



OFFICE OF THE  
INFORMATION &  
PRIVACY COMMISSIONER  
FOR BRITISH COLUMBIA

Order F22-14

## BRITISH COLUMBIA INSTITUTE OF TECHNOLOGY

Ian C. Davis  
Adjudicator

March 9, 2022

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**Summary:** The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the British Columbia Institute of Technology (BCIT) for access to emails, including “the header and all metadata attached”, between BCIT and its employee group benefits provider. In response, BCIT said the requested records are not in its custody or under its control, within the meaning of ss. 3(1) (scope of FIPPA) and 4(1) (information rights). The adjudicator determined that none of the records are in BCIT’s custody. However, the adjudicator determined that some, but not all, of the records are under BCIT’s control.

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

### INTRODUCTION

[1] The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the British Columbia Institute of Technology (BCIT) for access to emails, including “the header and all metadata attached.”<sup>1</sup> The requested emails relate to a BCIT employee group benefits plan. The Manufacturers Life Insurance Company (Manulife) and its subcontractors, including Bayshore Healthcare Ltd. (Bayshore), administer the plan on BCIT’s behalf. The applicant specifically requested access to emails containing information about him “received by” Manulife from either BCIT or Bayshore.

[2] In response to the request, BCIT stated that the responsive records are not in its custody or under its control, so they are outside the scope of FIPPA under s. 3(1) and the applicant has no right of access to them under s. 4(1).<sup>2</sup>

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<sup>1</sup> Letter from the applicant received by BCIT on April 18, 2018.

<sup>2</sup> Investigator’s Fact Report at para. 2. The parties dispute what constitutes BCIT’s response to the access request and when exactly BCIT responded. However, I do not consider it necessary to

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review BCIT's decision. Mediation did not resolve the matter and it proceeded to inquiry.<sup>3</sup> The OIPC invited Manulife to participate in this inquiry and it made submissions.

## **PRELIMINARY MATTERS**

### ***Clarifying the access request***

[4] The specific wording of the applicant's access request, which he made on April 18, 2018, is as follows:

I am requesting copies of emails received by [Manulife] from either BCIT or [Bayshore] containing either my personal information, or information referencing my self or my position at BCIT. My request is for copies of the full and entire email, which would include the header and all metadata attached. The scope of the request is for emails sent to Manulife, from either party, between the dates of December 1, 2017 and February 27, 2018 inclusive.

I would like those emails sent in electronic format.<sup>4</sup>

[5] Less than a week prior, on April 13, 2018, the applicant made a separate access request to BCIT for "copies of all emails sent by [BCIT] to Manulife" that contain information about him.<sup>5</sup> To be clear, the April 13 request is not at issue in this order, although it is relevant context. The access request at issue in this order is the April 18 request.

[6] Originally, BCIT interpreted the April 13 request as overlapping with the April 18 request; that is, it interpreted emails "sent by" BCIT to Manulife as the same records as emails "received by" Manulife from BCIT.

[7] Subsequently, the applicant advised, and BCIT acknowledged, that it misunderstood the April 18 request. The applicant clarified that the emails he is requesting are emails (including the attached metadata) as they exist on

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address those matters. The Fact Report clearly states that the response at issue in this inquiry is BCIT's December 7, 2018 response that the requested records are not in BCIT's custody or under its control.

<sup>3</sup> However, BCIT provided sworn evidence that, for reasons unclear to it, it was "not invited to participate in the usual mediation or investigation process at the OIPC, nor was it provided with advance notice that the request for review was being referred directly to Inquiry": Affidavit #1 of CK at para. 27. BCIT says it would have attempted to clarify certain issues through mediation, had it had the opportunity to do so: BCIT's initial submissions at para. 14.

<sup>4</sup> Letter from the applicant received by BCIT on April 18, 2018. I note that the applicant specifically requested "copies" of emails in "electronic format", which he distinguishes in his submissions at paras. 24-26 from emails in their "original electronic form".

<sup>5</sup> Letter from the applicant received by BCIT on April 13, 2018. This is the access request at issue in OIPC File No. F19-77904, which will be dealt with in a separate order.

Manulife's email systems, not BCIT's or Bayshore's systems. In other words, the applicant clarified that he is requesting the emails as *received* by Manulife, as opposed to the emails as *sent* by BCIT or Bayshore.

[8] Given the above, and despite confusion earlier on in the FIPPA process, the applicant has now clarified that the emails he is requesting are Manulife's, not BCIT's or Bayshore's versions. I will proceed in this inquiry on the basis that those are the responsive records in dispute.

### ***Custody and control issue relating to Bayshore***

[9] As noted, the applicant's access request is for emails containing information about him received by Manulife from either BCIT *or* Bayshore. During this inquiry, the applicant advised that he is no longer disputing whether the requested emails received by Manulife *from* Bayshore are in BCIT's custody or under its control.<sup>6</sup> As a result, that issue is not in dispute and I will not consider it. The only issue is whether the requested emails received by Manulife *from* BCIT are in BCIT's custody or under its control.

### ***Applicant's complaints regarding the response process***

[10] The applicant complains that, in the process of responding to and initially misunderstanding his access request, BCIT failed to comply with its duties under ss. 6, 7 and 8 of FIPPA.<sup>7</sup> Those sections set out a public body's duty to assist applicants (s. 6), the time limit for a public body's response to an access request (s. 7) and the required contents of a public body's response (s. 8).

[11] BCIT submits that the applicant's complaints are outside the scope of this inquiry and should not be considered.<sup>8</sup>

[12] I decline to consider the applicant's ss. 6, 7 and 8 complaints. In general, the issues to be decided in an OIPC inquiry are set out in the notice of inquiry and the investigator's fact report.<sup>9</sup> Neither of those documents state that ss. 6, 7 or 8 are inquiry issues. I see no indication in the material before me that the applicant requested permission from the OIPC to add ss. 6, 7 and 8 as inquiry issues. For these reasons, I conclude that ss. 6, 7 and 8 are not issues in this inquiry and I will not consider them.

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<sup>6</sup> Email from the applicant to the parties dated January 31, 2022, responding to a letter from the OIPC to the parties dated January 27, 2022.

<sup>7</sup> Letter from the applicant to the OIPC dated January 7, 2019; applicant's submissions at paras. 3-8 and 14-26.

<sup>8</sup> BCIT's response submissions at para. 43.

<sup>9</sup> See, for example, Order F21-50, 2021 BCIPC 58 at para. 7; Order F16-30, 2016 BCIPC 33 at para. 13.

**Recent amendment regarding FIPPA's application to metadata**

[13] As mentioned above, the applicant requested access to emails including “the header and all metadata attached.” He made this request in 2018.

[14] Recent amendments to FIPPA came into force on November 25, 2021. The amendments include s. 3(5)(c), which is a new subsection. It states:

(5) Part 2 [which deals with access to information requests] does not apply to the following: ...

(c) a record of metadata that

(i) is generated by an electronic system, and

(ii) describes an individual's interaction with the electronic system[.]

[15] Prior to this amendment, s. 3 of FIPPA did not address metadata at all.

[16] BCIT and Manulife submit that s. 3(5)(c) applies despite the fact that it was not in force in 2018 when the applicant made his access request or when BCIT responded to the request.<sup>10</sup> Relying on past orders,<sup>11</sup> BCIT and Manulife say the OIPC's practice is to decide inquiries based on the circumstances at the time of inquiry and that I should follow that practice here.

[17] The applicant submits that s. 3(5)(c) does not apply.<sup>12</sup> He argues that applying the amendment would offend common law presumptions against the retroactive application of legislation and interference with vested rights. He says he should have access to the records as originally requested in accordance with the law in force at the time of his request in 2018. Further, the applicant submits that, even if s. 3(5)(c) is available to BCIT and Manulife in this inquiry, the metadata he is requesting does not meet the requirements of s. 3(5)(c).

[18] In my view, it is not necessary in the particular circumstances of this case to address s. 3(5)(c). The outcome of this inquiry, as it relates to metadata, is the same whether s. 3(5)(c) applies or not. For the reasons provided below, I conclude that the requested metadata is not in BCIT's custody or under its control, so it is outside the scope of FIPPA under s. 3(1) and the applicant has no right of access to it under s. 4(1).<sup>13</sup> It is not necessary to wade into an analysis of past OIPC orders and presumptions of statutory interpretation to determine

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<sup>10</sup> BCIT's and Manulife's submissions dated February 4, 2022.

<sup>11</sup> Order F15-37, 2015 BCIPC 40; Order F15-39, 2015 BCIPC 42; Order F16-14, 2016 BCIPC 16; Order 01-39, 2001 CanLII 21593 (BC IPC).

<sup>12</sup> Applicant's submissions dated February 8, 2022.

<sup>13</sup> Sections 3(1) and 4(1) of both the previous and amended versions of FIPPA limit the scope of the Act and an applicant's access rights to records “in the custody or under the control” of a public body, so the test under those sections is the same regardless of which version of the Act applies.

whether the amended Act applies and, if it does, whether the requested metadata is also outside the scope of FIPPA under s. 3(5)(c). That said, s. 3(5)(c) is now the law, so it forms part of the relevant context for interpreting and applying FIPPA going forward and I consider it as such below.

### ***Concerns about the access request and procedure***

[19] To reiterate, the access request at issue in this inquiry, which the applicant made on April 18, 2018, is for emails “received by” Manulife from BCIT. As noted above, on April 13, 2018, the applicant made a separate access request to BCIT for emails “sent by” BCIT to Manulife. The date range for the April 13 request (October 17, 2017 to March 31, 2018) covers the date range for the April 18 request (December 1, 2017 to February 27, 2018).

[20] BCIT says, and I accept, that the information in the body of an email (i.e., the information created and inputted by the sender) is the same in the sender’s and recipient’s versions of the email.<sup>14</sup> This means that information in the Manulife emails responsive to the April 18 request would be the same as information in the corresponding BCIT emails responsive to the April 13 request.

[21] In his submissions, the applicant sheds light on why he made the April 18 request despite this information overlap and duplication. He says:

- there is “one very simple reason to ask for the emails received by Manulife – Manulife may have emails that BCIT did not collect from [its] servers because they were deleted or transferred”;
- “the quickest way to verify that a copy of an email record received through the FOI process is complete and unaltered from the original is to use the metadata that is attached to it”; and
- the records “Manulife receives could well be different than the records that BCIT sent as there could be additional records sent from BCIT or other servers”.<sup>15</sup>

[22] Given what the applicant says, I understand that he wants the Manulife emails responsive to the April 18 request so that he can assess for himself the completeness and accuracy of BCIT’s response to the April 13 request.

[23] I question whether this is an appropriate use of FIPPA’s access to information provisions. The OIPC has the power under s. 44(2) to investigate and attempt to resolve complaints that a duty under FIPPA has not been performed, including a public body’s duty under s. 6(1) to respond to each applicant openly, accurately and completely. The OIPC has a formal process for receiving, investigating and resolving such complaints. The applicant knows about this

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<sup>14</sup> BCIT’s reply submissions at para. 11.

<sup>15</sup> Applicant’s submissions at paras. 27, 31 and 34.

complaints process and has used it to make other complaints.<sup>16</sup> I see no indication that the applicant filed a complaint about BCIT's response to the April 13 request. It is not clear to me why he did not use the complaints process. I am concerned that the procedure taken in this case undermines the complaints process and the OIPC's investigative and regulatory authority over public bodies' actions under FIPPA.

[24] Further, setting the complaints process aside, it is also not clear to me why the applicant did not make an access request directly to Manulife under the *Personal Information Protection Act* for the Manulife emails he is seeking. BCIT suggested that option to him.<sup>17</sup>

[25] These concerns were not raised as issues in this inquiry and they do not appear to have been addressed in any substantive way earlier on in the FIPPA process. Accordingly, I see no legitimate basis to formally address them in this inquiry, particularly at this late stage and on my own motion. I raise the above concerns to clarify that this order should not be taken as endorsing the applicant's approach or the manner in which he proceeded procedurally. The outcome of this inquiry should be understood in light of the concerns raised above, even though they are not properly before me as inquiry issues.

### **ISSUE AND BURDEN OF PROOF**

[26] The issue in this inquiry is whether the requested emails received by Manulife from BCIT are in BCIT's custody or under its control within the meaning of ss. 3(1) and 4(1). The burden of proof is on BCIT.<sup>18</sup>

### **BACKGROUND**

[27] BCIT is a post-secondary educational institution. The applicant is a BCIT employee and he holds a position with the union operating at BCIT, the British Columbia Government Employees Union (Union). Manulife is an insurance company and group benefits provider.

[28] Manulife provides health and welfare benefits to BCIT employees under the terms of a contract between it and BCIT. Manulife engages subcontractors to support its provision of certain health benefits. One of Manulife's subcontractors is Bayshore. Bayshore supports Manulife in the provision of prescription drugs.

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<sup>16</sup> Applicant's submissions at paras. 30 and 35.

<sup>17</sup> Email from BCIT to the applicant dated November 7, 2018; Affidavit #1 of CK at para. 33.

<sup>18</sup> Order F16-15, 2016 BCIPC 17 at para. 8.

## RECORDS IN DISPUTE

[29] Neither BCIT nor Manulife provided the requested records to the OIPC. They say these records are not in BCIT's custody or under its control. As a result, I do not know how many records are in dispute or precisely what information they contain.<sup>19</sup> However, I will assume for the purposes of this inquiry, as the parties do, that responsive records exist and that they are, in general, the kinds of records described in the access request. I discuss the records and their contents in more detail below.

## SECTIONS 3(1) AND 4(1) – CUSTODY OR CONTROL

[30] Section 3(1) states that FIPPA applies to all records “in the custody or under the control” of a public body. Sections 4(1)-(2) give an applicant a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant. However, this right of access does not extend to information excepted from disclosure under ss. 12-22.1.

[31] The issue in this case is whether the emails the applicant requested are in BCIT's custody or under its control within the meaning of ss. 3(1) and 4(1). If they are, then FIPPA applies and the applicant has a right of access to them, subject to the exceptions in ss. 12-22.1. If they are not, then FIPPA does not apply and the applicant has no right of access to them at all.

[32] Before I can answer these questions, I must first address an issue raised by the parties. They disagree about whether the requested emails each constitute one record or whether the metadata is separate and must be treated and analyzed separately under FIPPA. I cannot decide whether the requested records are in BCIT's custody or under its control without first identifying what those records are. Accordingly, the first task in this case is to identify the records. After identifying the records, I will consider whether they are in BCIT's custody or under its control.

### ***What are the requested records?***

#### *The parties' submissions*

[33] BCIT and Manulife submit that each requested email has two separate parts—the “body” and the “header”—that are separate records under FIPPA and must be analyzed separately regarding control.<sup>20</sup>

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<sup>19</sup> I say this recognizing that, to the extent this is a joint inquiry with OIPC File No. F19-77904, which deals with the April 13 request, the records responsive to that request are before me and the contents of some or all of those records may be the same as the responsive records here.

<sup>20</sup> BCIT's reply submissions at paras. 15-39; Manulife's reply submissions at paras. 6-13.

[34] In support of its position, BCIT provided affidavit evidence from SJ, BCIT's Director of Cyber Security, who has over 20 years of experience working as an information technology professional. SJ deposes:

Email "metadata" or the email "header" is essentially information related to the transmission of an email message and the processing of the electronic communication. ... I refer to the email communication itself as the "Body" and the metadata or header as the "Header". The email communication is referred to as the "Email Envelope" containing the Body and the Header.<sup>21</sup>

[35] I pause here to address terminology. In the quote above, SJ appears to be using the terms "header" and "metadata" synonymously as referring to a certain kind of information. However, the language used elsewhere in his evidence suggests that the "header" and "metadata" are not actually the same thing, but rather that the metadata is *in* the header.<sup>22</sup> In addition to this ambiguity, I am also concerned about prejudging the issue by adopting terms that by definition support finding that the metadata is in a separate record. To avoid these issues, I alert the reader at this juncture that I will be adopting below slightly different terminology than the parties use.

[36] Turning back to SJ's evidence, he likens the relationship between what he calls the email envelope, the body and the header to a physical envelope containing two separate hardcopy letters.<sup>23</sup>

[37] With respect to the header in particular, SJ says it is produced and attached to the email body when it is sent and traverses the internet. He says the header typically includes information about the sender, the software used, timestamps and information specifying the origin and path of the email. SJ says that email metadata is "essentially information related to the transmission of an email message and the processing of the electronic communication."<sup>24</sup>

[38] To be clear, when SJ refers to the email "header", he is not referring to the part of an email, usually above the message when a recipient opens it in their email inbox, that displays the sender and recipient(s), date, time and subject of the email message. SJ attached an email header to his affidavit as an exhibit. It does not look like what an email recipient would see when they open an email in their inbox. Rather, it is a long string of various kinds of information about the email and its transmission (i.e., the metadata).

[39] SJ also deposes that:

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<sup>21</sup> Affidavit #1 of SJ at para. 5.

<sup>22</sup> Affidavit #1 of SJ at paras. 10 and 12.

<sup>23</sup> Affidavit #1 of SJ at para. 11.

<sup>24</sup> Affidavit #1 of SJ at para. 5.

- email metadata is captured at the receiving end of an email transmission, it is only available to the recipient, and can only be extracted from the recipient's systems;
- when a user opens an email envelope, they only see the body and not the header;
- the header can only be accessed by opening a separate link or attached section within the envelope;
- opening and printing the email envelope only reproduces the body;
- if a recipient wanted to print a copy or save an image of the header, they could not do so by simply opening the envelope, but would have to open the header, copy it, paste it into a new file and then print or save that new file;
- to create a record that contains both the body and the header, one would have to open the body and the header individually, copy them and paste them into a new file; and
- there is no automated method available at BCIT to create a single record that contains both the body and the header.<sup>25</sup>

[40] Based on SJ's evidence, BCIT submits that the bodies and the headers of the requested emails are "separate records" under FIPPA.<sup>26</sup> Similarly, Manulife says "the metadata is a separate record from the substantive email."<sup>27</sup>

[41] In response, the applicant submits:

... BCIT is incorrectly separating the email message, or body, from the header and metadata. The email mail message is one record. This record contains many parts, including the body and the metadata. There are not two separate records that are received by the Manulife, or BCIT, server. There is only one record received and thus the two parts of the one record cannot be separated and adjudicate[d] separately.<sup>28</sup>

[42] The applicant submits that separating the metadata from the record would result in an untenable system. He says that every electronic record has metadata attached to it, so the only way to have a record without metadata is to have a physical paper record. The applicant says this would involve redesigning records management systems to convert electronic documents into physical documents, which is the opposite of what is happening.

[43] The applicant provided an example of an email header. It looks similar in form to the header SJ provided and contains the same kinds of information.

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<sup>25</sup> Affidavit #1 of SJ at paras. 7-14.

<sup>26</sup> BCIT's reply submissions at paras. 23 and 28.

<sup>27</sup> Manulife's reply submissions (F19-77949) at para. 11.

<sup>28</sup> Applicant's submissions at para. 38.

[44] The applicant also relies on Order F11-34.<sup>29</sup> In that case, the applicant made an access request to a ministry for a minister's calendar, which was electronic. The ministry treated the individual calendar entries as separate records. It disclosed certain parts of the calendar, but said that other parts were not in its custody or under its control. The adjudicator found that the calendar was a single record, not multiple individual records for each entry. He stated that the ministry's approach did not reflect a common-sense, practical characterization of the calendar.

[45] Relying on Order F11-34, the applicant argues that BCIT is attempting, arbitrarily and inappropriately, to split the record so that it can argue that certain parts are outside the scope of FIPPA.

[46] In reply, BCIT and Manulife submit that Order F11-34 is distinguishable and actually supports treating the body and the header of an email separately.<sup>30</sup> BCIT submits that its approach is practical and aligns with common sense because the body and the header of an email have different purposes, contain different information, must be accessed and printed separately, and the header is only accessible by the recipient. They say it is reasonable and practical to interpret a request for an "email" as a request only for the body. They say an applicant should have to clarify, as the applicant did, that they are also requesting metadata.

#### *Analysis and conclusions*

[47] Turning to my analysis, I begin by noting that s. 4(1) of FIPPA says the applicant has a right of access to a "record" in BCIT's custody or under its control. Accordingly, the question here is what constitutes the "record" or "records" when the access request is for "full and entire" emails including "the header and all metadata attached."

[48] Schedule 1 of FIPPA defines the term "record", so in my view that definition must govern the analysis, even though the parties, for reasons unclear to me, did not refer to it. The definition reads:

**"record"** includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records[.]<sup>31</sup>

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<sup>29</sup> 2011 BCIPC 42; applicant's submissions at paras. 40-43.

<sup>30</sup> BCIT's reply submissions at paras. 18-32; Manulife's reply submissions (F19-77949) at paras. 9-12.

<sup>31</sup> The recent FIPPA amendments did not change this definition.

[49] This definition refers to “information” recorded or stored on a thing. The information at issue in this case is the information in the requested emails. I will call that information the email “metadata” and the email “message contents”. By “message contents”, I mean the information in the email communication created and inputted by the sender/author. By “metadata”, I mean, following SJ, various kinds of information about the transmission and processing of an email communication over the internet. Although the parties use different terminology, there is no dispute that these two kinds of email information exist within the email envelope.

[50] In light of the FIPPA definition of “record”, the question becomes: what is the thing or things on which the message contents and the metadata is recorded or stored by graphic, electronic, mechanical or other means? The applicant’s position is that the message contents and the metadata are both recorded or stored on a single thing, so that thing is the “record”. However, BCIT and Manulife submit that the message contents and the metadata are recorded or stored on separate things, so the requested emails each constitute two separate records.

[51] I make the following findings based on SJ’s sworn evidence, which I accept. Electronically, an email recipient must access the message contents and the metadata separately through the email envelope. When the recipient opens the envelope, they only see the message contents and not the metadata. To access the metadata, the recipient must open a separate link or section within the envelope. When the recipient prints the email, that only reproduces the message contents and not the metadata. To have a record with the message contents and the metadata together, one would have to copy each and paste them into a new electronic thing.

[52] I conclude from this that the message contents and the metadata are recorded and stored by electronic means on two separate existing<sup>32</sup> electronic things. I find that the thing on which the message contents are recorded and stored is the electronic thing the recipient sees when they open the envelope. I find that the thing on which the metadata is recorded and stored is the separate link or section of the email envelope that the recipient must open to access the metadata. In my view, these two electronic things are the distinct records that make up the “full and entire email[s]”, including the metadata, that the applicant requested.<sup>33</sup>

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<sup>32</sup> To be clear, although I find that no single record containing the message contents and the metadata exists on a recipient’s email system, I accept SJ’s evidence that a single record containing that information could be *created*. However, whether BCIT is required under s. 6(2) to create such a record is not an issue in this inquiry, so I do not address it.

<sup>33</sup> How an applicant might be given access to these records under s. 9, or whether the public body is required under s. 6(2) to create a new record from either of these records, are separate questions. Those are not stated as issues in this inquiry, so they must be left for another day.

[53] The sample headers BCIT and the applicant provided with their submissions support this conclusion. Those headers are standalone documents that contain the metadata only and not the message contents.

[54] In coming to my conclusion, I recognize, as the applicant emphasizes, that the message contents and the metadata arrive together on the email recipient's server and are both accessed through the email envelope. I accept this means that the email envelope is the thing in which the message contents and the metadata are transported or "packaged".<sup>34</sup> However, I am not persuaded that this means the email envelope is the thing on which the information is recorded or stored, as that language is used in the FIPPA definition of "record". Opening the envelope and printing the email only provides access to or reproduces the message contents and not the metadata, so I do not see how both are recorded or stored on the envelope.

[55] In my view, this approach of treating email metadata separately from the message contents is reasonable under FIPPA. I find it aligns with the practical, common-sense approach adopted in Order F11-34, which the parties discussed.

[56] I do not consider it reasonable to expect public bodies to interpret an access request for "emails" as including the metadata. In general, applicants are seeking access to the substantive contents of emails and not also the metadata. I see no persuasive reason to depart from the usual interpretation of an "email", which excludes the metadata. If an applicant wants something in addition to the email's message contents, they should say so explicitly. In fact, that is what the applicant did in this case. He specifically asked for the metadata as well as the message contents. This demonstrates to me that even the applicant recognizes that the term "email" on its own is not commonly understood to include metadata.

[57] Further, as noted above, due to recent amendments, FIPPA's access to information provisions do not apply to a "record of metadata". If a request for an "email" is to be interpreted as always including the metadata, then an "email" is, at least arguably, a "record of metadata" under s. 3(5)(c) and outside the scope of FIPPA. This would lead to an untenable interpretation because applicants are obviously entitled to request access to emails under FIPPA. I recognize that the applicant disputes whether s. 3(5)(c) applies to email metadata. However, the point is that his interpretation of an "email" would at least raise the question of whether s. 3(5)(c) applies to every request for an "email". In my view, raising that issue in every case is unnecessary because applicants generally do not intend to request access to metadata when they request access to "emails".

[58] For these reasons, I conclude that the applicant's request for each "full and entire" email, including the metadata, is actually a request for two separate records under FIPPA. One record is the electronic thing containing the message

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<sup>34</sup> Affidavit #1 of SJ at para. 11.

contents that the recipient sees when they open the email envelope. In keeping with common usage under FIPPA, I will refer to this thing simply as the “email”. The other record is the separate link or section of the email envelope that the recipient must open to access the metadata. I will refer to this as the “metadata record”.

[59] I turn now to the custody or control analysis. Consistent with my conclusion above, I will analyze the emails and the metadata records separately. I will consider first whether these records are in BCIT’s custody.

***Are the requested records in BCIT’s custody?***

[60] FIPPA does not define “custody”. However, past orders establish that custody requires physical possession, plus some legal right or obligation to the information in its possession.<sup>35</sup> It follows that a public body cannot have custody if it does not have physical possession.

[61] BCIT and Manulife submit that BCIT does not have physical possession of the emails or the metadata records because they are on Manulife’s electronic systems, not BCIT’s, so they are not in BCIT’s custody.<sup>36</sup>

[62] The applicant did not specifically address custody. His submissions focus on control.

[63] I accept BCIT’s statement that it does not have physical possession of the records. That makes sense, given that the applicant is explicitly requesting records “received by” Manulife, that is, records as they exist on Manulife’s email systems and not BCIT’s. I conclude from this that the emails and the metadata records are not in BCIT’s custody.

***Are the requested records under BCIT’s control?***

[64] Having found that the requested records are not in BCIT’s custody, the next question is whether they are under its control.

[65] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)* [*Minister of National Defence*],<sup>37</sup> the Supreme Court of Canada stated that no single factor is determinative of whether a public body has control of a record not in its physical possession and all relevant factors must be considered on an objective basis. To guide the analysis, the Court adopted a two-step test.<sup>38</sup>

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<sup>35</sup> See, for example, Order F16-15, 2016 BCIPC 17 at para. 16.

<sup>36</sup> BCIT’s initial submissions at para. 63; Manulife’s submissions (F19-77949) at paras. 5 and 8.

<sup>37</sup> 2011 SCC 25 [*Minister of National Defence*].

<sup>38</sup> *Ibid* at paras. 6, 48, 50, 55-56 and 60.

The test originated in the context of federal access to information legislation, but it has been applied to FIPPA<sup>39</sup> and the parties addressed it in this case.

[66] The two steps of the test ask:

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?<sup>40</sup>

[67] Again, consistent with my conclusion above, I will address the emails and the metadata records separately, starting with the metadata records.

*Do the contents of the metadata records relate to a BCIT matter?*

[68] The first part of the two-part control analysis asks whether the contents of the requested records relate to a public body matter. The contents of the metadata records consist of metadata, which, as I found above, is information about the transmission and processing of the email communications. This includes information about the sender, the software used, timestamps and information specifying the origin and path of the email communication.

[69] BCIT and Manulife submit that the metadata does not relate to a BCIT matter.<sup>41</sup> BCIT says this information “is concerned with Manulife’s electronic and data security systems”, which are matters relating to Manulife’s “internal management and administration.”<sup>42</sup> Similarly, Manulife says that the metadata does not relate to a BCIT matter because that information only relates to “the operation of Manulife’s servers and Manulife’s systems.”<sup>43</sup>

[70] The applicant submits that the metadata relates to a BCIT matter.<sup>44</sup> He says the email message contents clearly relate to a BCIT matter and the metadata is related to and transmitted with that information, so the metadata must also relate to a BCIT matter.

[71] In determining whether the contents of a requested record relate to a public body “matter”, courts have considered, for example, whether the contents

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<sup>39</sup> See, for example, Order F15-65, 2015 BCIPC 71 (CanLII) at paras. 17-61.

<sup>40</sup> *Minister of National Defence*, *supra* note 37. I modified the wording slightly to incorporate the language in FIPPA.

<sup>41</sup> BCIT’s initial submissions at para. 67; Manulife’s initial submissions at para. 11.

<sup>42</sup> BCIT’s initial submissions at para. 67; BCIT’s reply submissions at para. 29.

<sup>43</sup> Manulife’s reply submissions (F19-77949) at para. 7.

<sup>44</sup> Applicant’s submissions at paras. 37-38; applicant’s submissions in response to Manulife at paras. 15-16.

are substantive and whether they are about a subject or issue that falls within the public body's work or supervision or oversight.<sup>45</sup>

[72] In my view, the metadata clearly does not relate to a BCIT matter. I accept the applicant's point that the message contents and the metadata are related and transmitted together. However, that does not mean that their contents are the same or that they are both related to a BCIT matter. As discussed above, the message contents and the metadata are very different kinds of information. The metadata is technical, non-substantive information about the transmission of emails over the internet. It relates to Manulife's emails and email system. It does not pertain to BCIT's work and oversight role relating to the applicant and his use of or involvement with the benefits plan. On its own, the metadata has nothing to do with the benefits plan. Given the nature of the metadata, I am not persuaded that it relates to a BCIT "matter" as that term has been interpreted.

[73] Given my conclusion here, it is not necessary to also consider whether BCIT could reasonably expect to obtain copies of the metadata records from Manulife upon request. The metadata in those records does not relate to a BCIT matter, so I conclude they are not in BCIT's control.

*Do the email message contents relate to a BCIT matter?*

[74] The next question is whether the email message contents relate to a BCIT matter.

[75] The applicant submits that the message contents clearly relate to a BCIT matter. He says they are about his connections to BCIT, Manulife and the benefits plan.

[76] In general, BCIT and Manulife submit that Manulife's copies of the email messages are not in BCIT's control.<sup>46</sup> However, their submissions appear to assume that there is no need to consider the emails Manulife received from BCIT because BCIT has already disclosed its copies of those same emails in response to the applicant's April 13 access request.<sup>47</sup>

[77] In response, the applicant says BCIT and Manulife are incorrect.<sup>48</sup> He says, as noted above, that he wants the emails received by Manulife because

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<sup>45</sup> *Minister of National Defence*, supra note 37 at para. 63; *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559 at para. 112; *Yeager v. Canada (Public Safety and Emergency Preparedness)*, 2017 FC 330 at paras. 60-61, affirmed on appeal 2019 FCA 98.

<sup>46</sup> BCIT's reply submissions at para. 57; Manulife's initial submissions (F19-77949) at para. 8.

<sup>47</sup> BCIT's initial submissions at paras. 66-67; Manulife's initial submissions (F19-77949) at para. 11; Manulife's reply submissions (F19-77949) at paras. 6-7.

<sup>48</sup> Applicant's submissions at para. 27.

Manulife may have emails that BCIT did not collect from its servers in response to his April 13 access request.<sup>49</sup>

[78] I accept the applicant's point that there may be discrepancies between what BCIT collected as the responsive records and what is on Manulife's servers. Also, BCIT's copies of email messages sent by BCIT to Manulife are not the same records as Manulife's copies of email messages received by Manulife from BCIT. For instance, the timestamps will not necessarily be the same and the sender and recipient will be different. These are different records existing on different email systems, even though the message contents are the same. BCIT seems to recognize this at certain points in its submissions.<sup>50</sup> Accordingly, I must consider whether the contents of *Manulife's* emails relate to a BCIT matter.

[79] The first question is what exactly are the email message contents. I do not have the responsive records before me, so the best I can do is make some general findings about their contents based on the evidence and submissions.<sup>51</sup>

[80] The applicant specifically requested emails containing information about him. The applicant is a BCIT employee, a beneficiary under the benefits plan and he holds a position with the Union. BCIT says the records relate to complaints and demands the applicant made regarding the benefits plan and its administration.<sup>52</sup> Accordingly, I find that the email message contents concern the applicant's involvement with the benefits plan in his role with the Union and as an employee-beneficiary, and relate to complaints and demands he made regarding the plan and its administration.

[81] In my view, the message contents of the emails received by Manulife clearly relate to a BCIT matter. BCIT concedes this at one point in its submissions.<sup>53</sup> The contents relate to the applicant, who is a BCIT employee and holds a position with the Union operating at BCIT. The subject matter is substantive and concerns BCIT's work and oversight role in relation to the employee benefits plan and its administration. These are clearly BCIT matters.

*Could BCIT reasonably expect to obtain copies of the emails from Manulife upon request?*

[82] Having found that the email message contents relate to a BCIT matter, the final question is whether BCIT could reasonably expect to obtain copies of the

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<sup>49</sup> Applicant's submissions at para. 27.

<sup>50</sup> BCIT's reply submissions at para. 34 where it says that "BCIT's copies of these communications are distinct from Manulife's copies of the same communications". BCIT also distinguishes between what it defines as the "Manulife Electronic Copies" and the "Manulife Metadata".

<sup>51</sup> I say this recognizing again the point I made *supra* note 19.

<sup>52</sup> BCIT's initial submissions at para. 4.

<sup>53</sup> BCIT's initial submissions at para. 67.

emails from Manulife upon request. All relevant factors must be considered on an objective basis.<sup>54</sup> 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.<sup>55</sup>

[83] Further, previous orders and cases provide an expanded 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;
- 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
- 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.<sup>56</sup>

[84] This list is not exhaustive and not all factors will apply in every case.<sup>57</sup>

[85] BCIT submits that it “has no reasonable expectation of receiving” the emails if they requested them from Manulife.<sup>58</sup> However, its arguments under this part of the control analysis focus on the metadata rather than the message contents in the emails.<sup>59</sup>

[86] Manulife submits that BCIT could not reasonably expect to obtain copies of the emails from Manulife upon request.<sup>60</sup> In support of its position, Manulife provided affidavit evidence from CP, Manulife's Assistant Vice President and Chief Underwriter, Group Benefits Sponsor Experience. CP has 30 years of experience working in the group benefits business.

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<sup>54</sup> *Minister of National Defence*, *supra* note 37 at para. 56.

<sup>55</sup> *Minister of National Defence*, *ibid.*

<sup>56</sup> *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 F15-65, *supra* note 39 at para. 18; Order F06-01, 2006 CanLII 3255 (BCIPC) at para. 81.

<sup>57</sup> See, for example, Decision F10-01, 2010 BCIPC 5 (CanLII), at para. 9.

<sup>58</sup> BCIT's initial submissions at para. 75.

<sup>59</sup> BCIT's initial submissions at paras. 69-75.

<sup>60</sup> Manulife's initial submissions (F19-79949) at paras. 12-19.

[87] With respect to the emails and the metadata combined, CP deposes that:

- BCIT has no authority to regulate the use and disposition of the records;
- the records are integrated with other records held by Manulife, not other records held by BCIT;
- there is no contractual or statutory provision establishing that BCIT has control over the records; and
- BCIT has no right, contractual or statutory or otherwise, permitting it to inspect, review, audit, obtain, possess or copy the records.<sup>61</sup>

[88] The applicant submits that BCIT could reasonably expect to obtain the emails from Manulife upon request.<sup>62</sup> He says that Manulife is BCIT's service provider and administers the benefits plan on BCIT's behalf. According to the applicant, this means that Manulife has an obligation to provide the records to BCIT upon request. The applicant argues that the emails are clearly about BCIT matters and were created by BCIT employees, so they are under BCIT's control.

[89] In reply, BCIT submits that the applicant's characterization of the relationship between BCIT and Manulife as a simple service provider relationship is an oversimplification.<sup>63</sup>

[90] Turning to my analysis, I accept that the emails were created by BCIT employees in the course of their duties. Also, for reasons already provided above, I accept that the message contents relate to BCIT "matters", including its mandate and functions in relation to the benefits plan. The emails were clearly created in circumstances relating to the benefits plan and the relationship between BCIT and Manulife. These factors weigh in favour of the emails being under BCIT's control.

[91] I also find that the general nature of Manulife's relationship to BCIT is that Manulife is BCIT's service provider or contractor.<sup>64</sup> Manulife provides benefits plan administration services to BCIT and its employees under the terms of a contract.<sup>65</sup> Manulife acts on BCIT's behalf in administering the plan.

[92] In my view, the nature of this service provider relationship provides BCIT with a certain measure of control over the emails Manulife receives from BCIT. I accept, as BCIT argued, that the service provider relationship does not mean that BCIT has control over every record in Manulife's possession.<sup>66</sup> However,

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<sup>61</sup> Affidavit #1 of CP (F19-79949) at paras. 8-11 and 13.

<sup>62</sup> Applicant's submissions at paras. 49-58.

<sup>63</sup> BCIT's reply submissions at para. 41.

<sup>64</sup> The term "service provider" is defined in Schedule 1 of FIPPA as "a person retained under a contract to perform services for a public body".

<sup>65</sup> Affidavit #1 of JP at para. 14.

<sup>66</sup> See Order F20-43, 2020 BCIPC 52.

I find that the fact that Manulife is BCIT's service provider generally makes it more reasonable for BCIT to expect to obtain records it sent to Manulife upon request than if Manulife were not bound to BCIT by the terms of a contract. I find that this factor lends some weight in favour of the emails received by Manulife being under BCIT's control.

[93] Turning to other relevant factors, I accept that the emails Manulife received are not integrated with other records held by BCIT because the messages are on Manulife's email system, not BCIT's. I am also satisfied that BCIT has not relied upon the records to a substantial extent because BCIT has its own sent versions of the emails to rely upon. In my view, these factors weigh against a finding that the emails are under BCIT's control.

[94] Finally, there is the issue of whether BCIT has any statutory, contractual or other right or authority to inspect, review, audit, obtain, possess or copy the emails received by Manulife or regulate their use or disposition. CP deposes that BCIT has no such right or authority. He says there is nothing in the contract between BCIT and Manulife that grants BCIT any such power.

[95] I accept that there is nothing in the contract that explicitly grants or denies BCIT the right to exercise any form of control over the emails Manulife receives from BCIT. The contract is "silent" on the matter. The parties did not point to, and I do not see, any statement in the contract, a statute or elsewhere that provides any helpful guidance about whether BCIT has authority over emails Manulife receives from BCIT.

[96] Accordingly, I do not place much weight on CP's evidence. The fact that there is nothing explicitly stating that BCIT has authority over the emails Manulife receives from BCIT is not a strong indicator of control either way, so I do not give it much weight in favour or against control. At any rate, what a contract, statute or any other legal document says or does not say about control over records is one factor among others. All relevant factors must be considered and weighed together.

[97] In my view, considering all relevant factors and weighing them together, BCIT could reasonably expect to obtain, upon request, the emails Manulife received. After all, the email messages were created by BCIT and sent to Manulife by BCIT. BCIT and Manulife work together to ensure the proper administration of the benefits plan. The contents of the email messages relate to that work. Manulife is BCIT's service provider and acts on its behalf in administering the plan. I conclude that these factors are sufficient to establish that the emails Manulife received from BCIT are under BCIT's control. Even if Manulife would in actual fact resist the request, the test is whether BCIT would have a reasonable *expectation* of obtaining the records. I am satisfied BCIT would have a reasonable expectation in the particular circumstances of this case.

***Conclusion regarding control***

[98] In the result, I conclude that the emails Manulife received from BCIT (as defined above) are under BCIT's control within the meaning of ss. 3(1) and 4(1) of FIPPA, but that the metadata records (as defined above) are not. This means that the records I found are in BCIT's control are within the scope of FIPPA, the applicant has a right of access to them subject to the FIPPA exceptions to disclosure, and BCIT is required to proceed with the request in accordance with Part 2 of FIPPA.

**CONCLUSION**

[99] For the reasons given above, under s. 58(2)(b) of FIPPA, I confirm, in part, BCIT's decision that the records the applicant requested are outside the scope of FIPPA under s. 3(1) and that the applicant has no right of access to them under s. 4(1).

March 9, 2022

**ORIGINAL SIGNED BY**

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Ian C. Davis, Adjudicator

OIPC File No.: F19-77949