



Order F20-43

BRITISH COLUMBIA INSTITUTE OF TECHNOLOGY

Ian C. Davis
Adjudicator

October 2, 2020

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Summary: The applicant made four requests to the British Columbia Institute of Technology (BCIT) for access to records relating to group benefit plans provided by BCIT to its employees and administered by a third-party company. BCIT determined that the records were not in its custody or under its control and, therefore, not within the applicant's access rights under ss. 3(1) and 4(1) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). BCIT also argued that some of the records were outside the scope of FIPPA pursuant to s. 3(1)(k). The adjudicator found that the records were not in BCIT's custody or under its control and that it was not necessary to also consider s. 3(1)(k).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1), 3(1)(k) and 4(1).

INTRODUCTION

[1] The applicant made four requests to the British Columbia Institute of Technology (BCIT) for access to records relating to group benefit plans provided by BCIT to its employees and administered by the Manufacturer's Life Insurance Company (Manulife) and its subcontractors. BCIT advised the applicant that the records were not in its custody or under its control and, therefore, not within the applicant's access rights under ss. 3(1) and 4(1) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review BCIT's decisions. Mediation failed to resolve the issues and they proceeded to inquiry. The OIPC invited Manulife to participate in the inquiry and it also made submissions.

PRELIMINARY MATTERS

[3] After mediation, BCIT provided the applicant with a copy of a record responsive to one of the applicant's four access requests.¹ The applicant confirmed that he received the record and does not dispute it.² As a result, I am satisfied that the inquiry relating to that one access request is moot.

[4] In its initial responses to the applicant's access requests, BCIT did not specifically cite s. 3(1)(k) of FIPPA. That section states that FIPPA does not apply to "a record of a service provider that is not related to the provision of services for a public body." However, s. 3(1)(k) is listed as an issue in the OIPC Investigator's Fact Report and the parties addressed it. Accordingly, I confirm that s. 3(1)(k) is an issue in this inquiry.

ISSUE

[5] The issue is whether the requested records are outside the scope of FIPPA because they are either not in BCIT's custody or under its control for the purposes of ss. 3(1) and 4(1) of FIPPA, or because s. 3(1)(k) applies. The burden is on BCIT to show that the requested records are outside the scope of FIPPA.³

BACKGROUND

[6] BCIT is a post-secondary educational institution.⁴ The applicant is an employee of BCIT and holds a position within the union. BCIT employees are entitled under their respective contracts of employment and collective agreements to receive group health and wellness benefits.

[7] BCIT is also a member of a consortium of post-secondary institutions. The consortium was created to ensure that employee health and wellness benefits are procured and delivered to the consortium participants in a cost-effective manner. BCIT engaged Manulife to provide benefits to BCIT employees under the terms of an agreement between Manulife and the consortium participants (Consortium Agreement).

[8] Manulife administers BCIT's extended health and dental benefit plans under the terms of an administrative services agreement (Administration Agreement). Manulife manages the plans on BCIT's behalf and receives, adjudicates, and responds to claims made by BCIT employees. Claims for

¹ BCIT's initial submissions at para. 7, regarding OIPC File No. F18-76395.

² Applicant's submissions at para. 2.

³ Order F16-15, 2016 BCIPC 17 (CanLII) at para. 8.

⁴ The information in this background section is based on the evidence, which I accept, in Affidavit #1 of CK at paras. 2, 4-5, 9, 11 and 22; Affidavit #1 of JP at paras. 4-10 and 18-19; Affidavit #1 of CP at paras. 3-5 and 10-11.

extended health and dental benefits are funded by BCIT, so it has the authority to override Manulife's decision to accept or refuse a claim.⁵

[9] Manulife engages subcontractors to support its provision of certain extended health benefits. At the time the access requests at issue in this inquiry were made, Bayshore Healthcare Ltd. (Bayshore) supported Manulife's specialty drug program⁶ and Allianz Global (Allianz) provided emergency travel assistance to BCIT employees travelling outside of Canada.

[10] The applicant is concerned about the collection, use and disclosure of his personal information by Manulife, Bayshore and Allianz. On April 13, 2018, the applicant requested:

...copies of all emails sent [from October 1, 2017 to March 31, 2018 inclusive] by Bayshore Healthcare Ltd. email servers to any Manulife recipient which contain either my personal information or information about myself or emails which are in anyway concerned with or reference me or my position [within the union].

[11] On May 8, 2018, the applicant requested:

...information pertaining to the specific positions within BCIT's benefit agent's (Manulife's) structure which would be granted access to any of my personal information. I am specifically requesting two lists of positions to be forwarded.

First, I would like a list of the names of all positions, not individuals but position titles, within Manulife which may have access to my private information within their regular job duties.

Second, I would like a list, which is a subset of the first list, containing all those position titles which have the ability to access my personal information ... to conduct Manulife business and access Manulife systems outside of a Manulife location.

[12] Finally, on June 16, 2018, the applicant requested:

...the specific policies and written procedures for accessing personal information outside of Canada, and storage of personal information

⁵ According to Affidavit #1 of JP at para. 10, BCIT's long-term disability, life insurance and AD&D plans are provided to its employees on a different basis. They are available to employees under an insurance policy offered by Manulife. This means that upon payment of a monthly premium employees are entitled to submit claims for coverage for these benefits and receive payment from Manulife. As I understand, this case does not involve records and information related to BCIT's long term-disability, life insurance and AD&D plans.

⁶ However, it appears that Bayshore no longer provides this service to BCIT employees: Affidavit #1 of CP at para. 10; Affidavit #1 of JP at para. 19.

outside of Canada for Allianz Global, as mentioned on their website under the section “Use of Service Providers Outside Canada.”

Second, I am requesting the location of each of the Data Centers where Allianz could store our personal information, as a subcontractor for the Institution’s agent Manulife.⁷

[13] I will refer to the records requested in the April 13 request as the “Bayshore Emails”, in the May 8 request as the “Manulife Records”, and in the June 16 request as the “Allianz Records”.

[14] As noted above, in response to each of these three access requests, BCIT advised the applicant that the requested records were not in its custody or under its control and, therefore, not within the applicant’s access rights under ss. 3(1) and 4(1) of FIPPA.

RECORDS IN DISPUTE

[15] BCIT did not provide me with any of the requested records. It says it does not have these records.⁸

[16] Manulife says that, even if these records exist or could be created, it has no obligation to provide them to BCIT.⁹

[17] For the purposes of deciding this inquiry, I will assume that the records exist or could be created by Manulife and/or its subcontractors. I will assume that the Manulife Records and the Allianz Records contain the specific information identified in the applicant’s requests. As for the Bayshore Emails, I will address the issue of their contents in the analysis below.

CUSTODY OR CONTROL

[18] A record is subject to FIPPA if it is “in the custody” or “under the control” of the public body. Section 3(1) states that FIPPA applies to all records in the custody or under the control of a public body, except for the records listed in ss. 3(1)(a)-(k). Sections 4(1)-(2) give a person a right of access to any record in the custody or under the control of a public body, subject to the exceptions in ss. 12-22.1.

[19] FIPPA does not define “custody” or “control”. However, past orders and court cases provide guidance on the meaning of these terms. I will consider first whether the requested records are in BCIT’s custody.

⁷ Access requests dated April 13, 2018; May 8, 2018; and June 16, 2018. I have edited the requests slightly for grammar and clarity.

⁸ BCIT’s initial submissions at para. 25.

⁹ Affidavit #1 of CP at paras. 15-23.

Are the records in BCIT's custody?

[20] In Order F16-15, the adjudicator stated that “custody” within the meaning of s. 3(1) requires that a public body have “physical possession of a record, plus some legal right or obligation to the information in its possession.”¹⁰ The adjudicator found that the public body did not have physical possession of the requested records, so they were not in the public body’s custody.¹¹ The adjudicator did not also consider whether the public body had a legal right or obligation to the information in its possession.

[21] I make a similar finding here. BCIT says that the requested records are not within its “physical custody or possession”.¹² Manulife says it cannot comment.¹³ The applicant says he cannot determine whether BCIT has possession of the records.¹⁴ I accept BCIT’s evidence that it does not have physical possession of the Bayshore Emails, the Manulife Records or the Allianz Records. Therefore, I conclude that the records are not in BCIT’s custody for the purposes of ss. 3(1) and 4(1). The real dispute in this case is whether the records are under BCIT’s control.

Are the records under BCIT's control?

[22] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)* [*Minister of National Defence*], the Supreme Court of Canada adopted a two-step test for determining whether a public body has control of a record not in its physical possession.¹⁵ Although the test originated in the context of federal access to information legislation, it has been applied to FIPPA¹⁶ and the parties addressed it in this case.¹⁷ The test asks:

1. Do the contents of the record relate to a public body matter?
2. Could the public body reasonably expect to obtain a copy of the record upon request?¹⁸

[23] I will address the Bayshore Emails first.

¹⁰ Order F16-15, *supra* note 3 at para. 16.

¹¹ Order F16-15, *ibid* at para. 17.

¹² BCIT’s initial submissions at para. 43; BCIT’s reply submissions at para. 24(c)-(d); Affidavit #1 of CK at paras. 14, 21 and 25.

¹³ Manulife’s initial submissions at para. 27.

¹⁴ Applicant’s submissions at para. 95.

¹⁵ 2011 SCC 25 at paras. 6, 50, 55-56 and 60 [*Minister of National Defence*].

¹⁶ See Order F15-65, 2015 BCIPC 71 (CanLII) at paras. 17-61.

¹⁷ BCIT’s initial submissions at paras. 44-71; applicant’s submissions at paras. 45-148.

¹⁸ This articulation of the test has been modified to incorporate the language in FIPPA.

Bayshore Emails

Do the contents of the Bayshore Emails relate to a BCIT matter?

[24] BCIT acknowledges that it is responsible to establish a benefits plan for its employees and ensure that the plan operates according to commitments made in employment contracts and collective agreements.¹⁹ BCIT further acknowledges that it “participates in the operation and administration” of the benefits plans “for some purposes, such as by making decisions about specific services or programs to be provided”.²⁰ However, BCIT submits that the Bayshore Emails do not relate to a BCIT matter, including its obligation to establish a benefits plan or its limited involvement in claims administration.

[25] BCIT says the emails relate to extended health benefits claims made by the applicant that were independently administered by Manulife and/or Bayshore.²¹ BCIT says that, to protect the personal privacy of its employees and to ensure fair adjudication of benefits claims, it has purposely structured the claims process so that Manulife administers claims independently of BCIT. In short, BCIT submits that the Bayshore Emails relate to Manulife’s independent administrative functions and not to a BCIT matter.²²

[26] Manulife takes the same position as BCIT. It submits that the Bayshore Emails do not relate to BCIT’s mandate and functions, but rather to Manulife’s and/or Bayshore’s mandate and function to administer the benefits plan.²³ Manulife says it operates independently of BCIT in processing claims.²⁴

[27] The applicant submits that “the administrative processing of claims by Manulife, on behalf of BCIT, is not a function that is isolated to Manulife and therefore removed from the scope of what is a ‘BCIT matter’”.²⁵ The applicant says that BCIT accesses records related to claims in some cases, including when it assists an employee with a claim or directs Manulife to pay a claim. He also says that benefits administration is part of BCIT’s fiscal mandate and its mandate under the *Public Sector Employers Act* to “coordinate ... benefit administration”.²⁶ He argues that BCIT would be “rather negligent” if it did not “get directly involved with verification of the monies being spent and that would include information regarding claims adjudication”.²⁷

¹⁹ BCIT’s initial submissions at para. 48.

²⁰ BCIT’s reply submissions at para. 13.

²¹ BCIT’s initial submissions at para. 24.

²² BCIT’s initial submissions at paras. 47-50; BCIT’s reply submissions at paras. 13 and 24(f).

²³ Manulife’s initial submissions at para. 31.

²⁴ Manulife’s initial submissions at para. 26; Affidavit #1 of CP at paras. 6 and 15-16.

²⁵ Applicant’s submissions at para. 67.

²⁶ Applicant’s submissions at paras. 46-51.

²⁷ Applicant’s submissions at para. 49.

[28] The first issue is to determine the contents of the Bayshore Emails. The applicant says he is requesting emails concerning himself as a plan member who has received benefits payments.²⁸ This satisfies me that the applicant is seeking emails from Bayshore to Manulife that relate to benefits claims under the extended health plan made by him and the administrative processing of those claims. Since I do not have the records, I will proceed, as the applicant does in his submissions, on the basis that the contents of the Bayshore Emails relate to the processing of the applicant's benefits claims, including e.g. personal medical information (claims information).

[29] In my view, the contents of the Bayshore Emails do not relate to a BCIT matter. I accept the evidence of BCIT and Manulife that it is the role of Manulife, not BCIT, to receive benefits claims from BCIT employees and to determine their entitlement to benefits.²⁹ This is clearly stated in the Administration Agreement. Further, Manulife provided sworn evidence that it collects information from BCIT employees and adjudicates their benefits claims "independently of BCIT".³⁰ I find that BCIT's mandate and functions are limited to establishing and funding the benefits plan and overseeing its operation.³¹

[30] I am not persuaded by the applicant's argument that the contents of the Bayshore Emails relate to a BCIT matter because BCIT sometimes assists employees with issues related to Manulife's claims adjudication or directs Manulife to pay a claim. The applicant provided evidence, which I accept, that shows BCIT overrode Manulife regarding a matter related to one of the applicant's extended health benefits claims.³² However, I find the evidence does not establish that BCIT did so based on access to emails between Manulife and its subcontractor. I accept BCIT's and Manulife's evidence that BCIT resolves claims issues based on information voluntarily provided by the employee rather than direct access to claims information in emails between Manulife and its subcontractors.³³ Since BCIT functions without access to these emails, I do not see how the contents of the Bayshore Emails relate to a BCIT matter.

[31] I also do not accept the applicant's argument that the contents of the Bayshore Emails relate to a BCIT matter because they are relevant to BCIT's fiscal mandate and its mandate under the *Public Sector Employers Act*. BCIT's and Manulife's evidence is that Manulife provides BCIT with some reports regarding claims, but these reports only include "high level aggregated data that cannot be used to identify specific employees and [do] not include any claims

²⁸ Applicant's submissions at para. 162.

²⁹ Administration Agreement at Appendix B (Exhibit "B" to Affidavit #1 of JP); Affidavit #1 of JP at paras. 11 and 14-15; Affidavit #1 of CP at paras. 6-7.

³⁰ Affidavit #1 of CP at para. 6.

³¹ For a similar finding, see Alberta Order F2009-030, 2010 CanLII 98655 (AB OIPC) at para. 41.

³² Exhibits "B" and "C" to applicant's submissions.

³³ Affidavit #1 of JP at paras. 14-15; Affidavit #2 of CP at para. 6; BCIT's reply submissions at para. 7.

documentation.”³⁴ Based on this evidence, I am satisfied that the Bayshore Emails do not relate to BCIT’s financial and statutory obligations regarding its employee benefits plans because it meets those obligations without access to claims records.

[32] In the result, I conclude that the Bayshore Emails do not relate to a BCIT matter.³⁵ Given this conclusion, it is not strictly necessary for me to consider the second part of the *Minister of National Defence* test. However, I will do so below for the sake of completeness.

Could BCIT reasonably expect to obtain copies of the Bayshore Emails upon request?

[33] The next question is whether BCIT could reasonably expect to obtain copies of the Bayshore emails upon request. This part of the test is objective and all relevant factors must be considered.³⁶ In *Minister of National Defence*, the Court said relevant factors include the substantive content of the records, the circumstances in which they were created, and the legal relationship between the public body and the record holder.³⁷

[34] Further, previous orders and cases provide a list of factors to consider, which includes whether:

- the record was created by a staff member, an officer, or a member of the public body in the course of his or her duties;
- the record was created by an outside consultant for the public body;
- the record is specified in a contract as being under the control of a public body;
- the content of the record relates to the public body’s mandate and functions;³⁸
- the public body has the authority to regulate the record’s use and disposition;
- the public body has relied upon the record to a substantial extent;
- the record is closely integrated with other records held by the public body; or

³⁴ Affidavit #1 of JP at para. 16; Affidavit #1 of CP at para. 8.

³⁵ The parties argued at some length in their submissions about the significance of Alberta Order F2009-030, *supra* note 31 to this case. I have considered those submissions and that order, but I prefer to base my analysis on the specific facts of this case.

³⁶ *Minister of National Defence*, *supra* note 15 at para. 56.

³⁷ *Minister of National Defence*, *ibid.*

³⁸ I considered this factor above in my analysis of the first part of the *Minister of National Defence* test.

- the contract permits the public body to inspect, review, possess or copy records produced, received or acquired by the contractor as a result of the contract.³⁹

[35] This list is not exhaustive and not all factors will apply in every case.⁴⁰ In their submissions, the parties addressed these factors and others tailored to the specific facts of this case. I analyze the relevant considerations below.

What is the nature of the relationship between BCIT, Manulife and its subcontractors?

[36] The applicant submits that Manulife and its subcontractors provide services to BCIT as BCIT's agents. He says that this is not an "arm's length relationship" because BCIT has a significant level of control over Manulife.⁴¹ He also says that BCIT's control over Manulife "flows through" to Manulife's subcontractors.⁴²

[37] BCIT and Manulife say they have a contractual relationship where Manulife provides services on BCIT's behalf.⁴³ However, as discussed above, they say Manulife and its subcontractors provide these services independently of BCIT. BCIT also says it does not have a contract with Manulife's subcontractors or deal with them and, therefore, BCIT has "no right or authority over their engagement, supervision or direction."⁴⁴

[38] The Administration Agreement clearly states that Manulife acts as BCIT's agent and that their respective rights and responsibilities will be determined in accordance with the law of agency.⁴⁵ Further, the Administration Agreement and the Consortium Agreement clearly allow Manulife to engage subcontractors. I note, however, that the Consortium Agreement provides that work performed by Manulife's subcontractors "will be deemed to be work performed by Manulife".⁴⁶

[39] Given these contractual provisions, I find that BCIT has some level of control over Manulife. For example, BCIT can direct Manulife to pay or not pay a benefits claim. I also find that Manulife has a certain level of control and responsibility over its subcontractors given that the subcontractors' work is deemed to be Manulife's work. However, I find that the elements of control

³⁹ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, 1999 CanLII 6922 (BC SC) at para. 48. See also e.g. Order F10-01, 2010 BCIPC 5 (CanLII) at para. 8; Order 15-65, *supra* note 16 at para. 18; Order F06-01, 2006 CanLII 3255 (BCIPC) at para. 81.

⁴⁰ See e.g. Decision F10-01, 2010 BCIPC 5 (CanLII), at para. 9.

⁴¹ Applicant's submissions at para. 16-20.

⁴² Applicant's submissions at para. 41.

⁴³ BCIT's initial submissions at paras. 17-23; Manulife's initial submissions at paras. 20-21.

⁴⁴ Affidavit #1 of JP at para. 18.

⁴⁵ Administration Agreement (Exhibit "B" to Affidavit #1 of JP) at s. 3(i).

⁴⁶ Consortium Agreement (Exhibit "A" to Affidavit #1 of JP) at para. 15(j).

between BCIT and Manulife do not necessarily mean that claims records such as the Bayshore Emails are under BCIT's control.⁴⁷ In my view, the context and the nuances of the relationship between BCIT, Manulife and its subcontractors are key, as I will discuss below.

Who created the Bayshore Emails and for what purposes?

[40] The applicant submits that the Bayshore Emails were created by employees of BCIT for the purposes of providing services to BCIT.⁴⁸ The applicant argues that this supports a finding that BCIT has control over the records because they were created for the purposes of providing services to BCIT.⁴⁹ The applicant notes that, under FIPPA, the definition of "employee" includes a "service provider", which is defined as "a person retained under a contract to perform services for a public body".⁵⁰ The applicant says Manulife and Bayshore are BCIT's service providers and, therefore, its employees.

[41] BCIT submits that the Bayshore Emails were not created by BCIT employees, but rather "by a party providing contracted services to BCIT and its employees."⁵¹ BCIT notes that the services are primarily for the benefit of its individual employees enrolled in the benefit plans. BCIT argues that, even if the emails were created by Manulife or Bayshore as service providers to BCIT, Manulife and Bayshore are still independent from BCIT.

[42] Manulife submits that the Bayshore Emails were created by employees of Manulife and/or Bayshore and that it would be an "absurd result" to find that employees of Manulife are also employees of BCIT.⁵² Manulife notes that ss. 30.2, 30.4 and 30.5 of FIPPA distinguish between an employee of a public body, a service provider, and "an employee or associate of a service provider".⁵³ Manulife argues that Bayshore and Manulife employees are employees of a service provider, not employees of a public body.

[43] The issue raised by the parties' submissions is whether a public body's "employee" should be understood as including or excluding a contractor or "service provider" within the meaning of FIPPA. As the applicant notes, FIPPA defines "employee" as including a contractor. However, Manulife argues that, for

⁴⁷ *Ontario (Divisional Court) v. Ontario (Attorney General)*, 1997 CanLII 3017 (ON CA).

⁴⁸ Applicant's submissions at paras. 90-94, 96-97 and 131-133.

⁴⁹ Applicant's submissions at paras. 131-133.

⁵⁰ Schedule 1 of FIPPA.

⁵¹ BCIT's reply submissions at para. 24(a) (also paras. 3 and 24(b)).

⁵² Manulife's reply submissions at para. 17 (also paras. 14-15 and 18); Manulife's initial submissions at para. 29. I note, however, that Manulife concedes at paras. 20-21 of its initial submissions that it is a "service provider to BCIT".

⁵³ Manulife's reply submissions at para. 14. See also FIPPA at ss. 30.2, 30.4 and 30.5.

the purposes of the control analysis, “employee” should be understood as excluding a contractor, which is the common law definition of the term.⁵⁴

[44] In my view, it is more appropriate to understand “employee” as excluding a contractor when analyzing control and determining who created the records. Previous orders have recognized that a factor to consider in the control analysis is whether the person who created the records is “a staff member, an officer, or a member of the public body” or an “outside consultant for the public body”. That past orders have recognized this difference suggests to me that the salient point to consider is how far removed the person who created the records is from the public body. The further removed the record’s creator is from the public body, the less likely it is that the records are under the public body’s control. Considering a contractor to be a public body employee for the purposes of control leaves no room for considering this element of how far removed the creator of the records is from the public body. For this reason, I find it more helpful in the context of the control analysis to understand an employee as excluding a contractor.

[45] The Bayshore Emails were not created by an employee of BCIT.⁵⁵ They were created by employees of Bayshore, Manulife’s subcontractor for the purposes of providing a service to Manulife, who in turn was providing a service to BCIT, namely processing the applicant’s extended health benefits claims. The fact that the Bayshore Emails were created to provide a service to BCIT provides some support for a finding that the records are under BCIT’s control. However, the fact that the Bayshore Emails were not created by BCIT employees supports a finding that the records are not under BCIT’s control.

Has BCIT relied upon the Bayshore Emails to a substantial extent?

[46] Turning to the next factor, the applicant submits that BCIT relies upon information relating to benefits claims in certain circumstances such as when it exercises its final authority under the Administration Agreement and directs Manulife to pay a claim.⁵⁶ The applicant also says BCIT relies upon reports relating to benefits claims that Manulife provides to BCIT. According to the applicant, these considerations support a finding of control.

[47] BCIT and Manulife submit that BCIT “relies upon Manulife to administer and adjudicate claims, but it does not access or rely upon the individual records received and weighed by Manulife”.⁵⁷ BCIT notes that the reports it receives from

⁵⁴ See, for example, *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59; *McKee v. Reid’s Heritage Homes Ltd.*, 2009 ONCA 916.

⁵⁵ For a different approach and result, see Order F2009-030, *supra* note 31 at paras. 10-13.

⁵⁶ Applicant’s submissions at paras. 17-22 and 105.

⁵⁷ BCIT’s reply submissions at para. 24(j); Manulife’s initial submissions at para. 33.

Manulife only include information in aggregated de-identified form or do not relate to the Bayshore Emails at all.⁵⁸

[48] I note that in Alberta Order F2009-030, the adjudicator found that the public body relied upon records held by a third-party benefits administrator, Great-West Life, in refusing to pay the applicant's long-term disability claim.⁵⁹ The adjudicator found that the public body indirectly relied upon the records because it was required to follow Great-West Life's adjudication of the claim, which was based on records compiled and created by Great-West Life. The adjudicator concluded that this supported a finding of control, but only in a limited way because the public body's reliance on the records was indirect.

[49] I have considered the reasoning in Order F2009-030. Whether BCIT pays an extended health benefits claim is based on Manulife's professional assessment. Although Manulife's assessment is based at least in part on records created or collected by its subcontractors, such as the Bayshore Emails, BCIT relies primarily on Manulife's assessment rather than the related claims records. I am satisfied by BCIT's and Manulife's evidence that BCIT's limited role in claims administration does not require accessing claims records. Further, the Bayshore Emails are not the kinds of reports the applicant refers to, or that he requested access to. For these reasons, I conclude that BCIT does not rely on claims records such as the Bayshore Emails to a "substantial extent".

Does BCIT have contractual or statutory control over the Bayshore Emails?

[50] The parties did not argue, and I do not find, that BCIT has statutory control over the records.

[51] Regarding contractual control, the applicant submits that there is nothing in the Consortium Agreement or the Administration Agreement that prevents BCIT from exercising control over claims information such as the Bayshore Emails.⁶⁰

[52] BCIT and Manulife submit that BCIT does not have contractual control over the records.⁶¹ They say the Consortium Agreement and the Administration Agreement are "silent" on the issue of custody and control and that neither agreement provides BCIT with an express contractual right to access claims information.

⁵⁸ BCIT's reply submissions at paras. 6(b)-(c) and 7(b).

⁵⁹ Order F2009-030, *supra* note 31 at paras. 50-53.

⁶⁰ Applicant's submissions at para. 12.

⁶¹ BCIT's initial submissions at para. 28; Manulife's initial submissions at para. 30; BCIT's reply submissions at para. 24(e).

[53] Having reviewed the Consortium Agreement and the Administration Agreement, I agree that they do not directly or expressly address the issue of who has control of claims information such as the Bayshore Emails. However, as I discuss below, I find that certain aspects of the agreements do provide some insight into that issue.

Does a contract permit BCIT to access, inspect, review or audit the Bayshore Emails?

[54] The applicant submits that BCIT has a right to inspect or review claims records such as the Bayshore Emails.⁶² The applicant points out that the Administration Agreement states that Manulife’s claims records “shall be open at all reasonable times to inspection and audit by any person or persons designated in writing” by BCIT.⁶³ The applicant argues that this language allows BCIT to designate itself as auditor and review claims records.

[55] BCIT and Manulife submit that both the Consortium Agreement and the Administration Agreement allow for a third party to inspect and audit Manulife’s claims records, but BCIT itself has no right to do so under either agreement.⁶⁴

[56] I agree with the applicant that the Administration Agreement states that Manulife’s claims records “shall be open at all reasonable times to inspection and audit by any person or persons designated in writing” by BCIT.

[57] However, the Consortium Agreement expressly states that a “third party” (i.e., neither BCIT nor Manulife) must audit Manulife’s claims records.⁶⁵ Further, the Consortium Agreement states that the auditor must not disclose the personal information of BCIT employees to BCIT.⁶⁶ Specifically, the Consortium Agreement says that the auditor shall have a duty of care to ensure “that no information shall be used in any manner that allows the individual identification of a claimant” to BCIT or any other party.⁶⁷

[58] Given the terms of the Consortium Agreement, I disagree with the applicant’s interpretation of the Administration Agreement.⁶⁸ I find the terms of the Consortium Agreement show that BCIT designed its relationship with Manulife to restrict BCIT’s access to claims information in order to protect the personal privacy of its employees. In my view, the language in the Administration

⁶² Applicant’s submissions at paras. 7-11, 28-29 and 108.

⁶³ Section 9 of Appendix B to the Administration Agreement (Exhibit “B” to Affidavit #1 of JP).

⁶⁴ BCIT’s initial submissions at paras. 30-31; Manulife’s initial submissions at para. 35.

⁶⁵ Consortium Agreement at s. 8 and Schedule D (Exhibit “A” to Affidavit #1 of JP).

⁶⁶ Consortium Agreement, *ibid* at Schedule D, ss. 5-6 and 8.

⁶⁷ Consortium Agreement, *ibid* at Schedule D, s. 8.

⁶⁸ Related agreements are relevant to contractual interpretation: see e.g. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 46-58; *Bovaird West Holdings Inc. v. Mattamy (Credit River) Limited*, 2019 ONSC 7438 at para. 12.

Agreement about inspection and audit does not permit BCIT to access claims records in order to conduct its own audit. The Consortium Agreement is clear that the audit must be conducted by a third party. I am not persuaded that BCIT would enter into agreements that contradict each other by establishing in the Administration Agreement an auditor arrangement that allows BCIT to inspect and review the very personal information that it clearly and deliberately shielded itself from in the Consortium Agreement.

[59] I conclude that BCIT does not have a contractual right to access, inspect, review or audit Manulife's claims records. I find that the audit provisions in the Consortium Agreement support the view that BCIT and Manulife intended records such as the Bayshore Emails to be under Manulife's control in order to protect the personal privacy of BCIT employees.

Does any other evidence, apart from a contract, establish that BCIT has a right to access the Bayshore Emails?

[60] I considered above whether a contract permits BCIT to access, inspect, review or audit the Bayshore Emails. Here, I consider whether any other evidence establishes that BCIT has a right to access claims information.

[61] BCIT submits that its business practices with Manulife show that it does not have a right to access claims records. BCIT's evidence is that its practices "do not involve the sharing of documentation submitted by employees to Manulife relating to claims."⁶⁹ BCIT says these practices are consistent with Manulife's claims form. In the form, the employee authorizes the collection, use and exchange of personal information relevant to a benefits claim for the purposes of plan administration, audit and the assessment, investigation and management of a claim. The form states that information collected, used or shared for these purposes will only be accessed by the following persons:

- Manulife employees, representatives, reinsurers and service providers in the performance of their jobs;
- Persons to whom [the employee has] granted access; and
- Persons authorized by law.⁷⁰

[62] Manulife submits that BCIT does not have a right to access claims records. It provided sworn evidence that its practice is to "not disclose information provided by the applicant for benefits to BCIT".⁷¹ Manulife says the federal *Personal Information Protection and Electronic Documents Act* requires it

⁶⁹ Affidavit #1 of JP at para. 15.

⁷⁰ Affidavit #1 of CK at Exhibit "F", p. 2.

⁷¹ Affidavit #2 of CP at para. 9.

to protect, and not disclose, “personal information provided to it for the purposes of administering and adjudicating claims.”⁷²

[63] According to the applicant, BCIT has a right to access claims records, but simply chooses as a matter of business practice not to exercise it.⁷³ He questions the relevance of the language in Manulife’s claims form. However, he says it is broad enough to grant BCIT access to claims information.⁷⁴ The applicant also says that Manulife’s statutory privacy obligations do not prevent disclosure of claims information because the information could be redacted.⁷⁵ He says that control over claims records and the impact of privacy obligations on the disclosure of those records are separate issues.

[64] In response, BCIT and Manulife say the claims form allows Manulife to collect and exchange personal information only for the purposes of administering benefit claims, but it does not give BCIT the right to access claims records.⁷⁶

[65] First, I accept that the Bayshore Emails relate to the applicant’s benefits claims and likely include information provided to or collected by Bayshore and/or Manulife for the purposes of administering his claims. Therefore, I find that the provisions in the claims form about who can access the information provided to or collected by Manulife for the purposes of processing a benefits claim apply to the Bayshore Emails.

[66] In my view, the claims form does not grant BCIT a right to access or possess claims records such as the Bayshore Emails. I agree with the applicant that the language in the claims form authorizations is broad. However, I find that the language, taken together and in context, shows that access to claims information is limited to Manulife employees and others who require access to that information so that Manulife can process benefit claims. As I found above, BCIT does not require or seek access to claims information. I do not read the claims form as providing BCIT with a positive right to access claims information.

[67] Further, although the claims form grants access to claims information to persons “authorized by law”, the parties did not address under what “law” BCIT might be so authorized. I find that this part of the claims form does not apply to BCIT.

[68] The applicant also argues that BCIT’s business practice not to ask for claims records, and Manulife’s practice to refuse access to them, does not mean that BCIT does not have control over the records. I agree that whether BCIT asks

⁷² Affidavit #2 of CP at para. 5.

⁷³ Applicant’s submissions at paras. 4, 20 and 104.

⁷⁴ Applicant’s submissions at paras. 8-11; Affidavit #1 of CK at Exhibit “F”, p. 2.

⁷⁵ Applicant’s submissions at para. 161.

⁷⁶ BCIT’s reply submissions at para. 9; Affidavit #2 of CP at para. 9.

for claims records does not establish whether BCIT has a right to access those records. However, BCIT's and Manulife's unequivocal evidence is that BCIT could not reasonably expect to obtain copies of the Bayshore Emails upon request to Manulife because sharing that information would be contrary to Manulife's contractual and statutory obligations to protect the personal privacy of BCIT's employees. In my view, this evidence is clearly relevant to the second part of the *Minister of National Defence* test and supports the conclusion that BCIT could not reasonably expect to obtain copies of the Bayshore Emails upon request to Manulife.⁷⁷

[69] I conclude that Manulife's claims form and BCIT's and Manulife's practices do not support the conclusion that BCIT has a right to access claims information such as the Bayshore Emails.

Does BCIT have a right to possess the Bayshore Emails or to regulate their use and disposition?

[70] I found above that BCIT does not have a right to access, inspect, review or audit the Bayshore Emails. For the same reasoning as set out above, I find that BCIT does not have a right to possess the records either. I do not see how BCIT could have no right to access records but have a right to possess them.

[71] I also find that BCIT does not have the authority to regulate the use or disposition of the Bayshore Emails. The parties' arguments on this factor are essentially the same as those discussed above in relation to access and contractual control. I accept Manulife's evidence that there is nothing in the Administration Agreement that would allow BCIT to regulate the use or disposition of emails created by Manulife and/or Bayshore.⁷⁸ I also see nothing in the Consortium Agreement or elsewhere that grants BCIT such authority. I find that the Bayshore Emails are created and used by Manulife and Bayshore, and that they alone have the authority to regulate the use and disposition of these records.

Are the Bayshore Emails closely integrated with other BCIT records?

[72] The applicant submits that the Bayshore Emails are closely integrated with other BCIT records because Manulife provides BCIT with records relating to claims in some cases.⁷⁹

⁷⁷ For a similar finding, see Alberta Order F2009-030, *supra* note 31 at paras. 66-70.

⁷⁸ Affidavit #1 of CP at para. 12.

⁷⁹ Applicant's submissions at paras. 106-107.

[73] BCIT and Manulife say the Bayshore Emails are not closely integrated with other BCIT records because BCIT does not possess these emails, does not seek access to them and does not use them.⁸⁰

[74] In my view, the Bayshore Emails are not closely integrated with other BCIT records. As stated above, I accept that BCIT does not possess these emails, seek access to them or use them.

Conclusion

[75] To summarize, on the one hand, the Consortium Agreement and the Administration Agreement show that, in certain respects, BCIT has some control over Manulife and Manulife has some control over Bayshore. The Bayshore Emails were created in the course of providing services to BCIT. BCIT's decisions about whether to pay an extended health benefits claim are based on Manulife's professional assessment, which is based at least to some extent on claims records such as the Bayshore Emails. In my view, these factors support a finding that the Bayshore Emails are under BCIT's control.

[76] However, BCIT did not create the records and does not possess them. The records are not closely integrated with other BCIT records. BCIT also does not have a right to possess the records or to regulate their use or disposition. Although Manulife's claims assessment is based on claims records, BCIT primarily relies on Manulife's professional advice, not the claims records themselves. Further, the audit provisions in the Administration Agreement and the Consortium Agreement show that BCIT has shielded itself from claims information in order to protect the personal privacy of its employees. Finally, this approach to personal privacy is reflected in the language in Manulife's claims form and the business practices between BCIT and Manulife. In my view, these factors support the conclusion that the Bayshore Emails are not under BCIT's control.

[77] Having regard to all the relevant factors, I conclude that on balance they support that the Bayshore Emails are not under BCIT's control. Therefore, FIPPA does not apply to them. I turn now to the applicant's other two access requests.

Manulife Records and Allianz Records

Do the contents of the Manulife Records and the Allianz Records relate to a BCIT matter?

[78] The Manulife Records are lists of the position titles of Manulife employees who have access, including remote access, to the applicant's personal information. The Allianz Records are Allianz's policies and procedures for

⁸⁰ BCIT's reply submissions at para. 24(k); Manulife's initial submissions at para. 34.

storage of, and access to, personal information outside of Canada and a list of the locations of Allianz's data centers that store the personal information of BCIT employees.

[79] BCIT submits that the contents of the Manulife Records do not relate to a BCIT matter because they are "records exclusively within the purview of Manulife and relate to how Manulife structures and organizes its business operations."⁸¹ Also, BCIT submits that the contents of the Allianz Records do not relate to a BCIT matter because they relate to the "internal management and operations of Allianz".⁸² BCIT says the access to information provisions in FIPPA were not intended to capture these records because Manulife and Allianz are "separate corporate entities" subject to "different statutory regimes".⁸³

[80] Manulife also submits that the contents of the Manulife Records and the Allianz Records do not relate to a BCIT matter.⁸⁴ Manulife says these records relate to Manulife's and/or Allianz's mandate and functions, not BCIT's. Manulife adds that it has no contractual obligation to create these records or provide them to BCIT.

[81] The applicant submits that the contents of the records relate to a BCIT matter. He says the records relate to BCIT's mandate to establish and maintain "an appropriate security policy" for benefits claims administration and BCIT's obligations under FIPPA to know who has access to the personal information of BCIT employees and where that information is stored.⁸⁵ The applicant argues that FIPPA applies to the records because Manulife agreed in the Consortium Agreement that it would at all times comply with FIPPA.⁸⁶

[82] In early 2018, the applicant began raising concerns to BCIT about the extent to which Manulife employees were able to access his personal information via remote connection. BCIT's sworn evidence is that it "followed up on these concerns with Manulife, and there were further communications between the Applicant and BCIT responding to and following up on these issues."⁸⁷ The applicant then made a formal FIPPA request for the Manulife Records.

[83] Also in early 2018, the applicant raised concerns to BCIT about Allianz's data security practices. BCIT's evidence is that it "provided the Applicant with responses to the concerns raised by the Applicant and provided a summary of the information BCIT had received from Manulife in response to the Applicant's

⁸¹ BCIT's initial submissions at para. 54.

⁸² BCIT's initial submissions at para. 55.

⁸³ BCIT's reply submissions at paras. 30-32.

⁸⁴ Manulife's initial submissions at paras. 39 and 43.

⁸⁵ Applicant's submissions at paras. 69 (also paras. 70-76).

⁸⁶ Applicant's submissions at paras. 77-88.

⁸⁷ Affidavit #1 of CK at para. 19.

concerns.”⁸⁸ The applicant then made a formal FIPPA request for the Allianz Records.

[84] I find it difficult to accept that BCIT would seek out information from Manulife and its subcontractors relating to the applicant’s concerns, and follow up on those concerns, if the information did not relate to a BCIT matter.

[85] I accept that the information in the Manulife Records and the Allianz Records is, in one sense, information relating to the internal business operations of Manulife and Allianz. However, I also find that this information clearly relates to Manulife’s and Allianz’s personal information protection practices. As is evident from BCIT’s position regarding the Bayshore Emails, one of BCIT’s functions in relation to the benefits plans is to ensure that the personal information of its employees is protected. BCIT’s own evidence, as discussed above, is that it fulfills this function by not accessing claims information. The Manulife Records and the Allianz records contain information relevant to whether the personal information of BCIT employees is being protected. In my view, BCIT’s own position in relation to the Bayshore Emails supports that this is a BCIT matter.

[86] I conclude that the contents of the Manulife Records and the Allianz Records relate to a BCIT matter.

Could BCIT reasonably expect to obtain copies of the Manulife Records and the Allianz Records upon request?

[87] BCIT and Manulife submit that BCIT could not reasonably expect to obtain copies of the Manulife Records and the Allianz Records upon request. They say the records would be created by Manulife or Allianz but not in the course of carrying out any contractual obligation to BCIT, the records were not produced for BCIT or at BCIT’s request, BCIT does not possess the records, the records are not integrated with BCIT records, and BCIT has no contractual right to direct, access, obtain or regulate the use of the records.⁸⁹

[88] Manulife also notes that it would be “impossible” for it to create the Manulife Records “because of the nature of the distribution of work within the claims system in Manulife.”⁹⁰

[89] The applicant submits that BCIT could reasonably expect to obtain copies of the Manulife Records and the Allianz Records upon request.⁹¹ He says the records should reasonably be available to BCIT because BCIT would need to

⁸⁸ Affidavit #1 of CK at para. 23.

⁸⁹ BCIT’s initial submissions at para. 71; Manulife’s initial submissions at paras. 37-45.

⁹⁰ Affidavit #1 of CP at para. 17.

⁹¹ Applicant’s submissions at paras. 69-108.

know about their contents in order to fulfil its obligations to protect its employees' personal information.

[90] Based on the evidence before me, I find the Manulife Records and the Allianz Records were (or would be) created by an employee of Manulife and/or Allianz, not BCIT. I accept that these records would not be created in the ordinary course of Manulife's or Allianz's duties in administering the benefit plans because they relate to general business operations rather than specific benefits claims. Further, I find that BCIT does not currently possess the records, BCIT does not rely upon them to a substantial extent and they are not currently integrated with other BCIT records. I also find that both the Consortium Agreement and the Administration Agreement do not expressly say whether BCIT has a right to access the records or to require Manulife or its subcontractors to create them.

[91] The applicant argues that s. 30 of FIPPA, which sets out a public body's obligations to protect personal information in its custody or under its control, supports his argument that the Manulife Records and the Allianz Records are under BCIT's control.⁹² He says that BCIT must have custody and control of the Manulife Records and the Allianz Records because it needs those records in order to comply with its s. 30 obligations regarding any claims-related personal information.

[92] However, that is a misapprehension of the way that s. 30 works. Section 30 only applies to information that is in the custody or under the control of a public body. I have found above that the claims-related personal information is not in BCIT's custody or under its control, so s. 30 is not engaged.

[93] A final consideration is that BCIT has already sought information, and addressed some of the applicant's concerns, relating to the Manulife employees who access personal information via remote connection and Allianz's data security practices. For example, BCIT's evidence includes a May 16, 2018 letter from BCIT to the applicant providing the applicant with responses to many of his questions and concerns relating to Allianz.⁹³ This suggests that it might be reasonable for BCIT to expect to obtain further information, specifically the information in the Manulife Records and the Allianz Records, upon request to Manulife.

[94] I find that this consideration supports the conclusion that the Manulife Records and the Allianz Records are under BCIT's control. However, it is only one factor. I find that this alone is not sufficient to outweigh all of the other control factors, which are either neutral or support a finding that BCIT does not have control over the Manulife Records and the Allianz Records.

⁹² Applicant's submissions at para. 73.

⁹³ Exhibit "J" to Affidavit #1 of CK.

[95] Ultimately, when all relevant factors are considered together, I conclude that they support a finding that BCIT does not have control over the Manulife Records or the Allianz Records. Given my conclusions, it is not necessary to also consider s. 3(1)(k).

[96] Finally, the applicant suggests that if I find BCIT does not have custody or control of the records, then I am permitting it to improperly “contract out” of FIPPA.⁹⁴ I disagree. I see no evidence that BCIT has purposely attempted to shirk its FIPPA obligations by structuring its contracts in the way it did. In fact, the evidence before me shows that BCIT has made significant efforts, as evidenced by the May 16, 2018 letter, for example, to assist the applicant and to protect the personal information of BCIT employees.

CONCLUSION

[97] For the reasons given above, I conclude that the Bayshore Emails, the Manulife Records and the Allianz Records are not in the custody or under the control of BCIT. Therefore, the requested records are outside the scope of FIPPA and not within the applicant’s access rights under ss. 3(1) and 4(1).

October 2, 2020

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

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⁹⁴ Applicant’s submissions at paras. 140-148.