



Order F25-16
(Partial reconsideration of Order F22-48)

THOMPSON RIVERS UNIVERSITY

Jay Fedorak
Adjudicator

March 6, 2025

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Summary: This case is a court-ordered reconsideration of Order F22-48. The matter began when an applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to Thompson Rivers University (TRU) for copies of email correspondence between a faculty member and an academic colleague living in a foreign country. TRU denied access under s. 3(1)(e) of FIPPA, on the grounds that the records were the research information of its faculty member and, in the alternative, that the records were not in its custody or under its control. Order F22-48 found that the records were in the custody of TRU and that it had failed to establish that s. 3(1)(e) applied. The order was subject to judicial review that required the Commissioner to reconsider the issue as to the application of s. 3(1)(e). During reconsideration, the adjudicator found that TRU applied s. 3(1)(e) correctly to some of the records but ordered it to continue processing the request for the records to which it had incorrectly applied s. 3(1)(e). Also, during reconsideration, the adjudicator considered a new issue raised by TRU, which was that it did not have custody or control of some of the records because they contained information of a purely personal nature. The adjudicator found that only some of those records contained information of a purely personal nature. He ordered TRU to continue processing the request for records that were not correctly characterized as containing information of a purely personal nature. In summary, the adjudicator ordered TRU to continue processing about 250 of the almost 6000 pages of records at issue.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 3(1), 3(1)(e); *Copyright Act* (Canada), RSC, 1985, c. C-42.

INTRODUCTION

[1] This is a court-ordered reconsideration of Order F22-48.¹ The matter began when an individual (applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to Thompson Rivers University (TRU) for all correspondence sent via email between a faculty member and his academic colleague living in a foreign country (the academic colleague) over a period of eleven years. TRU responded that the requested records were outside the scope of FIPPA in accordance with s. 3(1)(e), as they constituted the research information of a faculty member of TRU, which is a post-secondary educational body.

[2] FIPPA was subsequently amended, resulting in s. 3(1)(e) being renumbered as s. 3(3)(i)(i), and the phrase research “information” was changed to research “materials”. As I did in Order F22-48, I will refer to the provision as s. 3(1)(e) and use the phrase “research information” because that is what it was at the time of TRU’s decision, which is the matter under review. The parties did not argue that I should do otherwise.

[3] The applicant requested a review by the Office of the Information and Privacy Commissioner (OIPC) of TRU’s decision that FIPPA did not apply to the records in accordance with s. 3(1)(e). Mediation by the OIPC did not resolve the matter, and the applicant requested that it proceed to an inquiry.

[4] During the previous inquiry, TRU’s position was that it did not have custody or control of the requested records because they belonged solely to the faculty member. Consequently, the previous inquiry considered whether the requested records were in the custody or under that control of TRU and, if they were, whether they were excluded from FIPPA in accordance with s. 3(1)(e).

[5] Also, during the previous inquiry, TRU submitted that, after it had originally responded to the applicant by refusing to process his request, the faculty member destroyed most of the responsive records, and only a small collection of records remained in the faculty member’s archive folder.² TRU said that its information technology department indicated that it was not possible to retrieve these remaining records.

[6] The inquiry resulted in Order F22-48, in which I found that the records in dispute were in the custody of TRU in accordance with s. 3(1). I also found that TRU had failed to establish that the records were research information in accordance with s. 3(1)(e) of FIPPA.

¹ Order F22-48, 2022 BCIPC 55.

² The applicant made a separate complaint to the OIPC that TRU had destroyed records contrary to s. 65.3 of FIPPA. That complaint was not at issue in the previous inquiry, nor is it at issue in this reconsideration inquiry.

[7] TRU petitioned the Supreme Court of British Columbia for judicial review. That resulted in *Thompson Rivers University v. British Columbia (Information and Privacy Commissioner)*, 2023 BCSC 1933 [*Thompson Rivers*] which remitted Order F22-48 back to the Commissioner for reconsideration. Justice Gomery upheld my finding that the records were in the custody of TRU. However, he directed that the Commissioner reconsider and redetermine the issue of whether s. 3(1)(e) applied to the records.

[8] Justice Gomery also said that it was reasonable for me to doubt parts of the faculty member's testimony as to whether all the email correspondence constituted research information. He confirmed that, because deciding the application of s. 3(1)(e) to each record individually required further information, I could request that TRU produce the records or provide clarification or supplemental evidence.

[9] I invited the parties to make submissions to this reconsideration inquiry, which they both did.

[10] In its initial submission in this reconsideration, TRU admitted that its previous submission that the responsive records had been destroyed was premature, because it subsequently discovered that those records had in fact not been destroyed. Therefore, whereas Order F22-48 applied only to the records in the archive folder of the faculty member, this order applies to all of the responsive records.

[11] TRU also submitted that some of the responsive records were not in its custody or under its control because they are "purely personal communications", which I understand to mean the records contain only information of a purely personal nature. This is a new issue that was not part of the previous inquiry. TRU did not explain why it did not raise it earlier nor why it did not now comply with the OIPC requirement that it formally request permission for a new issue to be added.³ Nevertheless, I decided to add it to expedite the reconsideration and avoid the raising of further jurisdictional issues. The parties were invited to make submissions about that new issue, which they did.

[12] Up to that point, TRU had refused multiple requests by the OIPC to produce the disputed records for review. Therefore, as an alternative, I invited TRU to provide me with a list and brief description of each responsive record. I gave the applicant an opportunity to respond to the list and descriptions. The applicant's response included evidence that raised doubts about TRU's descriptions of the records, so I requested that TRU provide me with access to seven of the emails. My review of those emails in the context of the applicant's evidence caused me to question the accuracy of some of the descriptions. As a

³ OIPC Instructions for Written Inquiries <https://www.oipc.bc.ca/documents/guidance-documents/1658>, p. 3.

result of these questions, I concluded that I could not determine whether each individual record at issue in the inquiry contained research information without viewing each of the records individually, because I doubted the accuracy of TRU's descriptions. I then invited the parties to make submissions on whether I had the authority to compel TRU to produce the records for my review in accordance with s. 44(1).

[13] In response, TRU offered to provide me with copies of the records, if I allowed it to make further submissions on the applicability of s. 3(1)(e). I agreed to this proposal. TRU provided me with the records and both parties provided additional submissions about s. 3(1)(e).

ISSUE

[14] The issues to be decided in this inquiry are:

1. Whether the records requested by the applicant are outside the scope of FIPPA in accordance with s. 3(1)(e) of FIPPA;
2. Whether the records are not in the custody or under the control of TRU in accordance with s. 3(1) because they contain only information of a purely personal nature.

[15] Previous orders have established that the public body has the burden of establishing that records are excluded from the scope of FIPPA.⁴

DISCUSSION

[16] **Background** – The faculty member works in a department of TRU that has been the subject of controversy over the issue of the academic quality of certain journals in which some faculty members have published articles. One of his faculty colleagues published a study alleging that members of a department of an unidentified Canadian post-secondary institution had published in journals engaging it substandard academic practices. It subsequently became known publicly that the institution at issue in the study was TRU. The faculty member then began a series of research projects with the academic colleague, with whom he had previously collaborated. These projects included examining the publications of his faculty colleague noted above. This research collaboration included correspondence that the faculty member conducted through an email account that TRU had provided to him for the purposes of the research, teaching and administrative duties required by his employment.

[17] The applicant believes that someone in the department leaked confidential information about a departmental meeting to the academic colleague. The

⁴ For example, Order F15-26, BCIPC 28 (CanLII), para. 5.

applicant states that he is not seeking access to research information, but rather correspondence relating to what he describes as professional activism.

[18] **Record at issue** – The records consist of 5,811 pages of email correspondence and attachments. TRU has withheld all the records in their entirety.

Are the records excluded from FIPPA under s. 3(1)(e)?

[19] FIPPA applies to all records in the custody or under the control of a public body subject to ss. 3(3) to (5). In addition, s. 4 gives an applicant a right of access to a record in the custody or under the control of a public body but specifies the right does not extend to information that is excepted from disclosure under Part 2 of FIPPA.

[20] TRU's access decision was that s. 3(1)(e) applies to most of the records because they contain research information of the faculty member. I note that TRU does not submit that the records contain teaching materials, so I will not consider whether they do. The relevant provision of FIPPA, at the time TRU responded to the request, read as follows:

- 3** (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

...

- (e) a record containing teaching materials or research information of
(i) a faculty member, as defined in the College and Institute Act and the University Act, of a post secondary educational body.

[21] As this provision applies to "a record containing ... research information", it applies to the record as a whole, rather than just to the research information contained within the record. In cases where a record containing research information also contains information of a purely personal nature, the entire record is subject to s. 3(1)(e). There is no obligation on TRU to separate the personal comments from the research information to treat them separately under FIPPA.

[22] Given TRU's position is that most of records are the faculty member's research information, my first task in this reconsideration is to consider whether each record at issue contains the research information of the faculty member.

Is the faculty member a “faculty member” for the purposes of s. 3(1)(e)?

[23] In Order F22-48, I found that the faculty member was a faculty member at a post-secondary educational body for the purposes of s. 3(1)(e).⁵ I make the same finding here for the reasons provided in Order F22-48, which I will not repeat for the sake of brevity.

Do the records contain “research information” under s. 3(1)(e)?

[24] In Order F22-48, because FIPPA did not define the term “research information”, I followed the principles established by previous orders that had considered the application of s. 3(1)(e).⁶

[25] I explained that former Commissioner Loukidelis in Order 00-36 found that the purpose of s. 3(1)(e) was as follows:

Section 3(1)(e) is intended to protect individual academic endeavour. It will protect the intellectual value in teaching materials or research information developed by an employee of a post-secondary educational body, for her professional purposes, by protecting it from disclosure to those who might exploit it to her disadvantage.⁷

[26] As former Commissioner Loukidelis explained, s. 3(1)(e) applies specifically to information that has “intellectual value”. This is the information that someone could exploit to the faculty member’s disadvantage, for example, by stealing the researcher’s ideas and depriving them of the priority of publication.

[27] I accept that the purpose of s. 3(1)(e) is to protect the information that faculty members of post-secondary bodies use and produce in researching a matter and creating papers, articles and books for publication and other forms of dissemination.

Parties’ submissions

[28] TRU submits that most of the records at issue concern the partnership established between the faculty member and the academic colleague for the purpose of conducting academic research. TRU provides a list of research projects the faculty member and the academic colleague collaborated on and identifies their resulting papers and publications.⁸ TRU says the responsive records include copies and drafts of some of these publications. TRU also

⁵ Order F22-48, para. 47.

⁶ See for example, Order F12-03, 2012 BCIPC 3 (CanLII); Order F10-42, 2010 BCIPC 63 (CanLII) and Order 00-36, 2000 BCIPC 39 (CanLII).

⁷ Order 00-36, page 5.

⁸ TRU September 18, 2024 submission, para. 19.

submits that some communications relate to ongoing research projects that did not result in papers or publications by the time of the request.

[29] In its submission to this reconsideration, TRU cites Order F10-42, which describes research as “a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research.”⁹ TRU submits further that the term “research” should be interpreted broadly. It cites the Supreme Court of Canada (SCC) in *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, [SOCAN v Bell] 2012 SCC 36, which took an expansive interpretation of the term “research” in the federal *Copyright Act*.¹⁰ TRU refers to the passage in this decision that states that to qualify as “research” the activity does not have to be related to creative purposes and does not demand the establishment of new facts or conclusions. Research includes activities that are piecemeal, exploratory and confirmatory.¹¹

[30] TRU applies the finding of the SCC to the application of s. 3(3)(e) as follows:

This provision is intended to protect individual academic endeavour and the intellectual value in teaching or research materials and scholarly pursuits. The rationale underlying the section is the protection of the intellectual value in research and research information developed by an employee of a post-secondary educational body.¹²

[31] TRU also submits:

Further, any member of the public could use the access provisions of FIPPA to access, appropriate, disrupt, or take the benefit of proprietary ideas, concepts, and creations, and unfairly deprive the creators of those works the full benefit of their research and academic endeavors.¹³

[32] TRU notes that some of the records relate to the faculty member and the academic colleague having conducted research in response to the work of the faculty colleague who had critiqued the academic credentials of certain research journals.¹⁴

[33] TRU postulates that there was a legislative intent to grant researchers a degree of deference and discretion in determining what constitutes their research

⁹ TRU September 18, 2024 submission, para. 32; Order F10-42, 2010 BCIPC 63 (CanLII), para. 13.

¹⁰ TRU September 18, 2024 submission, para. 33; RSC, 1985, c. C-42.

¹¹ SOCAN v Bell, para. 22.

¹² TRU's September 18, 2024 submission, para. 34.

¹³ TRU's January 5, 2024 submission, para. 14.

¹⁴ TRU's January 5, 2024 submission, para. 27; TRU's September 18 submission, para 14.

information and whether a particular record contains research information. This is demonstrated, TRU says, by the fact that this type of information is exempted under s. 3, rather than included in the exceptions to disclosure in Part 2.

[34] It also cites the decision of the British Columbia Court of Appeal in *British Columbia (Children and Family Development) v. British Columbia (Information and Privacy Commissioner)*, 2024 BCCA 190 [*Ministry of Children and Family Development*]. In this decision, the court found that public bodies, rather than the Commissioner, had the responsibility to weigh whether the public interest, in the context of s. 25 of FIPPA, should override solicitor-client privilege. TRU states that s. 3(1)(e) grants the faculty member the same degree of discretion in determining whether records contain research information.¹⁵

[35] The applicant responds that, while he accepts that responsive records may contain research information, it is implausible that every record at issue consists only of research information or personal matters. He cites my review of a sample of the responsive records where I raised doubts as to whether TRU accurately described some of the records as research information. He accuses TRU of conflating political activism by the researchers as research activities.¹⁶

Analysis

[36] In citing the SCC decision *SOCAN v Bell* and its interpretation of the activity of “research”, TRU has raised an important issue. Nevertheless, it is necessary to consider this term in context to determine the impact that it has on the application of FIPPA. There are a couple of vital points of clarification.

[37] The first is that the provision of the *Copyright Act* considered by the SCC uses the term “research” in its form as a noun. In that context, it is an activity undertaken by consumers. In s. 3(1)(e) of FIPPA, “research” is used in the form of an adjective to qualify the noun of “information”. It is not about an activity but about the nature of information contained in a record. While the meanings of both are related, they are not identical.

[38] The second is that the interpretation of the term “research” serves a different purpose in two distinct legislative schemes. Under the *Copyright Act*, the purpose is, as the court stated, “to maintain the proper balance between the rights of a copyright owner and users’ interests”. The court goes further and states the fair dealing exception in the *Copyright Act* “must not be interpreted restrictively so that in maintaining that balance, users’ rights are not unduly constrained”.¹⁷

¹⁵ TRU September 18, 2024 submission, paras. 39-40.

¹⁶ Applicant’s reconsideration response, paras. 3-6.

¹⁷ *SOCAN v Bell*, para. 27.

[39] The purpose of s. 3(1)(e) in FIPPA, is, as TRU correctly submits, “the protection of the intellectual value in research and research information developed by an employee of a post-secondary educational body”. Like the *Copyright Act*, FIPPA attempts to maintain the proper balance between an applicant’s right of access to records against the public interest in protecting research information of intellectual value. In maintaining that proper balance, FIPPA requires that an applicant’s rights not be unduly constrained.

[40] Following the decision in *SOCAN v Bell*, the noun “research” in the fair dealing provision of the *Copyright Act* must receive a large and liberal interpretation and apply to a broad range of activities that consumers undertake. I take the same non-restrictive approach here with the adjective “research” in s. 3(1)(e) of FIPPA. I find that it should be interpreted as applying expansively to many types of information, however formally or loosely developed and collated. Nevertheless, it must be applied within the context of information that is collected, created and used during the course of the professional activities of a faculty member of a post-secondary educational body. Moreover, as TRU indicates, the purpose of the provision in FIPPA is to protect academic endeavour and the intellectual value that it produces. Therefore, in taking the broadest interpretation of the term “research information”, it would still be necessary to exclude information that has no intellectual value.

[41] I have considered the relevant case law, including previous orders, along with the submissions of the parties. I conclude that records containing research information would be records that include, in the broadest possible manner, materials used, or to be used:

- in the investigation and analysis of an academic issue relevant to the faculty member’s professional duties; and
- which contain intellectual value.

[42] This would include information used in the deliberations of the researchers and in the drafting of a paper or publication. I am also satisfied that s. 3(1)(e) would apply broadly to documented source materials for a research project. In addition, I find it would apply to records containing the ideas, thoughts, arguments, suggestions for improvement and constructive comments by collaborators and external reviewers.

[43] Based on that understanding, and from my review of each individual record, I find that TRU has correctly applied s. 3(1)(e) to more than 95 per cent of the pages of records because they contain research information. Given that TRU has numbered 2,000 individual records (some of which contain streams of multiple individual emails and attachments), it is not feasible for me to explain my reasons for why each of those records falls within s. 3(1)(e). However, in a

general way, I can say that the records that I find contain information that clearly falls within the definition of research information are as follows:

- Drafts of papers by the faculty member and academic colleague and their publication proofs;
- Suggestions for corrections or amendments of the faculty member's and academic colleague's drafts, including comments of peer reviewers;
- Requests by the faculty member and academic colleague to colleagues for professional feedback on papers;
- Copies of published research papers of other academics that the faculty member or academic colleague gathered because they were relevant to a current or future research project;
- Raw data and statistical or financial calculations under investigation;
- Discussion between the faculty member and the academic colleague of the strategy, essence or details of current or future research projects;
- Requests to individuals and organizations for information or data relevant to the faculty member's and the academic colleague's research projects; and
- Discussions between the faculty member and the academic colleague about which journal to target for submission of their draft article, and how that choice may influence the form or content of the draft article.

[44] I find the above listed records contain research information. This is because it is apparent on the face of the draft papers and the discussions between the faculty member and the academic colleague that all of the documentation of the academic projects described in the records meet the definition of "research information", as I have defined that term above.

[45] The records that I find contain research information also include some of the records relating to academic publications. I accept TRU's evidence that publishing is an integral part of the academic research process and communications with publishers may influence the work of the researchers. I also accept TRU's evidence that the faculty member and the academic colleague collaborate on research relating to certain aspects of academic publishing, in particular the issue of predatory journals. This also includes some communications from publishers containing the comments of peer reviewers about a draft article because these are peer comments that the researcher would consider for the purpose of making changes to their article.

[46] However, I find that there are some records that do not contain research information. In some cases, this is because TRU has incorrectly categorized them, in the sense that the information in those records does not accurately reflect the category TRU has assigned to them. In other cases, there is information that is correctly categorized but does not meet the definition of research information.

[47] For example, one of the categories is “Overarching Scholarly Publication Research”. While the faculty member conducted research refuting the publications of his faculty colleague, that does not mean that any information about that faculty colleague or the rest of the department mentioned in the records necessarily constitutes the faculty member’s research information. In some cases, the information is about the administration of departmental business distinct from the subject matter of the faculty member’s research. This includes intelligence provided to senior administration for departmental purposes, which does not meet the criteria for research information.

[48] Further, not everything related to the topic of scholarly publishing in this case is research information. Specifically, I am not persuaded that the following type of information is research information because I find it would not reveal anything of intellectual value or cause the type of harm s. 3(1)(e) is designed to prevent:

- a publisher’s communications stating that a paper has been published and is available on the internet or in print;
- a publisher’s publicly available instructions about how to submit an article for review;
- information that merely refers to the existence of the faculty member’s publication that is already publicly available;
- communications to academic publishers that were sent in an attempt to persuade them to change their general operating practices.

[49] As for TRU’s argument about the BC Court of Appeal’s decision in *Ministry of Children and Family Development*, I disagree. I am not persuaded that this decision requires me to defer to TRU’s decision that the information in dispute is research information under s. 3(1)(e). The court decision concerned the special role solicitor-client privilege plays in the legal system and whether s. 25 contains sufficiently clear language to abrogate privilege. The court rejected an assertion that s. 25 provides the requisite clear and explicit language necessary to abrogate privilege. It did so in part because public bodies are already required to consider the public interest when deciding whether to exercise their discretion to disclose records that may be withheld pursuant to s. 14 of FIPPA. The decision does not stand for the proposition that the OIPC is required to defer to public bodies. Indeed, that proposition has been repeatedly rejected.¹⁸ There is nothing in *Ministry of Children and Family Development* that even remotely supports TRU’s argument that I should defer to its assessment that all the records contain research information.

[50] Rather, TRU has the burden of proving whether the content of a particular record falls within the meaning of the term research information in s. 3(1)(e). I

¹⁸ For example, see *Vancouver Whitecaps FC LP v British Columbia (Information and Privacy Commissioner)*, 2020 BCSC 2035.

accept that the faculty member has the greatest level of knowledge about his research and his records. Nevertheless, he must use that knowledge to explain the reasons why he asserts that the records contain his research information and provide evidence in support of his position. It is up to me to determine whether his explanations and evidence are persuasive.

[51] As mentioned, given the large number of records, it is not possible to provide an explanation for each record. Therefore, I will provide some general reasons followed by a list of the pages that I find do not contain research information, grouped together under the same explanation, where appropriate, to save space.

[52] The following are the approximately 250 pages of records that I find TRU has incorrectly described as containing research information. There is nothing to suggest that the faculty member used, or is now using, this information in the course of his research projects. I see nothing of intellectual value in this information that, if disclosed, could reasonably be expected to unfairly deprive the faculty member of the full benefit of his research and academic endeavours. I conclude that the information in these records relates to matters other than the research of the faculty member.

1. There are some communications between the faculty member and the academic colleague about TRU's university-wide and departmental matters, facilities and personnel. There are no reasonable grounds to conclude that the faculty member used these communications as materials for his research. These are the emails on pages 1166, 1179, 1182, 1208, 1862, 1868-74, 1880-81, 2034, 2128, 2180, 2189, 2195, 2197, 2223-26, 2279-81, 2380, 2404-10, 3027, 3082, 3095-98, 3297, 3743, 3746, 3753-54, 3775-76, 3862-64, 3871, 3909, 3935, 4061, 4111, 4676, 4761, 4773, 4795, and 5802.
2. There are some communications between the faculty member and TRU's administrators and faculty members that relate to TRU's university wide or departmental matters, facilities or personnel, including communicating intelligence to senior administrators for departmental purposes. These are the emails on pages 101, 1163, 1175-76, 1627, 1651, 2211-12, 2288, 3335, 3389, and 4325.
3. There is correspondence concerning the identity of an author of comments on social media. These are the emails on pages 3083 and 3090-93. There is no indication as to how the identity of this author is relevant to any research project.

4. There is a communication containing criticism by the academic colleague about another academic recommending that the latter make changes to a work already published. This is the email on page 247.
5. There is an email from the faculty member to the academic colleague about academic matters other than research. This is the email on page 2806.
6. There is correspondence from the academic colleague to a website operator about the operations of the website. This is the email on page 253.
7. There is correspondence between the faculty member or the academic colleague and a publisher which contain only comments, requests or recommendations regarding the publication's practices. These are emails on pages 312-14, 448, 452-53, 476-77, 601, 825, 829, 861-2, 888-93, 1438-39, 2411-14, 2630-34, 2639-43, 2732, 3056, 3067-68, 3103-05, 4681, 4800, 4810-12, 4851, 4875, 4885, 4899, 4915-17, 4936, 5026, 5043-44, and 5423-30.
8. There is correspondence from a publisher informing reviewers employed by the journal about journal business. This is the email on page 389.
9. There is correspondence between the faculty member and the academic colleague about the activities of publishers unrelated to the research of the faculty member. These are the emails on pages 450-51, 4626, 4762, 5084, 5088, and 5124.
10. There is correspondence between faculty member, the academic colleague and another academic about the media having made requests to academics. These are the emails on pages 4759-60.
11. There are professional assessments and comments by the faculty member and the academic colleague about the professional attributes and work of other academics and administrators. These are the emails on pages 1891, 2137, 2289, 3010, 3073, 3088, 3881-82, 3994, 4033-4037, 4052, 4057, 4441, 4469, 4995-98, 5014-15, and 5379.
12. There is correspondence between the faculty member and the academic colleague, and between them and other academics and publishers, about the faculty member's publicly available publications and where they can be found. These are the emails on pages 2011-12, 2042, 2044-45, 2210, 2237, 2288, 3043, 3298, 3333-34, 3378, 3735-36, 3842-43, 3862-64, 3866 3880, 3960, 3979-80, 3992, 4032, 4151, 4351, 4472,

4647, 4649, 4673, 4863-64, 4897-98, 5484, 5529, 5768-69, and 5810-11.

[53] Therefore, I find that these records enumerated above are in the custody of TRU and they do not contain research information under s. 3(1)(e). Therefore, FIPPA applies, and TRU must process these records in accordance with Part 2 of FIPPA.

Are some of the records not in the custody or under the control of TRU because they contain only information of a purely personal nature?

[54] TRU submits that some of the records are not in its custody or under its control pursuant to s. 3(1), because they are, what it characterizes as, purely personal communications. TRU says these records are about the faculty member's and the academic colleague's personal lives and families and contain only information of a purely personal nature that is unrelated to the university. TRU also submits that some of the records are about events at TRU in the context of how they affected the faculty member personally.

[55] The applicant notes that aspects of TRU's September 18, 2024 submissions were inaccurate and that it is improbable that all of the records contain only research information or purely personal matters.¹⁹

Analysis and findings

[56] Based on my review, I find that most of the records TRU describes as purely personal communications contain only information of a personal nature about the faculty member and the academic colleague. It is information about their families, their health, their recreational activities and personal interests, and it does not refer to their research work.

[57] Nevertheless, there are some records that TRU has mischaracterized as being of a purely personal nature, because I find that the information they contain does not relate solely to the personal lives of employees unconnected to the functions of the public body. Those records contain information relating to professional academic matters and do not include any reference to how these matters have affected the faculty member personally. The following are the pages that find TRU has incorrectly described as containing only information of a purely personal nature:

1. There is correspondence with a research centre requesting information on certain matters on pages 381 and 390-9.

¹⁹ Applicant's response submission, paras. 4-5.

2. Pages 486, 799, 800, 1319, 1770, 2179, 2190, 2268, 3078, 3135, 3428-29, 3445, 3511, 4109, 5432 and 5462-3 contain factual information about TRU departmental matters, including human resources activities involving other employees, that does not reveal how those matters affected the faculty member personally.
3. There is correspondence with a publisher regarding certain matters, including making certain requests or recommendations on pages 448, 825, 5113-15, 5160 and 5226-27.
4. There is correspondence with government officials on the subject of the media's reporting on academic research on page 1177.
5. There is correspondence between academics and librarians about the faculty member's publications on pages 3325-26 and 5568-69.
6. There is correspondence expressing professional comments about other academics on pages 3990-91.
7. There is correspondence between academics about academic awards on pages 5413-15.

[58] TRU denies custody or control of only those records that contain information that is purely personal. Therefore, I now turn to whether the records that I found contain only information of a purely personal nature are in the custody or under the control of TRU.

[59] A record must either be in the custody or under the control of a public body for an applicant to access it under FIPPA. A record does not need to be both in the custody and under the control of a public body, as either will suffice to bring it within the scope of s. 3(1).

[60] I will first decide if the records that I found contain only personal information are in TRU's custody. Only if I find they are not, will it be necessary to consider if those records are under TRU's control.

Custody

[61] Although FIPPA does not define "custody", previous orders have established how to determine whether a public body has custody of a record. Past orders have established that to have custody of a record the public body must have both physical possession of the record and some "right to deal with the records and some responsibility for their care and protection."²⁰ Former Commissioner Loukidelis noted that "The idea that a public body must have

²⁰ Order F18-45, 2018 BCIPC 48 (CanLII), para 15.

‘charge and control’ of a record in order to have custody of it introduces an element of overlap between ‘custody’ and ‘control’.”²¹ This is because the application of FIPPA does not depend solely on the physical location of the record but rather to the relationship between the public body and the record. Prior jurisprudence has confirmed that a public body must also have “immediate charge and control of the records, including some legal responsibility for their safe keeping, care, protection or preservation.”²²

[62] There are cases where a record is physically or electronically present on the premises or information technology network, but that record does not relate to functions of the public body. For example, the fact that an employee places a birthday card on their desk at work or uses their work email account to communicate with their physician about a medical appointment does not necessarily mean that their employer has custody of the card or the email for the purposes of FIPPA.

[63] Therefore, the first step is to determine whether TRU has physical possession of the records at issue. If it does, the second step is to determine whether TRU also has a legal right or obligation to the information in its possession.

[64] In Order F22-48, I decided that all of the requested records were in the physical possession of TRU. There is no need to reconsider that finding here because TRU does not dispute that it has physical possession of the records.

[65] The next stage is to consider whether TRU has legal rights and obligations regarding records in its physical possession. In Order F22-48, I applied the standard indicators of control to the records that TRU characterized as the research information of the faculty member. I will now apply the same indicators to the records I found contain purely personal information.

Were the records created by an employee in the course of carrying out their duties?

[66] TRU does not deny that its faculty member created the records but submits that he did not create the records containing purely personal information in the course of carrying out his duties as an employee of TRU. I find that the records containing only purely personal information were created by an employee of TRU but not in the course of carrying out his duties.

²¹ Order 02-30, para. 23; see also *Minister of Small Business, Tourism and Culture et al v. The Information and Privacy Commissioner of the Province of British Columbia et al*, 2000 BCSC 929 (CanLII) [Ministry of Small Business], para. 14 and Order F15-65, 2015 BCIPC 71 (CanLII), para. 12.

²² Ministry of Small Business, para. 12. Order 02-30, 2002 BCIPC 30 (CanLII); Order No. 308-1999, 1999 BCIPC 21

Does the public body have statutory or contractual control over the records?

[67] There was no evidence provided of statutory provisions or a contract governing the control of the records. There is a collective agreement between TRU and its faculty members, but it is silent on the issue of the control of records for the purposes of FIPPA.

Has the public body relied on the record?

[68] There is no evidence before me to suggest that TRU has relied in any way on records containing purely personal information.

Are the records integrated with the other records of the public body?

[69] TRU's submissions and evidence do not address this point. Given that the records were retrieved from TRU's email system along with the records relating to the research of the faculty member, it is reasonable to conclude the records are integrated with other records of TRU.

Does the public body have the authority to regulate the use and disposition of the records?

[70] There is no evidence before me to suggest that TRU has the authority to regulate the use and disposition of the records containing purely personal communications.

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

[71] There is no evidence before me to suggest that the contents of records relating to the health, family members, recreational activities and personal interests of the faculty member or the academic colleague relate to TRU's mandate. Nor is there any evidence to suggest that records containing solely information about how events affected the faculty member personally relate to TRU's mandate or functions.

Does a contract allow the public body to inspect, review, possess or copy the record?

[72] As I indicated in Order F22-48, there is no contract that addresses TRU's rights to inspect, review, possess or copy the record. The collective agreement is silent on these points.

[73] In summary, I find that, on balance, the indicators of custody in this case support the conclusion that the records containing only information of a purely personal nature are not in TRU's custody.

Control

[74] Given I found the records that contain purely personal information are not in TRU's custody, I also considered if they are under TRU's control.

[75] As was the case with the term "custody", FIPA does not define the term "control". However, past orders have said that the way to determine if a public body has control of a record is to apply the same factors that I considered above under custody. Given what I concluded about those factors, I also find that TRU does not have control of the records that contain purely personal information.

Summary - custody and control

[76] In summary, I find that some of the records contain purely personal information and are not in TRU's custody or under its control. For that reason, FIPPA does not apply to those records and the applicant has no right of access to them under FIPPA.

[77] However, I conclude the records enumerated above at paragraph 56 do not contain information of a purely personal nature. Therefore, TRU has not established that it does not have custody or control of those records for the reasons TRU claimed. I find FIPPA applies to those records and TRU must process them in accordance with Part 2 of FIPPA.

[78] For the purpose of clarification, I note that the Order to process the records does not mean necessarily that ultimately all of the information in the records must be disclosed. Processing records includes considering the application of possible exceptions to disclosure in Part 2 of FIPPA.

CONCLUSION

[79] For the reasons given above, I make the following order under s. 58 of FIPPA:

1. I confirm that, subject to item 2 below, TRU has correctly applied s. 3(1)(e) to most of the records.
2. Section 3(1)(e) does not apply to the records whose page numbers are listed above in paragraph 52 and those records are subject to FIPPA.
3. I confirm that, subject to item 4 below, most of the records that TRU claimed contain only information of a personal nature fall outside the

scope of FIPPA because they are not in the custody or under the control of TRU pursuant to s. 3(1).

4. The records whose page numbers are listed above in paragraph 57 are subject to FIPPA .
5. TRU is required to process the records described in items 2 and 4 above in accordance with Part 2 of FIPPA.
6. TRU must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with the records described at items 2 and 4 above.

[80] Pursuant to s. 59(1) of FIPPA, TRU is required to comply with this order by April 17, 2025.

March 6, 2025

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

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