of the Governing Council in order to appeal a decision of the TST divisional appeals body. However, I do not interpret these provisions to stand as evidence of TST or Knox's integration on an academic level with the university. In my view, these are more suggestive of practical and procedural fairness considerations than integration of academic operations as a whole. In this respect, I note that Knox is obligated to reimburse the university a portion of the costs incurred in carrying out the final stage academic appeals function, another consideration I find weighs against concluding there is a substantial degree of integration in the academic operations of the university on one hand and TST and Knox on the other.

Financial integration

[86] Additionally, I find that the evidence provided respecting TST and Knox's financial affairs does not support a finding that their financial affairs are integrated with the university's to any significant degree.

[87] I accept that the university is not responsible or liable for the financial obligations of Knox or TST. Knox and TST each have budgets, generate revenue and manage their own finances. Knox and TST each own their buildings and assets and have their own employees.

[88] Paragraphs 37 to 39 of the MOA address financial arrangements between the university and TST and its members colleges, including the colleges' responsibility for its own capital and operating budgets and expenditures. In my view, these provisions, particularly paragraph 37, establish the financial independence of Knox, as a member school of TST. There is an exception, in paragraph 38, for the transfer of certain funds to the member colleges, such as the university's remittance of provincial operating grants for conjoint degree programs to TST, subject to reimbursements by TST for "administrative, academic and student services" rendered by the university under paragraph 39 (including appeals). Paragraph 39 confirms that the MOA "shall be the primary agreement governing the exchange/transfer of funds between the U of T and the TST" with Schedule C, *Administrative Guidelines for Financial Transactions under the MOA*, forming the comprehensive record of all such financial arrangements.

[89] TST and Knox receive flow-through public monies for their conjoint theology programs, including the one in which the appellant was registered. However, *FIPPA* was not created in such a way as to cover all entities receiving public funding. In my view, the flow-through funding from the university to TST (and on to Knox) does not by itself justify a finding that Knox or TST are part of the university, absent a greater degree of financial and other integration between them.³⁹ I find there to be a low level of financial integration between TST and Knox on the one hand and the university on the other that supports their independence and acts as another reason for distinguishing the finding in Order PO-2775-R from the situation before me in this appeal.

³⁹ Order PO-4066.

Administrative integration

[90] I have also considered the evidence, and I accept it, that Knox and TST are separate legal entities, as corporations in their own right. Knox and TST are independently governed by a governing council and board of trustees, respectively, and each has a CEO that operates independently of the others within the federation. Paragraphs 34 and 35 of the MOA provide for some university representation on TST boards and committees, as well as consultation with the university regarding the selection of a TST director. However, neither has the capacity to govern the other; nor can they direct the administrative affairs of the others.

[91] Paragraph 21 of the MOA provides that the enrolment of students in conjoint degree programs, such as the appellant's, shall be carried out by the TST and its member schools, in this case Knox. Under this provision, it is clear that TST is responsible for maintaining "comprehensive records of all such students" but only data related to operating funds about them is intended to be shared with the university. This is a caveat. The university submits, and I accept, that it enjoys a limited right of access to "data" for the purpose of auditing the per student grant monies that the university flows through to TST, but this does not extend to access to student records.

[92] As the university has noted, the MOA provides for a form of quality assurance respecting certain academic and administrative matters. TST and its member schools have obligations under the MOA to ensure consistency with corresponding university policy and procedures in respect of code of conduct matters and grading practices (paragraph 22), while certain policies of the university apply to students of TST and its member schools, such as the research ethics and sexual harassment policies (paragraph 23).

[93] Based on my consideration of the factors above, I find the evidence suggestive of only limited administrative integration between TST and Knox on the one hand and the university on the other.

Conduct of Knox, TST and the university

[94] In Order PO-2775-R, the adjudicator considered the actions of Victoria and the university following the enactment of Bill 197.⁴⁰ In that appeal, the adjudicator was provided with what he construed as evidence of Victoria's intention to participate in the access to information regime under *FIPPA* in a cooperative, if distinct, capacity to the university. There is no suggestion, on the facts before me in this appeal, that either TST or Knox has evidenced, through their actions or internal policy measures, an intention to assume the responsibilities of a *FIPPA* institution. While it is true that nothing precludes TST or Knox from disclosing information in accordance with the spirit and principles of the *Act*, I find that they have acted consistently as though they are not bound by it.

[95] Having considered the relevant provisions of the *University of Toronto Act* and the MOA, along with the other evidence as to academic, financial and administrative integration and the actions of the university, TST and Knox, I find no reasonable basis to conclude that TST and Knox are part of the university under the *Act*.

⁴⁰ The Bill 197 amendments brought universities under the *FIPPA*.

[96] This finding means that the question of whether responsive records held by TST or Knox are subject to the *Act* must be determined on a case-by-case basis, applying the principles of custody or control. It is to that question that I turn next.

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

[97] The university, TST and Knox all take the position that any responsive records are not in the custody or control of the university for the purposes of *FIPPA*. The university argues that it has no relationship with the appellant, his professors, TST and Knox that invites it to deal with the records at issue in any manner, let alone in a manner that would give rise to custody or control over them by the university.

[98] I must consider, therefore, whether the university has custody or control of, first, the requested emails between the named TST professors regarding the appellant's "second major exam" and, second, the requested emails between one of the same named TST professors and Knox College's Registrar regarding the appellant's "second major exam," and the mailing of his enrollment history and transcript to a named seminary college.

Factors relevant to determining custody or control

[99] In the overview of the appeal given above, I set out the principles of custody or control and referred to the IPC having developed a non-exhaustive list of factors to consider in determining the issue. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply. The non-exhaustive list of factors considered includes consideration of the following:

- Was the record created by an officer or employee of the institution?⁴¹
- What use did the creator intend to make of the record?⁴²
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?⁴³
- Is the activity in question a "core", "central" or "basic" function of the institution?⁴⁴
- Does the content of the record relate to the institution's mandate and functions?⁴⁵
- 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?⁴⁶

⁴¹ Order 120.

⁴² Orders 120 and P-239.

⁴³ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

⁴⁴ Order P-912.

⁴⁵ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); and Orders 120 and P-239.

⁴⁶ Orders 120 and P-239.

- If the institution does have possession of the record, is it more than “bare possession”?⁴⁷
- 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?⁴⁸
- Does the institution have a right to possession of the record?⁴⁹
- Does the institution have the authority to regulate the record’s content, use and disposal?⁵⁰
- 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?⁵¹
- To what extent has the institution relied upon the record?⁵²
- How closely is the record integrated with other records held by the institution?⁵³
- 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?⁵⁴

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

- If the record is not in the physical possession of the institution, who has possession of the record, and why?⁵⁵
- Is the individual, agency or group who or which has physical possession of the record an “institution” for the purposes of the *Act*?
- Who owns the record?⁵⁶
- Who paid for the creation of the record?⁵⁷
- What are the circumstances surrounding the creation, use and retention of the record?⁵⁸

⁴⁷ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

⁴⁸ Orders 120 and P-239.

⁴⁹ Orders 120 and P-239.

⁵⁰ Orders 120 and P-239.

⁵¹ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

⁵² *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; Orders 120 and P-239.

⁵³ Orders 120 and P-239.

⁵⁴ Order MO-1251.

⁵⁵ Order PO-2683.

⁵⁶ Order M-315.

⁵⁷ Order M-506.

⁵⁸ Order PO-2386.

- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?⁵⁹
- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the institution?⁶⁰ If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?
- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?
- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? Did the agent have the authority to bind the institution?⁶¹
- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?⁶²
- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue?⁶³

[101] The factors are to be considered contextually in light of the purpose of the legislation.⁶⁴ Where an institution does not have possession of the record, a relevant factor is whether it could reasonably be expected to obtain a copy on request.

[102] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,⁶⁵ the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

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

⁵⁹ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

⁶⁰ Orders M-165 and MO-2586.

⁶¹ *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) (*Walmsley*); and *David v. Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.).

⁶² Order MO-1251.

⁶³ Order MO-1251.

⁶⁴ *Ottawa (City) v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835 (*City of Ottawa*).

⁶⁵ 2011 SCC 25, [2011] 2 SCR 306 (*National Defence*).

Representations

The university

[103] The university maintains that the custody or control analysis must be informed by the context in which separate entities relate to one another. It refers to the *Children's Lawyer* decision of the Court of Appeal⁶⁶ and identifies its importance as a reminder that a finding of custody or control can threaten independence - independence that exists for legitimate and important purposes. The university states that:

In *Children's Lawyer*, the Court held that independence was important because the Children's Lawyer is in a confidential relationship with the children who it represents. In this appeal, independence is essential to the University, TST and Knox mandates. The independence that these entities have purposely maintained despite their affiliation should not be frustrated by a finding that causes the University to deal with matters and records for which it has no responsibility.

[104] The university adds that it does not have any power to access, or any practice or custom of accessing, TST emails, including TST faculty member emails about examinations, exam questions and exam grades, or registrar functions, such as providing information to outside institutions. Moreover, the university submits, it has no power to conduct a search for records or say to Knox and TST, "We are taking this over. You must give us access to your people to give them search instructions. We want to see what may be responsive. We want to assess whether fee estimates are required."

[105] The university provided the following submissions on the custody or control factors applied by the Court of Appeal in *Children's Lawyer* and others considered in the usual analysis of custody or control:

Was the record created by an officer or employee of the institution?

[106] The university submits that the responsive records, if they exist, are communications between employees of TST or Knox, (and Knox denies it has any).⁶⁷ The university adds that each of the three examiners identified by the appellant is employed by one of the TST member schools, and not by the university, and the university has no role in dealing with the type of misconduct allegations against these examiners alleged by the appellant.⁶⁸ The university also submits that although the examiners may have cross-appointments, paragraph 31 of the MOA provides for TST faculty to be granted status-only appointments based on mutual agreement between the employing TST member school, TST and the university, but the member school remains the employer.

⁶⁶ *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559 (CanLII).

⁶⁷ Responsive to the second request, that is.

⁶⁸ The university refers to paragraph 27 of the MOA, which states that "the teaching staff in theology of the TST and its member institutions shall continue to be appointed by and to hold their contracts of employment with their respective institutions and shall continue to be subject to the procedures and disciplinary jurisdiction of those institutions and not subject to those of U of T."

What use did the creator intend to make of the record?

[107] The university initially stated that the records were “presumably created to address some issue with which the University has had no involvement and no way of knowing or assessing.” After learning from the appellant’s representations of the academic subject matter of the records, the university relies on paragraph 8 of the MOA and maintains that these are operational, day-to-day matters that TST and Knox handle independently of the university.

[108] Regarding the fact that the university’s Academic Appeals Committee is available to appeal TST decisions that have been processed through TST’s own appeal procedure, the university reiterates that this does not give the university custody or control of TST records, though it may cause the university to receive TST records in the event of an academic appeal.

Does the institution have possession of the record?

[109] Relying on the Divisional Court decision in *City of Ottawa v Ontario*,⁶⁹ the university submits that it is an arms-length IT service provider to TST. It maintains that while it possesses the systems and data, it does not possess the records at issue, nor does its powers as an IT service provider support a custody finding for the purposes of *FIPPA*.

Does the institution have a right to possession of the record?

[110] The university submits that it has no power or authority “to cause TST, Knox or their employees to deliver up records” and says that this factor is especially significant. Specifically, it argues that under paragraph 21 of the MOA, TST and its members own and control student records and information and while the university has bargained a limited right to data for enrollment auditing purposes, it has “no greater right to access” student records and information. The university submits that in this context, it has no power to administer a freedom of information request for the kinds of communications at issue.

[111] Further, the university states that, as there has been no appeal to its Academic Appeals Committee about the matter described in the appellant’s representations, the university therefore “has no records related to the matter and has no basis for requesting, compelling or otherwise obtaining records related to the matter.”

Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?⁷⁰

[112] The university submits that the MOA establishes the university as a service provider to TST, in the form of being a provider of IT and email service under Schedule C to the MOA. Under this arrangement, the university maintains, it acts simply as a service provider, with no right of access to data “beyond the limited rights that are enjoyed by any arm’s length IT service provider.”

⁶⁹ 2010 ONSC 6835, para 42 (CanLII).

⁷⁰ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

Does the content of the record relate to the institution's mandate and functions?

[113] The university also maintains that the content of the records, if any exist, would not relate to its mandate and functions, because it has a secular mandate that is distinct from the mandate of TST and Knox to which the records directly relate.

Does the institution have the authority to regulate the record's use?

[114] The university states that it does not have the authority to regulate the records' use, because the communication of TST and Knox employees with students is governed by TST and Knox as employers.

To what extent has the record been relied on by the institution?

[115] The university submits that it has not seen or relied upon the communications sought by the access request.

How closely has the record been integrated with the other records held by the institution?

[116] The university submits that there is no integration of responsive records, if any exist, with the records of the university. It states that, "the email correspondence at issue is presumably in an 'account' or similar resource controlled by individual custodians who are employed by TST and/or Knox and not the University."

Does the institution have the authority to dispose of the record?

[117] The university denies that it has the authority to dispose of the records that would be responsive to the request and submits that it may only dispose of TST and Knox faculty emails at the direction of TST and Knox.

Knox

[118] Knox begins by stating that the only records responsive to either request were in the possession of TST and have already been disclosed to the appellant. Knox says that no records responsive to the appellant's second request exist in its record holdings and, regardless, had any records existed, the university would not have been in a position to disclose them, as it would have had neither custody nor control of them.

[119] Regarding the factors relevant to determining custody or control of "a series of email communications between its professors," Knox states that it maintains all records for its basic degree programs and that TST is responsible for the administration of its graduate degree programs. Knox submits that if such email correspondence between its professors using their official e-mail addresses had existed, it would have been a record of Knox's employees and Knox would have the right to possess it, though it would also have been in the possession of TST, as of right, because the student was enrolled in a TST-administered graduate program.

[120] Knox submits that if responsive records had existed, they would have related to Knox's mandate and functions in respect of providing students with an education in theology, divinity and ministry; though they would equally have related to TST's mandate and functions. The authority to regulate the records would have been under TST's

administration and authority, but it would also have been subject to Knox's authority to regulate the business records of its employees. Both TST and Knox would have had the authority to dispose of them.

[121] In response to the appellant's representations, Knox argues that the academic appeal process does not affect custody or control. Knox agrees that, pursuant to the MOA, students of TST member schools in conjoint degree programs may appeal to the university's Academic Appeals Committee and it acknowledges that this "outsourcing arrangement" requires TST member schools to pay a portion of the university's expenses to cover the costs of hearing those appeals. Knox maintains, however, that the MOA does not grant the university any entitlement to custody or control of any TST member college's records and "the fact that a final appeal might be made to the university's Academic Appeals Committee does not alter this fact."

TST

[122] TST adopts the university's representations and also adopts the university's and Knox's reply representations.

The appellant

[123] The appellant submits that the university has custody or control over responsive records in this appeal because it is the owner of the "information technology services such as email, network connectivity, security, student information system (currently ROSI) access and learning management system (currently Blackboard) access" used by TST, including its professors and students.

[124] The appellant submits that the MOA establishes "a clear and substantial connection" between the university and the operations and activities of TST in the areas of quality assurance, information technology, degrees and governance that is sufficient to support a finding that responsive records are in the university's custody or control. The appellant also relies on Knox and TST's internal academic dispute resolution mechanism and its relationship with the university as an indicator of control over the responsive records.

[125] The appellant challenges Knox's position that no responsive records exist, and refers to an obligation on the part of the professors involved to maintain documentation about students, particularly as it relates to the assessment of a doctoral student. The appellant argues that the university's search for responsive records was not reasonable. In response to this point, Knox repeats that its cross-appointed faculty members are not employees of the university and, in any event, it rejects what it calls the implicit assumption that, because doctoral records in general should be kept, specific emails concerning the appellant's exam must have been created, sent and retained, which it maintains, were not.

Analysis and findings

[126] The appellant submitted two requests to the university, seeking emails exchanged between identified TST professors and/or the Knox Registrar. The university's response was that such records were not in its custody or control under the *Act* and that he could only obtain access to such records outside of *FIPPA*, because it does not apply to either TST or Knox. The appellant received access to the paper records that TST located, but has

stated that he wants electronic copies of those records for “forensic purposes.”

[127] I found above that neither TST nor Knox are part of the university for the purposes of the *Act*, and the question I must now consider is whether the university nevertheless has custody or control of responsive records, if they exist, under section 10(1) of *FIPPA*.

[128] The responsive records – email correspondence between professors at TST, Knox or one of the other TST member schools – are about a specific exam of the appellant’s during his ThD studies and/or the mailing of his enrollment history and transcript to another seminary by Knox.

[129] I discuss below the possibility that responsive emails, if any exist, are in the university’s possession (by virtue of being on its servers). However, I begin by looking at the following two-part test developed by the Supreme Court of Canada in *National Defence* on the question of whether an institution has control of records that are not in its physical possession:

(1) Do the contents of the document relate to a departmental matter?

[130] While the responsive records in this appeal may relate in a broad sense to the university because they are about a student who was enrolled in one of its conjoint degree programs, this alone is not sufficient to establish that the records relate to a university matter within the meaning of the *National Defence* test. As Senior Adjudicator Gillian Shaw stated in Order PO-3894,

The context of the creation of a record is important in determining what constitutes a “university matter”, and previous orders of this office have suggested that for this part of the test to be satisfied, the records must arise out of a decision-making function of the institution or be integral to an institutional matter.

[131] I find that the emails at issue do not arise out of a decision-making function of the university, nor are they integral to a university matter. The responsive records, to the extent they exist (or once existed), arose out of decision-making functions of TST and Knox, and not those of the university.

[132] Even if I were to accept that this part of the *National Defence* test were satisfied, I find that the second part is not.

(2) Could the university reasonably expect to obtain a copy of the document upon request?

[133] The appellant was a student of TST and Knox enrolled in a program of study that I accept is “developed and directed by Knox to meet Knox’s distinctly theological mandate.” I find that part two of the *National Defence* test is also not met, and in making this finding, rely on the usual custody or control factors outlined below for concluding that, in the ordinary course, the university could not reasonably be expected to obtain from TST or Knox a copy of the records sought by the appellant.

Whether or not the university has possession, it does not determine custody or control

[134] Knox argued in this appeal that the only records responsive to either request were in the possession of TST and had already been disclosed to the appellant. Knox says that both it and TST would have been entitled to possess such records, because the appellant was enrolled in a TST-administered graduate program. For its part, the university rejects that it has any power or authority to possess responsive records. It relies on *City of Ottawa* to argue that it merely acts as an arms-length IT service provider to TST: while it possesses the systems and data, it does not possess the records at issue and its powers as an IT service provider do not support a custody finding for the purposes of *FIPPA*. The appellant disagrees, viewing the MOA's provisions relating to information technology and other TST operations and activities as sufficient to establish that responsive records are in the university's custody or control.

[135] Given the evidence before me, such as the parts of Schedule C of the MOA relating to the university's provision of information technology services to TST and its member schools, including email, it appears that the responsive records, if they exist, would be in the university's possession by virtue of them existing on or transiting through the university's servers. It is not necessary for me to decide this matter, however, because given my review of all the factors, the result would be the same regardless of the matter of possession. That is, if the records are not in the university's possession (as not being on its servers), I find, based on *National Defence* and my review of the relevant factors below, that there is no control over the records. If, on the other hand, they are in the university's possession, I find below that such possession does not amount to custody for the purposes of the *Act*, again as a result of looking at the relevant factors.

[136] Supposing there to be possession of responsive records by the university, there is insufficient evidence to support a finding that this possession amounts to more than "bare possession" under section 10(1) of the *Act*. This is because there must be something more than mere physical possession to establish custody for the purposes of the *Act*. There must be some right to deal with the records and some responsibility for their care and protection, and I accept that this threshold has not been met in the circumstances. This conclusion follows from my discussion above about the existence of the university, TST and Knox as separate legal entities with their own property, assets, employees, policies, practices, functions and mandates. The university has a clear secular mandate, distinct from the Christian theological mandate of TST and its member schools, both affirmed and protected in section 13 of the *University of Toronto Act, 1971*. The provisions of the MOA support their intentional separate existences.

[137] Next, supposing the university does not have physical possession of the responsive records, my conclusion would be that it has no control over them, which is consistent with my findings on the *National Defence* test above, particularly that the university could not expect to receive copies of the responsive records, even if it was to request them. I find support for this in paragraph 21 of the MOA, which provides that TST and its member schools own and control student records and information, subject only to making available the information necessary for the university and external auditors to review enrollment data related to the distribution of funding. I accept that the university may not, under the MOA or otherwise, access or possess records related to TST or Knox's students of the nature sought in this appeal. It follows that the university has no right to possess the

responsive records, other than in its capacity as IT provider and for that limited purpose.

The records were not created by an officer or employee of the institution and are not held by the university

[138] The evidence before me is clear that the records sought by the appellant, communications between employees of TST or Knox, concern individuals all employed by TST or one of its member schools, and not by the university. Under paragraph 27 of the MOA, "the teaching staff in theology of the TST and its member institutions shall continue to be appointed by and to hold their contracts of employment with their respective institutions." With respect to the appellant's argument about the examiners of his "second major exam" having cross-appointments at the University of Toronto, I agree with the university's position. Specifically, paragraph 31 of the MOA addresses situations where, by mutual agreement between them, TST faculty may be granted status-only appointments with the university, but this does not affect the employment relationship: the employing TST member remains the employer.

[139] Moreover, the responsive records are not, and would not be, held by an officer or employee of the University of Toronto for the purposes of their duties as an officer or employee because the individuals named in the request are all employees of TST or one of its member schools, not the university.

The records relate to day-to-day matters of TST or Knox that are handled independently of the university

[140] Regarding the use the creator intended to make of the records, I find that the responsive records would relate to academic and administrative matters within the purview of TST and Knox. The appellant relied on the fact that students in conjoint programs, such as his ThD program, may have access to the university's Academic Appeals Committee. The appellant also argues that the nature of Knox and TST's internal dispute resolution mechanism respecting academic matters and its relationship with the university strongly support a finding that "the locus of control for the responsive records rests with the university."

[141] Paragraph 25 of the MOA provides for the route of appeal for academic matters. However, even if the appellant's intent may have been to put the requested records to use in an academic appeal proceeding contemplated by paragraph 25 of the MOA, I do not consider this persuasive in my analysis of custody or control over them. As the university points out, the mere fact that such an academic appeal may result in the university receiving records of the nature sought in the event of an academic appeal does not, on its own, give the university custody or control of any TST or Knox records.

[142] Moreover, I accept that the university does not have any practice or custom of accessing TST or TST member school emails, including faculty member emails about examinations, exam questions, or exam grades in this particular context. Further, there is insufficient evidence that any academic appeal was made, which might have led to a right of access for the purposes of that appeal, pursuant to the rules of procedural fairness (not under the *Act*).

The university does not have the authority to regulate the records' content, use or disposal

[143] I accept the university's position that it does not have the authority to regulate the records' use, because communications between TST and Knox employees and with their students is governed by TST and Knox as employers. I find that the authority to regulate, control or dispose of the responsive records would have been under both Knox's and TST's administration and authority, and not that of the university.⁷¹

[144] As indicated above, Schedule C of the MOA "establishes the university as a service provider to TST," but I do not take this service provision to confer any authority upon the university to access, regulate the content, or dispose of the responsive records. Past orders have considered that, in the case of postsecondary institutions, the university owns the IT system and, in some cases, this has led to the finding that it has the concomitant right to regulate use or content.⁷² Determining whether an authority to regulate the content, use or disposal of a record exists in such a context focuses on whether the institution has some kind of responsibility for the substance of the information. In *City of Ottawa*, the Divisional Court found that the mere possibility that the city had the authority, pursuant to its IT policy, to monitor the employee's email account for misuse, was not sufficient to bring the employee's personal emails (that were at issue) within the city's custody under the *Act*. The records must be directly connected to a business purpose of the institution and were not.

[145] I make a similar finding in this appeal. The records sought by the appellant were (or would have been) created by employees of TST or Knox, not the university, and to the extent that any existed, such records would have been held in the email accounts of those TST or Knox employees. I accept the university's position that such records are not integrated with those of the university notwithstanding that they may exist on, or have transited through, university servers due to TST and Knox's reliance on the university to provide IT services. Under the MOA. I find that the university does not have the requisite authority to regulate the content or use of email communications between employees of TST or Knox or the registrar functions of Knox or TST, to support a finding that the responsive records are in the university's custody or control.

Conclusion

[146] Although the university may have bare possession of any responsive records because of its role as IT service provider, the other factors I have considered do not support a finding that the records are, or would be, in the custody or control of the university for the purposes of section 10(1) of the *Act*, if they exist, and I find they are not.

[147] In determining whether the records are in the "custody or control" of the university, I am required to consider the factors contextually in light of the purpose of the legislation.⁷³ The purpose of the *Act* is to promote accountability by shining light on the activities of institutions. In my view, given the independence of Knox and TST from the

⁷¹ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

⁷² Order PO-3009-F, for example.

⁷³ *City of Ottawa v. Ontario*, cited above.

university as outlined above, finding the responsive records to be in the custody or control of the university would not promote the accountability purpose in the *Act*.

[148] Given my finding that the responsive records are not in the university's custody or control, it follows that the university was under no obligation to search for responsive records. Further, having found that the records are not in the university's custody or control, there is also no need for me to determine the university's alternate claim that the exclusion in section 65(5.3) of the *Act* applies to them.

ORDER:

I uphold the University of Toronto's decision that the records requested by the appellant are not in its custody or control, and I dismiss the appeal.

Original Signed by: _____

Daphne Loukidelis
Adjudicator

_____ August 12, 2021