



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
— for —  
British Columbia

Order F08-01

**SIMON FRASER UNIVERSITY**

Catherine Boies Parker, Adjudicator

January 4, 2008

Quicklaw Cite: [2008] B.C.I.P.C.D. No. 1

Document URL: <http://www.oipc.bc.ca/orders/OrderF08-01.pdf>

**Summary:** The applicant requested information relating to two “spin-off companies” in the possession of SFU’s University/Industry Liaison office. SFU initially took the position that the records were in its custody and control but later changed its position and said that the records were within the custody and control of its wholly-owned subsidiary, SFUV. The records are within SFU’s control and SFU is ordered to discharge its obligations as a public body to the applicant and to third parties.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 3(1) and 4(1); *University Act*, ss. 46.1, 47, 48, 50, 51, 56, 57 and 58; *Business Corporation Act*, s. 185

**Authorities Considered:** **B.C.:** Order 04-08, [2004] B.C.I.P.C.D. No. 8; Order 04-19, [2004] B.C.I.P.C.D. No. 19; Order 03-19, [2003] B.C.I.P.C.D. No. 19; Order 02-29, [2002] B.C.I.P.C.D. No. 29; Order 02-30, [2002] B.C.I.P.C.D. No. 30; Order F06-01, [2006] B.C.I.P.C.D. No. 2.

**Cases Considered:** *Connell v. University of British Columbia*, [1988] B.C.J. No. 13.

## 1.0 INTRODUCTION

[1] This decision arises out of the applicant’s request under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) for all records related to two “spin-off companies”, Credo Interactive, Inc. (“Credo”) and Virtual Learning Environments, Inc., in the possession of the University/Industry Liaison Office (“UILO”) at Simon Fraser University (“SFU”). The applicant stated that his request included the following: agreements among the principals, the company

and SFU; descriptions of assets, including patents, copyrights, trademarks and licences; identification of company directors, managers and equity owners; accounts of revenues; distribution of revenues; and any and all involvement of SFU and SFU personnel with the two “spin-off firms”.<sup>1</sup>

[2] SFU notified four companies with an interest in the requested records of the request. It told the companies that it did not believe s. 21(1) of FIPPA applied but that it was giving the companies an opportunity to comment on whether disclosure of the records would harm their business interests. One of the four companies, Credo, made representations, while a second, Solstice Management Group (“Solstice”), said that, as a shareholder in Credo, its position regarding the request was the same as Credo’s.

[3] SFU then notified the four companies that it had decided to disclose the records in part and that the companies could request a review of that decision by this office. SFU then disclosed to the applicant a number of records that were “not at issue”, applying s. 22 of FIPPA to some information. SFU also told the applicant that two of the third parties objected to disclosure of the remaining records related to Credo, that the other two third parties had not responded and that it would not be disclosing any further records at that point. Throughout this process, SFU took the position that the remaining records were in its custody or under its control.

[4] Credo and Solstice requested reviews of SFU’s decision that s. 21 did not apply to the records related to them and, as a result of mediation through this office, SFU disclosed more records, withholding some information under s. 22. SFU then notified the applicant that it was changing its earlier decision about disclosure, as it had now decided that the remaining disputed records were not in its custody or under its control but instead under the control of SF Univentures (“SFUV”), an incorporated entity wholly owned by SFU. Credo and Solstice were satisfied with this decision and agreed that it resolved their requests for review.

[5] The applicant then requested a review of SFU’s new decision and the matter proceeded directly to an inquiry under Part 5 of FIPPA. This office invited representations from the applicant, SFU, appropriate persons and intervenors. The office received submissions from the applicant, SFU, Credo, Solstice and SFUV and, as intervenors, the University of British Columbia (“UBC”), the University of Victoria (“UVic”), the Canadian Association of University Teachers (“CAUT”) and the BC Freedom of Information and Privacy Association (“FIPA”).

---

<sup>1</sup> The facts set out in this Introduction are taken from the portfolio officer’s fact report and para. 2 of SFU’s initial submission.

## 2.0 ISSUE

[6] The only issue before me in this case is whether, for the purposes of ss. 3(1) and 4(1) of FIPPA, the records in dispute are in the custody or under the control of SFU.

## 3.0 DISCUSSION

### [7] 3.1 Factual Background

#### **SFU**

[8] SFU was incorporated as a university and is continued under s. 3(1) of the *University Act*. SFU's powers and functions are set out under the *University Act*, as follows:

#### **Power and capacity of a natural person**

46.1 Subject to this Act and for the purposes of exercising its powers and carrying out its duties and functions under this Act, a university has the power and capacity of a natural person of full capacity.

#### **Functions and duties of university**

47 A university must, so far as and to the full extent that its resources from time to time permit, do all of the following:

- (a) establish and maintain colleges, schools, institutes, faculties, departments, chairs and courses of instruction;
- (b) provide instruction in all branches of knowledge;
- (c) establish facilities for the pursuit of original research in all branches of knowledge;
- (d) establish fellowships, scholarships, exhibitions, bursaries, prizes, rewards and pecuniary and other aids to facilitate or encourage proficiency in the subjects taught in the university and original research in all branches of knowledge;
- (e) provide a program of continuing education in all academic and cultural fields throughout British Columbia;
- (f) generally, promote and carry on the work of a university in all its branches, through the cooperative effort of the board, senate and other constituent parts of the university.

[9] Section 48 of the *University Act* provides that the Minister of Advanced Education must not interfere in the exercise of powers conferred on a university with respect to the following:

- (a) the formulation and adoption of academic policies and standards;

- (b) the establishment of standards for admission and graduation;
- (c) the selection and appointment of staff.

[10] A university may acquire and hold property (s. 50), expropriate land (s. 51), execute legal documents (s. 56), invest money (s. 57) and borrow money with the minister's approval (s. 58). Universities are subject to the *Financial Administration Act* and the *Financial Information Act* and must provide the Province with statements of financial information, including a statement of their assets and liabilities.

### ***University/Industry Liaison Office ("UILO")***

[11] The purpose of SFU's UILO is set out in its mission statement:

... to facilitate the creation of new university-industry research and development partnerships and to commercialize the results of University-based research with a view to providing an economic return to the University, the Province of British Columbia, and Canada.<sup>2</sup>

[12] The Vice President of Research for SFU has overall responsibility for the UILO's operations. The UILO is supported by the Province, the Research Council of Canada and SFU.<sup>3</sup> The UILO provides a number of advisory and support services to SFU students and researchers and to industry researchers. The UILO:

- identifies and assesses university technologies with commercial potential
- provides intellectual property advice and protection to university researchers
- provides funding to develop or test inventions or research with commercial potential
- identifies industry partners and assists in negotiating commercial agreements between university researchers and industry
- assists researchers with creating new commercial ventures based on university technology.<sup>4</sup>

### ***SF Univentures ("SFUV")***

[13] SFUV was incorporated on May 11, 1989 under the name 365632 British Columbia Ltd. The name of the corporation was changed to SF Univentures on September 29, 1989.<sup>5</sup> SFUV is a corporation under the *Business Corporations*

---

<sup>2</sup> Para. 19, initial submission; paras. 2-3 and Exhibit "A", Volker affidavit.

<sup>3</sup> Para. 20, SFU initial submission.

<sup>4</sup> Para. 20, initial submission; para. 4 and Exhibit "B", Volker affidavit.

<sup>5</sup> Para 15, SFU initial submission; Exhibit "C", Volker affidavit.

Act and has the powers and capacity of a natural person as well as the additional powers provided under the *Business Corporations Act*.

[14] SFU's materials state that the UILO identifies opportunities for SFU to invest in spin-off companies. Where a decision is made to invest in a spin-off company, the investment may be made through SFUV.<sup>6</sup> SFUV thus facilitates SFU's investment in "companies that are exploiting the results of university and university-industry research for commercial purposes".<sup>7</sup> SFU's website contains an entry on SFUV in the UILO section, under "Related Programs and Facilities at SFU", which says the following:

SF Univentures Corporation is a private, for-profit company which is wholly owned by Simon Fraser University. SF Univentures was incorporated under the *Company Act of British Columbia* in 1989 to ensure that the maximum number of good Simon Fraser University research ideas are put into effective public use in the marketplace and generate financial returns to the University.

SF Univentures operates as an alternative technology transfer vehicle when the use of a corporate entity is deemed to be the most effective manner to achieve commercialization. Currently, the staff of the UILO, in conjunction with the Contracts Officer, Office of Research Services, deliver the services of SF Univentures including the day-to-day management of the Corporation. A Board of Directors, which includes representatives from industry and the University, brings the insight of the private sector to technology transfer activities, financing and operational plans.<sup>8</sup>

[15] SFU says it has not used SFUV to provide services related to the exploitation of technology under the SFU/SFUV agreement but has used SFUV only as a holding company.<sup>9</sup> SFU's financial statements include SFUV as a "related entity".<sup>10</sup>

[16] SFU is the sole shareholder of SFUV.<sup>11</sup> The President of SFUV is the Vice President of Research at SFU and the director of the UILO is an SFUV director.<sup>12</sup> All of SFUV's directors are SFU employees.<sup>13</sup> All of SFUV's activities and its day to day management are undertaken by staff of the UILO. SFUV's office is located at SFU within office space that the UILO occupies.

---

<sup>6</sup> Para. 9, Volker affidavit.

<sup>7</sup> Para. 8, Volker affidavit.

<sup>8</sup> <http://www.sfu.ca/uiilo/about/programs.html>; see copy attached to applicant's initial submission.

<sup>9</sup> Para. 23, SFU initial submission; para. 12, Volker affidavit.

<sup>10</sup> Para. 24, SFU initial submission; Exhibit "A", Trask affidavit;

<sup>11</sup> Para. 5, Volker affidavit.

<sup>12</sup> Paras. 17 and 18, SFU initial submission; Para. 3 and 7, Volker affidavit.

<sup>13</sup> Paras. 16, SFU initial submission; paras. 5-8, Volker affidavit.

[17] SFU contributes to SFUV's operating budget through "contributed surplus" and SFUV transfers to SFU any monies it receives as a result of its holdings through an offset against contributed surplus or as a dividend.<sup>14</sup> SFUV has its own bank account and the UILO's associate director provides financial administration services to SFUV by recording transactions, depositing and issuing cheques and contracting with any consulting professionals required for SFUV's operations.<sup>15</sup>

[18] Under a written agreement of April 1, 1999 (the "Agreement") which either party may terminate, SFU provides office space and administrative services to SFUV.<sup>16</sup> The Agreement opens with these statements:

A. The Corporation [SFUV] is a Canadian Controlled Private Corporation wholly owned by the University [SFU].

B. The University will from time to time utilize the Corporation to serve primarily as an investment holding company for equity positions with respect to the commercial exploitation of technology and research results arising out of work done by the faculty, staff and students of the University; and

C. The Corporation will conduct its affairs in the interests of the University, on the terms and conditions set out in this agreement.

[19] The remaining relevant portions of the Agreement may be summarized as follows:

- SFUV acquires, holds and manages on behalf of SFU equity interests in business ventures where equity is received by SFU in exchange for technology rights and other consideration
- SFU, under the auspices of SFUV, may provide services in relation to the commercial exploitation of technology (such as conducting market studies; negotiating licences; building prototypes; organizing further research and development; supervising the implementation of any exploitation plans)
- SFUV sets its own annual budget and is responsible for preparing its own financial statements
- SFU provides SFUV with support services and office facilities within SFU's premises and SFUV pays SFU a fee for those services and facilities
- SFUV agrees to respect SFU's policy manual
- Except as provided in the Agreement, SFUV is not an agent or partner of SFU and SFUV has no authority to act on behalf of SFU or make commitments binding on SFU.<sup>17</sup>

---

<sup>14</sup> Paras. 4-6, Trask affidavit.

<sup>15</sup> Para. 26, initial submission; paras. 3-8, Trask affidavit.

<sup>16</sup> Exhibit "E" and para. 10, Volker affidavit.

<sup>17</sup> Paras. 20-22, initial submission; para. 11, Volker affidavit.

[20] SFUV made no separate submission in this inquiry, but rather relied on and supported SFU's submissions.

### ***Credo***

[21] The "BC Company Summary" which SFU provided<sup>18</sup> shows that Credo was incorporated on November 7, 1996. Credo's submissions state that SFUV became a minority shareholder in Credo by means of a Licence Agreement dated November 13, 1996, between Credo, SFU and SFUV, and that SFUV currently holds "a 6.8%(approximate) common share equity in Credo."<sup>19</sup> It appears that SFUV became a shareholder in Credo in exchange for Credo receiving a transfer of technology from SFU.<sup>20</sup> Record 6, one of the disclosed records, shows that, in 1996, Credo had an agreement with SFU to occupy space in an SFU campus building.

### ***Solstice***

[22] Solstice is a significant shareholder in Credo, more than 25%, and its president and director is also the chairman and a director of Credo and a former Credo officer. Solstice has no relationship or interest in SFU or SFUV.<sup>21</sup>

### ***The Intervenors***

[23] As noted earlier, this office invited and received submissions from a number of intervenors, which I outline below as appropriate. UBC and UVic made a joint submission. They said each of them has an office with similar functions to SFU's UILO. They have also each created a corporation with similar functions to SFUV's which provides services to the private sector.<sup>22</sup>

[24] CAUT made submissions, describing itself as

... the national voice for universities and colleges academic staff, representing 48,000 faculty members, teachers, librarians, researchers and other academic professionals. CAUT is an outspoken defender of academic freedom and works actively in the public interest to improve the quality and accessibility of postsecondary education in Canada. CAUT is widely recognized for its expertise on matters related to research, intellectual property and academic freedom.<sup>23</sup>

---

<sup>18</sup> As Exhibit "F" to the Volker affidavit.

<sup>19</sup> Para. 9(c), Credo initial submission.

<sup>20</sup> Para. 5, CAUT submission.

<sup>21</sup> Pages 1 and 2, Solstice submission.

<sup>22</sup> Paras. 1-10, UBC/UVIC submission.

<sup>23</sup> Para. 2, CAUT submission.

[25] FIPA also provided submissions.

[26] **3.2 The Records in Dispute**—The portfolio officer’s fact report issued by this office describes the records in dispute as “financial statements, shareholder agreement, resolutions and waivers, and general financial documents of Credo Interactive Inc.” and “communications about SFUniventures’ matters”. SFU says that all of the records are related to SFUV’s interest in Credo,<sup>24</sup> and describes them as: records that Credo created that came into SFUV’s possession in SFUV’s capacity as a shareholder of Credo or into the hands of the UILO director, who is also an SFUV director; and internal records that SFUV created in its capacity as a shareholder of Credo. SFU provided brief open and *in camera* descriptions of the records in dispute and the reasons for their existence. SFU said that none of the records were provided by SFUV to SFU in its capacity as the shareholder of SFUV.<sup>25</sup>

[27] At least one UILO employee was also a director of Credo, as SFUV’s nominee. Credo states that record 15 was provided to this UILO employee in his capacity as a director of Credo.<sup>26</sup> The UILO employee forwarded the document to another UILO employee who, under the SFU/SFUV agreement, delivers administrative services to SFUV.<sup>27</sup>

[28] The records are in two files: a yellow folder named “Credo Interactive”; and a binder labelled “Life Forms”. The file labelled “Credo Interactive” contains only SFUV records, and in particular, records related to SFUV’s shareholding in Credo Interactive Inc. The binder labelled “Life Forms” contains both SFU and SFUV records relating to the Life Forms technology.<sup>28</sup> Although it was not fully explained in the submissions, it appears that the “Life Forms” technology was the subject of licences granted by SFU, including to Credo.

[29] **3.3 Does SFU Have Custody or Control Over the Records?**—Under ss. 3(1) and 4(1), the right of access to records under FIPPA is limited to those records which are in the custody or under the control of a public body. Section 3, which defines the scope of FIPPA, provides, in relevant part:

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, ...

[30] Section 4(1) of FIPPA incorporates the requirement for public body custody or control into the right of access to records:

---

<sup>24</sup> Para. 29, initial submission.

<sup>25</sup> Para. 75, SFU initial submission.

<sup>26</sup> Para. 23, Credo initial submission.

<sup>27</sup> Record 14.

<sup>28</sup> Paras. 11-14, Trask affidavit.



- 4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant

[31] As a result, in determining whether a record is subject to disclosure under FIPPA, a threshold question is whether it is in the custody or under the control of a public body.

[32] SFU is an “educational body” under FIPPA’s Schedule 1 definition of “local public body”, and each local public body in turn is a “public body” under Schedule 1 of FIPPA. The definition of “local government body” under FIPPA includes a corporation which is wholly-owned by any entity otherwise defined as a “local government body” under FIPPA. However, there is no corresponding provision bringing into the definition of “public body” a corporation which is wholly owned by an entity which is otherwise defined as an “educational body” or a “public body”.

[33] In Order 04-08<sup>29</sup>, the Commissioner considered the status of a corporation wholly-owned and controlled by the Province. After examining the definitions of “public body”, “local public body” and “local government body”, the Commissioner arrived at this conclusion:

[12] The effect of paragraph (n) of the definition of “local government body”, in combination with the definitions of “local public body” and “public body”, is to include in the definition of “public body” some, but not all, public body-owned or -created corporations. There is no comparable provision of this kind for corporations owned by the Province, such as 552.

[13] It is evident from the definition of “public body” in Schedule 1 of the Act, and the definitions of its components, that the Legislature chose not to designate, as a class of public bodies under the Act, corporations owned or controlled by the Province. With the exception of the limited applicability of paragraph (n) of the definition of “local government body”, the legislators have made Crown-owned or -controlled corporations public bodies under the Act through specific designation in Schedule 2.

[34] Similarly, a corporation owned by an “educational body” is not itself a “public body” unless it is designated under Schedule 2. As a result, even though SFUV is wholly-owned by SFU, it is not a public body under FIPPA because it has not been designated as such under Schedule 2.

[35] Although records in the custody or control of SFUV are not within the scope of FIPPA, the threshold question in this case which remains is whether the records at issue are within the custody or control of SFU, which is a public body. The joint submission of UBC and UVic argues that the records cannot be in the

---

<sup>29</sup> [2004] B.C.I.P.C.D. No. 8.

custody and control of both SFU and SFUV.<sup>30</sup> Referring to a preliminary decision made by the Information and Privacy Commissioner in another matter on November 19, 2002,<sup>31</sup> FIPA argues that it is possible for both SFU and SFUV to have custody or control of the disputed records.<sup>32</sup> Such a possibility was also recognized in Order 04-19.<sup>33</sup> I agree that it is possible for more than one entity, here both SFUV and SFU, to exercise control over records and, for the reasons given below, I find that SFU has control over the disputed records. Because of my finding on control, it is not necessary to consider the issue of custody.

[36] **3.4 The Meaning of “Control”**—In Order 04-19, Adjudicator Francis reviewed the appropriate approach to determining the issue of control, as canvassed in previous orders. She held that the meaning of control is informed by FIPPA as a whole. She noted that previous orders had set out a number of factors to be considered in addressing the question of control and went on to say:

[44] These factors are useful but they are not exhaustive. As the Commissioner stated in Order 02-29, para. 17:

... I agree with my predecessor, in Order No. 11-1994, that the following comments of Commissioner Linden (as he then was) in Ontario Order 120, [1989] O.I.P.C. No. 84, at p. 7 (Q.L.), are relevant in addition to the *Policy and Procedures Manual* factors mentioned in *Greater Vancouver*:

In my view, it is not possible to establish a precise definition of the words “custody” or “control” as they are used in the Act, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether “custody” or “control” has been established in the circumstances of a particular fact situation.

[45] In *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110, [1995] F.C.J. No 241 (C.A.), paras. 32-33, the court held that the broad meaning of “control” in the *Access to Information Act* (Canada) was not limited to *de jure* (legal) control:

The notion of control referred to in subsection 4(1) of the Access to Information Act (the Act) is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting, or “de jure” and “de facto” control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting

<sup>30</sup> Paras. 50 and 58, UBC/UVIC submission.

<sup>31</sup> [http://www.oipc.bc.ca/orders/other\\_decisions/14385prelimNov19.pdf](http://www.oipc.bc.ca/orders/other_decisions/14385prelimNov19.pdf).

<sup>32</sup> Para. 7, FIPA submission.

<sup>33</sup> [2004] B.C.I.P.C.D. No. 19.

the citizen's right of access only to those documents that the Government can dispose of or which are under the lasting or ultimate control of the Government.

It is, in my view, as much the duty of the courts to give subsection 4(1) of the Access to Information Act a liberal and purposive construction, without reading in limiting words not found in the Act or otherwise circumventing the intention of the legislature ... It is not in the power of this Court to cut down the broad meaning of the word "control" as there is nothing in the Act which indicates that the word should not be given its broad meaning. On the contrary, it was Parliament's intention to give the citizen a meaningful right of access under the Act to government information. ... [footnotes omitted]

[46] Control is to be given a liberal and purposive meaning that promotes the objectives of British Columbia's access and privacy legislation. The nature of requested records and all aspects of their generation and use must be assessed in relation to the public body's mandate and functions. Records that are created or acquired by or for a public body as part of its mandate and functions will be under the public body's control. That control need not be exclusive. For example, a preliminary ruling respecting Order 03-19,<sup>34</sup> concluded that both the College of Pharmacists of British Columbia and the Ministry of Health had control of records in PharmaNet. The duty to provide access to records under the Act is not defined by the willingness of the public body or its staff, contractors or agents. It also prevails over outsourcing of the public body's functions and contractual silence or wording that would negate rights or obligations under the Act.

[37] Several other orders have considered the issue of whether a public body has custody or control of requested records, for example, Order 02-29,<sup>35</sup> Order 02-30,<sup>36</sup> and Order F06-01.<sup>37</sup> I have applied here, without repeating them, the principles set out in those orders for determining the issue of control, recognizing that the factors for determining control as discussed in those orders are not exhaustive.

[38] In order to establish control, it is not necessary that the public body be at liberty to deal with records in any manner it sees fit. Even if a public body has control over a record, there may be restrictions on its disclosure, arising from the public body's agreement to maintain the confidentiality of a record, through the application of FIPPA, or both. Rather, a public body will have control over the records if it accesses them for its own use. In some cases, the ability to demand production of the records may be sufficient to establish control.

---

<sup>34</sup> [2003] B.C.I.P.C.D. No. 19.

<sup>35</sup> [2002] B.C.I.P.C.D. No. 29.

<sup>36</sup> [2002] B.C.I.P.C.D. No. 30.

<sup>37</sup> [2006] B.C.I.P.C.D. No. 2.

[39] In this case, SFU argued that the four factors relevant to control are as follows:

- (a) Do the records relate to the mandate of SFU?
- (b) Were the records created or received by an employee of SFU in the course of his or her duties?
- (c) Does SFU have contractual control over the records?
- (d) Does SFU have statutory control over the records?<sup>38</sup>

[40] I agree that these factors are relevant in this case. However, while statutory or contractual provisions which provide a public body with access to records are relevant, it is important to consider all aspects of the relationship between SFUV and SFU to determine whether SFU has control.

[41] **3.5 Do the Records Relate to the Mandate of SFU?**

***The parties' submissions***

[42] SFU argues that SFUV is not performing any of SFU's core functions and that the records do not relate to the education and research mandate of SFU under s. 47 of the *University Act*. SFU says that, in *Connell v. University of British Columbia*,<sup>39</sup> the court characterized the functions identified in s. 48 of the *University Act* as the core functions of a university, and that none of these relate to the records here in dispute.<sup>40</sup>

[43] FIPA asserts that the records in question relate to SFU's core research mandate by "exploiting university research in the marketplace and holding the University's interest in such ventures", with the resulting flow of revenue back to SFU assisting with fundraising.<sup>41</sup> CAUT also claims that the records relate to SFU's mandate.<sup>42</sup>

[44] SFU disagrees with FIPA's argument that the records relate to SFU's research mandate, saying the "commercial exploitation of research is not a necessary or integral function of university research" and the "investment and financial management of a university are not part of its key functions of education and research but rather are ancillary functions".<sup>43</sup>

---

<sup>38</sup> Para. 62, SFU initial submission.

<sup>39</sup> [1988] B.C.J. No. 13.

<sup>40</sup> Paras. 35-36 and 63, SFU initial submission.

<sup>41</sup> Para. 23, FIPA submission.

<sup>42</sup> Para. III 1-5, CAUT submission.

<sup>43</sup> Paras. 26-32, SFU reply submission.

## ***Findings***

[45] As noted above, SFU's website states that SFUV was created by SFU "to ensure that the maximum number of good Simon Fraser University research ideas are put into effective public use in the marketplace and generate financial returns to the University." SFUV is not a separate business entity, carrying out a commercial operation unrelated to the University's functions, which just happens to be owned by SFU. I do not accept that SFUV's activities are not related to SFU's mandate. SFU clearly has a mandate to undertake and support research activities. But for SFU's research activities, SFUV would not exist. It is thus "related to" SFU's mandated activities. Having said that, I agree with SFU that SFUV's activities are not "a necessary or integral function of university research" and are not at the core of a university's functions.

[46] As has been noted in previous orders, this factor receives less weight than others in determining control. As in Order 02-29,<sup>44</sup> it cannot be said that the records do not relate at all to the university's mandate and functions. This relationship would not, however, in itself, be sufficient to establish control.

[47] **3.6 Were the Records Created or Received by SFU Employees in the Course of Their Duties?**

### ***The parties' submissions***

[48] SFU states that the records were not created by SFU employees in the course of their employment duties with SFU, but were created or received by SFUV directors and by an SFU employee performing contract services to SFUV.<sup>45</sup> SFU argues that none of the records were provided to SFU in its capacity as the shareholder of SFUV.<sup>46</sup>

[49] Credo states that the records "do not involve matters, discussions, arrangements, and or agreements with a public body and were never provided to a public body" but rather involve matters and are private and confidential documents between:

- private companies, that is, Credo, Credo's directors, directors of SFUV, where those directors may also have held roles with SFU, and/or
- Credo shareholders, of which SFUV is one, having a minority position in Credo.<sup>47</sup>

---

<sup>44</sup> [2002] B.C.I.P.C.D. No. 29.

<sup>45</sup> Para. 72, SFU initial submission.

<sup>46</sup> Para. 75, SFU initial submission.

<sup>47</sup> Para. 15, Credo initial submission.

[50] Credo states that the records were not created or received by an officer or employee of the public body. Credo says that the records were, subject to certain exceptions, created, maintained and paid for by Credo. Those exceptions involve documents which were created by SFU employees, but, Credo asserts, in their capacity as SFUV directors or as agents of SFUV. Credo states that the records do not involve and were not provided to SFU (either voluntarily or under a statutory or employment requirement) but rather were provided to Credo's shareholders or directors and SFU has no right to possession of the records, nor any authority to regulate their use or dispose of them.<sup>48</sup>

[51] The applicant's submissions on control centre on his argument that SFUV is part of SFU and not a separate body. In this regard, the applicant discusses the relationship between the roles of certain individuals as both employees of SFU and officers or directors of SFUV. The applicant notes that as SFU's Vice President, Research, Mario Pinto is responsible for the commercialization of SFU's research through the UILO, which he oversees; he is also the president of SFUV. The applicant states:

As part of his job as Vice President Research, Mr. Pinto oversees UILO and serves as President of SFUniventures. Both of these functions are his responsibilities as an officer of a public body, from which he receives his only compensation and which is subject to the Act.<sup>49</sup>

[52] The applicant also states that Mr. Pinto's function as president of SFUV is "a derivative function of his capacity as an official of the University as Vice President, Research."<sup>50</sup>

[53] In its reply submissions, SFU states that this assertion:

...ignores the legal status and legal obligations of Dr. Pinto as President of SFUV and the duties and obligations imposed on him under the BC Business Corporation Act.... As such, Dr. Pinto's position as SFUV President is not a derivative function. It is in fact independent and autonomous of his role as an SFU official.<sup>51</sup>

[54] In his reply submission, the applicant argues against the suggestion that SFU employees only deal with the documents on the basis of a "work-for-hire job shop". He states that work-for-hire service providers "do not typically share directors with, engage in the management of, or have equity interest in the hiring firm and ownership rights to the work itself."<sup>52</sup>

---

<sup>48</sup> Para. 17-24 and 36, Credo initial submission.

<sup>49</sup> Page 2, applicant's initial submission.

<sup>50</sup> Page 3, applicant's reply submission.

<sup>51</sup> Para. 4, SFU reply submission.

<sup>52</sup> Page 2, applicant's reply submission.

---

## **Findings**

[55] I find that the records were created or received by SFU employees in the course of their employment. In some cases, the records were provided directly to SFU by Credo, or to SFU employees in their capacity as SFU employees. In other cases, SFU employees acted in their capacity as SFU employees when dealing with the records. Moreover, even when SFU employees were acting as SFUV directors, I find that they were still acting in the course of their employment with SFU.

[56] As outlined more fully below, it is clear that until October 2005, a year after the information request was received, the parties involved conducted themselves in their dealings as if there was no substantive distinction between SFU and SFUV. As noted, SFU originally took the position that all of the requested records were under its control and wrote to Credo expressing its intention to disclose the requested documents. Credo replied in a letter which read in part:

Whether the information is explicitly or implicitly confidential or is impliedly confidential *it was provided to SFU, via SFU's subsidiary SF Univentures Corporation ("SFUV") and or is in the possession of SFU as a shareholder of Credo* and such information is subject to the terms of the Shareholders Agreement dated March 12, 1997 (Document No. 9), between shareholders of Credo where SFU, via SFUV, is a signatory to this agreement [emphasis added].<sup>53</sup>

[57] It thus appears that Credo fully intended to provide the documents to SFU, albeit by way of SFUV. This passage also demonstrates that Credo considered SFU to be shareholder of SFUV. This is relevant insofar as it confirms that Credo intended to, and did, provide SFU with copies of those documents which it provided to its shareholders.

[58] At least some of the records themselves, such as Record 13, contemplate that they will be received by SFU. This is apparent from the definition of "Creditor Shareholder" in Records 12 and 13 and Schedule "A" to each of those documents.

[59] It also appears that in some of their dealings with the documents, SFU employees were acting directly in their capacity as SFU employees or as both SFU and SFUV employees. Record 36 is signed, on behalf of SFUV, by the current Vice President Research of SFU, who was also the President of SFUV. Below his printed name, his "Title" is stated as "VP Research SFU". Below that, it states "President of SFUV".

---

<sup>53</sup> Correspondence from Sang Mah, President and CEO of Credo, to Jan Forsyth, August 4, 2004.

[60] Record 37 consists of two emails. One is between an SFU employee who reviewed Record 36 and the SFU employee who provides administrative services to SFUV. The employee who reviewed Record 36 is described elsewhere as an “SFU employee with a law degree” who “provides advice to SFUV on various matters.”<sup>54</sup>

[61] Record 14 is an email exchange between the Director of the UILO, who was also a director of SFUV and of Credo, and the SFU employee who provided administrative support to SFUV. The UILO Director had provided this employee with Record 15 and asked her to confirm some information relating to SFUV and SFU. She replied that she was unable to do so, but asked the Director to let her know if he felt the issue was “important for SFU and/or SF Univentures”. This indicates that both the UILO/SFUV director and the SFU employee were acting on behalf of both SFU and SFUV in dealing with the records.

[62] I also note that some of the records which were provided to UILO employees were addressed to those employees in their capacity as UILO employees, and not as SFUV or Credo directors. For example, Record 27 (which was attached to Record 28 and perhaps 29) and Record 31 (which was attached to Record 32) were sent, with a covering letter to the director of the UILO, who was also a director of Credo and a director of SFUV. In both cases, the letters were addressed to him as Director of the UILO. These letters refer to the fact that the attached material is confidential and “subject to the restrictions set out in the Shareholders Agreement dated March 12, 1997”. The UILO Director does not appear to have personally been a shareholder of Credo. As a result, Credo shareholder’s documents were sent directly to the UILO. Similarly, Record 20 (which was attached to Records 21 and 22) is stamped as having been received by the UILO. Record 21 has the additional notation “UILO copy” on it.

[63] Credo explains Records 20, 27 and 31 as follows:

It is Credo’s position that these documents were sent to the UILO, with the understanding that the UILO was acting as the agent for SFUV, for Credo understood matters related to SFUV should be directed to the UILO since they were responsible for managing the day to day matters related to SFUV. This date stamp should not be interpreted as implying the noted records are in the custody/control of SFU.<sup>55</sup>

[64] While this may explain why the records in question were sent to the UILO office and stamped there, it does not explain why the letters, which refer to the confidentiality provisions of the shareholders agreement, were not addressed to the SFU employee in his capacity as a director of SFUV.

---

<sup>54</sup> Para. 3, Trask affidavit.

<sup>55</sup> Para. 41, Credo initial submission.



[65] As noted, the applicant suggests that it is artificial to distinguish between actions taken by SFU employees in their capacity as SFU employees and in their capacity as directors or officers of SFUV. Unfortunately, SFU did not fully explain the manner in which SFUV's directors and officers are appointed and, as noted above, SFUV made no submissions separate from SFU. SFU did state that:

The President of SFUV is the Vice-President of Research at SFU. The current President of SFUV is Dr. Mario Pinto. Prior to Dr. Pinto assuming the role of President, Dr. Bruce Clayman, the former Vice-President of Research at SFU, was the President of SFUV.<sup>56</sup>

[66] While it is not entirely clear, it appears that the applicant is correct in suggesting that the presidency of SFUV is a "derivative function" of the position of Vice-President of Research at SFU. While Dr. Pinto may, as President of SFUV, have obligations under the *Business Corporations Act*, he does appear to hold his position as President by virtue of his position at SFU. Given that all of SFUV's directors are SFU employees and there is no suggestion that they have been selected to serve on the board of SFUV through some process separate from their employment with SFU, it appears that all of the positions as SFUV directors are derivative of those persons' employment with SFU. This, combined with the fact, outlined below, that SFUV is merely a vehicle through which SFU acts, suggests that when receiving or creating the records as SFUV directors, those employees were acting in the course of their duties as SFU employees.

[67] In some cases, an employee of a public body may, as part of his or her duties as a public body employee, provide services to a third party pursuant to an arm's-length commercial agreement between the third party and the public body for the provision of those services. In such a case, it would not be appropriate, for the purposes of determining control, to find that such an employee's dealings with records of the third party were in the course of his or her employment with the public body.

[68] Some of the arguments made by SFU, and those made in the joint submission of UBC/UVic, proceed on the basis that SFU's only relationship to the records is as a service provider to SFUV. The joint UBC/UVic submission argues that, when public bodies outsource the management of personal information under contract, public bodies have obligations to ensure that they maintain custody or control over the records and must ensure that the contractors provide protection for that personal information. When public bodies are providing services to the private sector, however, UBC and UVic argue that the records are not in the custody or under the control of the public body, unless the parties have

---

<sup>56</sup> Para. 17, SFU initial submission.

agreed by contract that the public body has control or a statute imposes control.<sup>57</sup> In their view:

There is no democracy interest invoked where the public body is acting, outside of its statutory mandate to provide services to the public, as a service provider to a private company. Access to the records will not further the transparency principle of government as the public body is not engaged in activities that are directly related to the mandate of the public body.<sup>58</sup>

[69] However, this is not a case where SFU is providing administrative, clerical, accounting or other services to an unrelated entity. As set out more fully below, SFUV has been used solely as a vehicle to carry out SFU's objectives and SFU exercises complete control over SFUV's operations. In these circumstances, I find that when SFUV directors received or created the records, they were acting in the course of their employment with SFU.

[70] In my view, it is disingenuous for Credo to characterize the relationship between the SFUV directorships and SFU employment as happenstance, by suggesting that SFUV directors "happened to" also be SFU employees.<sup>59</sup> It is not a coincidence, I am satisfied on the material before me, that the SFUV directors are SFU employees. It is also incorrect to say, as Credo does, that the records "have nothing to do with SFU."<sup>60</sup> Much of the discussion in the documents relates to matters which directly affected SFU's interests.

[71] For all of the reasons set out above, I find that the records were created or received by SFU employees.

[72] **3.7 Does SFU have a right of access to the records?**

### ***The parties' submissions***

[73] As noted, the applicant's arguments turn on his assertion that SFUV is not a separate entity from SFU:

... In fact, apart from its merely legal entity, SFUV has never had, nor could it have, any existence independent of the public body SFU. SFUV was founded in 1989 as a wholly-owned, for-profit subsidiary of SFU, for the sole function of promotion and commercialization of academic research – academic research conducted and generated at largely taxpayer expense by the public body SFU. Thus activities and transactions of SFU ventures entail the development and disposition of public goods created under the

<sup>57</sup> Paras. 16 and 17, UBC/UVIC submission.

<sup>58</sup> Para. 18, UBC/UVIC submission.

<sup>59</sup> Para. 17, Credo submission.

<sup>60</sup> Para 20 and 21, Credo submission.

auspices of SFU. As well, SFUniventures is “empowered by the University to enter into business contracts, conduct market analyses, prepare business plans, and administer commercial contacts and licences.” Thus, it derives its authority to conduct its private business from the public body that owns it, and, hence, not just from its private charter of incorporation but also from the provincial statutory authority of the public body. [citation omitted]<sup>61</sup>

[74] The applicant relies on the fact that SFUV has no staff or location independent of SFU. Mr Pinto runs SFUV out of his office on the SFU campus and SFU staff at the UILO—housed in the same building as SFUV and also under Mr Pinto’s administration—undertake all of SFUV’s activities, its day-to-day management and deliver its services:<sup>62</sup>

In sum, given the decidedly dependent, indeed symbiotic, relationship SFUniventures has with SFU, it appears to hold that if SFU does not have custody or control of the records in dispute neither does SFUniventures. Likewise to the contrary, if SFUniventures has control of the records in dispute, so too does SFU.<sup>63</sup>

[75] SFU states that the SFU/SFUV agreement does not provide SFU with any rights to access and inspect the records in dispute; the records in this case are thus not within the contractual control of SFU, either through its ownership of SFUV or through the agreement.<sup>64</sup>

[76] SFU notes that under s. 185 of the *Business Corporations Act*, SFU is entitled as the shareholder of SFUV to receive copies of SFUV’s financial statements and any auditor’s reports on the statements. However, SFU does not, it argues, have a general statutory right to access all records in possession of SFUV nor does SFU have a right under the *University Act*, the *Financial Administration Act* or the *Financial Information Act* to access records, other than financial statements, held by a corporation owned in whole or in part by SFU.<sup>65</sup>

[77] Credo states that SFU has no right of access to the records. Credo relies on the confidentiality provisions of the shareholders agreement and the “fiduciary confidentiality that exists between directors of private companies in supplying and discussing the information contained” in the records.<sup>66</sup> Credo notes that SFUV entered into a shareholders agreement with the other shareholders of Credo in 1997 which set out how the shareholders “would conduct themselves” regarding Credo matters. Credo cited some sections from the shareholders

---

<sup>61</sup> Page 4, applicant’s initial submission.

<sup>62</sup> The applicant referred to the UILO’s website on this point.

<sup>63</sup> Pages 4-5, initial submission.

<sup>64</sup> Paras. 73-78, initial submission. Some of SFU’s argument on this point was *in camera*. SFU also referred to Ontario orders that it considers support its position.

<sup>65</sup> Paras. 79-83, SFU initial submission.

<sup>66</sup> Para. 8(b), Credo submission.

agreement,<sup>67</sup> among them a provision stating that shareholders may not communicate “any trade secret or other secret or confidential matter” of Credo without the written consent of the other shareholders.

[78] FIPA argues that, as the sole shareholder of SFUV, SFU “has the power to ensure its subsidiary is accountable and discloses to that shareholder any document it wishes.”<sup>68</sup> FIPA notes that under company law, company directors have “a fiduciary duty to satisfy themselves of the prudence of all transactions” and thus require access to relevant documents; as sole shareholder of SFUV, SFU has the ability to cause SFUV to make any legal decision SFU wants, including the compulsion of documents.<sup>69</sup>

[79] FIPA also states that SFUV is SFU’s agent, conducting certain aspects of SFU’s business.<sup>70</sup> FIPA argues that the law of agency provides that an agent serves the principal and owes a duty of full disclosure to the principal”. FIPA notes that the “brief operating agreement” under which SFUV operates is not arm’s-length and SFU controls both parties and thus also the contract.<sup>71</sup>

[80] In response, SFU argues that SFUV is not an agent of SFU, and the SFU/SFUV Agreement does not grant SFUV any power to affect the legal relationships of SFU with the outside world, and in particular, with corporations that SFUV may invest in on behalf of SFU.<sup>72</sup>

[81] CAUT argues that SFU has the right of access to the records and that to say otherwise because of s. 185 of the *Business Corporation Act* is to look at only one part of that Act without taking into account the fact that SFU is the sole shareholder of SFUV. CAUT asks, if SFU does not have the right of access to the records, who has the right to supervise the activities of SFUV? CAUT notes that SFU has the right to elect SFUV directors and to replace them.<sup>73</sup>

### **Findings**

[82] I agree with SFU that there is no particular contractual or statutory provision which provides SFU with access or control over the records. However, in order to give effect to FIPPA’s purposes, it is necessary to consider whether, in the specific circumstances of this case, SFU does in fact have control over the records in question, through its control over SFUV. Given the relationship between SFU and SFUV, it is necessary to consider whether it is appropriate to

---

<sup>67</sup> Para. 9(f), Credo submission.

<sup>68</sup> Para. 15, FIPA submission.

<sup>69</sup> Paras. 23-26, FIPA submission.

<sup>70</sup> Paras. 16, FIPA submission.

<sup>71</sup> Para. 23, FIPA submission.

<sup>72</sup> Para. 41, SFU reply submission.

<sup>73</sup> Para. V 4, CAUT submission.

ignore the separate existence of the public body's subsidiary for the purposes of determining control under FIPPA.

[83] Commissioner Loukidelis referred to this possibility in Order 02-29.<sup>74</sup> The Commissioner first noted that, if a public body's subsidiary had been incorporated for the purposes of avoiding the public body's obligations under FIPPA, it might be appropriate to ignore that separate existence and treat the public body and the subsidiary as a single entity. He went on to say:

There may even be cases in which a public body's subsidiary has been incorporated for legitimate business reasons, but is so completely under the public body's domination that its separate corporate existence should be ignored for the Act's purposes. I should be clear that only in the clearest of cases will it be appropriate even to consider whether a subsidiary's separate corporate existence can be ignored on either of the grounds just mentioned.<sup>75</sup>

[84] If it is clear that SFUV has no real independent existence or autonomy, its separate corporate existence may be ignored for the purposes of determining control under FIPPA.

[85] The factual circumstances in this regard are very different from those in Orders 02-29 and 02-30. In Order 02-29, Commissioner Loukidelis held that the Workers' Compensation Board (the "WCB") should not be held to have custody or control over documents relating to activities of the Industrial Musculoskeletal Injury Reduction Program Society (the "Society"). The Society was a "three way initiative" between the Council of Forests Industries ("COFI"), the Industrial Wood and Allied Workers' Union (the "IWA") and the WCB. The WCB provided all of the funding of the Society, and had a contractual right of access to some of the Society's records. According to an MOU between the participants, the board of directors of the Society was to govern "independently from COFI, IWA and the WCB". The members of the Society were COFI and the IWA, but not the WCB. COFI and the IWA each had two directors on the Society's board, while the WCB was allowed only a non-voting advisory representative. The president and vice-president of the society were appointed by COFI and the IWA on a rotating basis.<sup>76</sup>

[86] In contrast, SFUV is the only shareholder of SFUV. SFUV operates only as a holding company for SFU. All of its directors are SFU employees. SFUV has no location or staff independent of SFU. There is no indication that SFUV is governed in any way other than under the direction of SFU, and in order to promote SFU's interests.

---

<sup>74</sup> [2002] B.C.I.P.C.D. No. 29.

<sup>75</sup> At para. 68.

<sup>76</sup> See paras. 20-23, 25 and 55.

[87] In Order 02-30,<sup>77</sup> Commissioner Loukidelis rejected the applicant's argument that the University of Victoria Foundation (the "Foundation") should be treated as not having a separate existence from the University of Victoria or from the Ministry of Finance. In some respects, this case is similar to the factual situation considered in that case. As here, the Foundation records were physically located at UVic, and UVic provided support services to the Foundation under contract. In this case and in Order 02-30, the two entities were governed by different statutory regimes.

[88] However, I find that there are significant differences between Order 02-30 and this case. In the circumstances considered in Order 02-30, UVic did not own the Foundation.<sup>78</sup> The Foundation was a statutorily continued entity which was governed by a Board of between 8 and 12 members. The University President and Bursar sat on the Board. The University was entitled to appoint two members to the Foundation's Board, as was the Minister of Advanced Education. These members then elected between two and six other members. The University Secretary deposed that 3 of the 12 Board members were UVic employees.<sup>79</sup> In contrast, the entirety of SFUV's board is under SFU's control, and there is no indication that the Board acts with any objective other than promoting the purposes of SFU.

[89] As noted above, SFU's website describes SFUV "an alternative technology transfer vehicle when the use of a corporate entity is deemed to be the most effective manner to achieve commercialization." I am of the view that SFUV is, in a very real sense, nothing more than an instrument through which SFU acts. It is under SFU's domination and control in a manner very different from the circumstances of the entities considered in Orders 02-30 and 02-29.

[90] The SFU/SFUV agreement states that SFUV is not an agent of the University "[e]xcept as contemplated under this Agreement." The same Agreement states that SFUV "will acquire, hold and manage *on behalf of* the University its equity interests in business ventures where equity is received in exchange for Technology rights and other contributions" (emphasis added). The Agreement also lists "[o]ther services which the University may conduct *under the auspices of*" SFUV (emphasis added).<sup>80</sup>

[91] The SFU/SFUV agreement thus specifically contemplates SFUV acting on behalf of SFU, and SFU acting under the auspices of SFUV, when it comes to matters such as SFUV's interest in Credo. Whether or not this amounts to an agency relationship in law, it supports my finding that SFUV is simply a vehicle through which SFU acts. In addition, the course of dealings between Credo, SFUV and SFU, as described in the records, demonstrates that the parties

---

<sup>77</sup> [2002] B.C.I.P.C.D. No. 30.

<sup>78</sup> At para. 27.

<sup>79</sup> At para. 12.

<sup>80</sup> Exhibit "E", Volker affidavit (emphasis added).

treated SFU and SFUV as if they were interchangeable, recognizing that SFUV was simply one tool which SFU used in carrying out its intentions.<sup>81</sup>

[92] Credo put great emphasis on the fact that the records, or many of them, were confidential documents, and that under the shareholders agreement, SFUV was required not to disclose them, presumably even to SFU. However, given that several of the documents contemplate SFU as a shareholder, and given Credo's statement that it had provided the documents to SFU by way of SFUV, this argument is not persuasive. That being said, this does not mean that the confidential nature or other features of the records' contents will not affect whether they are ultimately exempt from disclosure under FIPPA.

[93] I agree with SFU that the mere fact that it has an exclusive ownership interest in SFUV is not sufficient to demonstrate that SFUV's separate existence should be ignored for the purposes of determining control under FIPPA. A finding that ownership is sufficient would render meaningless the different treatment under FIPPA of corporations owned by local government bodies and those owned by entities otherwise defined as public bodies. However, in this case, a number of factors combine to demonstrate that, in this case, SFU and SFUV should be treated as one entity. It is obvious from the structure and operation of SFUV that it is wholly within SFU's domination. As a result, for the reasons set out above, I find that this is one of those clear cases where records under the control of SFUV should be treated as being under the control of SFU.

[94] **3.8 Are the Records Outside FIPPA's Scope Under s. 3(1)(g) of the Act?**—Credo argued that the records are also excluded from FIPPA's scope by s. 3(1)(g), which states that FIPPA does not apply to "material placed in the archives of a public body by or for a person or agency other than a public body."<sup>82</sup>

[95] In its reply submission, SFU states that the records have not been placed in SFU's archives but instead are located in the premises occupied by the UILO at SFU.<sup>83</sup> Given that the records are not located in SFU's archives, I find that s. 3(1)(g) does not apply.

#### **4.0 CONCLUSION**

[96] For the reasons given above, I find that SFU has control over the records at issue for the purposes of ss. 3(1) and 4(1) of FIPPA. Under s. 58 of FIPPA, I require SFU to discharge its obligations as a public body to the applicant and also to third parties as regards their potential s. 21 interests. Those obligations are outlined below.

---

<sup>81</sup> For example, Records 37 and 38 both contemplate the possibility that shares relating to SFUV's interest may be issued instead to SFU.

<sup>82</sup> Credo submission, para. 39.

<sup>83</sup> SFU reply submission.

[97] SFU initially gave notice under s. 24 of its decision to grant access, subject to the exercise of third-party rights of review. Credo and Solstice exercised those rights, on the basis of s. 21. When the reviews were in mediation, SFU disclosed more records with the consent of Credo and Solstice and decided that the remaining records were not in its custody or under its control. Credo and Solstice agreed that this decision by SFU made an inquiry respecting s. 21 unnecessary. This order has now reversed SFU's decision on control of the records.

[98] The applicant need not now re-initiate his access request. It was never withdrawn. Nor were the requests for review respecting s. 21 withdrawn, except that an inquiry was unnecessary so long as SFU's decision that it did not have custody or control of the records stood.

[99] As I see it, this order returns the matter to the situation prevailing when SFU gave notice under s. 24 of its decision to grant access subject to third-party review rights. It is thus open to Credo and Solstice to elect to continue with the reviews they requested respecting s. 21. Consistent with the timeframe in s. 24(3) that would normally apply, Credo and Solstice will each have 20 business days from the date of delivery of this order to them to notify this office of their election to continue with their requested reviews respecting the applicability of s. 21. If either Credo or Solstice elects within that time to pursue the review respecting s. 21, the matter will go forward from there under Part 5 of FIPPA. If neither makes that election, then SFU will be at liberty to implement its decision to grant access.

January 4, 2008

**ORIGINAL SIGNED BY**

---

Catherine Boies Parker  
Adjudicator

OIPC File: F05-26821