

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Thompson Rivers University v. British Columbia  
(Information and Privacy Commissioner),  
2023 BCSC 1933*

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Docket: S229630  
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

And in the Matter of an Order of a Delegate of the Information and Privacy  
Commissioner of British Columbia, dated October 26, 2022, made under the  
*Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165

Between:

**Thompson Rivers University**

Petitioner

And

**The Information and Privacy Commissioner of British Columbia**

Respondent

In Chambers

Before: The Honourable Mr. Justice Gomery

On judicial review from: An order of a Delegate of the Information and Privacy  
Commissioner of British Columbia, dated October 26, 2022 (*Thompson Rivers  
University*, 2022 BCIPC 55, Order F22-48).

## Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.  
October 16-17, 2023

Place and Date of Judgment:

Vancouver, B.C.  
November 6, 2023

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## **Overview**

[1] This case arises against the backdrop of a pointed academic dispute among faculty members in the business school of Thompson Rivers University (“TRU”). They are Dr. Pyne and Dr. Tsigaris. Their dispute concerns the frequency with which academic papers are published in journals characterized as “predatory”. At the risk of oversimplification, Dr. Pyne thinks it is a problem. Dr. Tsigaris begs to differ. In collaboration with a colleague in Japan, Dr. da Silva, Dr. Tsigaris has authored 23 published papers since 2017, many of which challenge Dr. Pyne’s thesis and his research. Dr. Tsigaris has corresponded with Dr. da Silva through an email domain maintained by TRU.

[2] Like other post-secondary institutions in British Columbia, TRU is a public body for the purpose of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c.165 [*FIPPA*]. *FIPPA* gives the public a right of access to records in the custody or under the control of a public body, subject to certain exceptions; s. 3(1).

[3] A member of the public applied to TRU for access to all email correspondence between Dr. Tsigaris’ email address and Dr. da Silva’s email address. Dr. Tsigaris objected to providing the correspondence. TRU supported him in the objection. As contemplated by *FIPPA*, the request was eventually referred to a delegate of the Information and Privacy Commissioner for adjudication. The adjudicator issued a written decision on October 26, 2022. His decision is indexed at 2022 BCIPC 55.

[4] The adjudicator had to address two issues. The first was whether the email correspondence, described as the requested records, were in the custody or under the control of TRU. He held that they were, to the extent that they were still in existence.

[5] The second issue involved an exception to the application of *FIPPA* set out in s. 3(1)(e) of the statute. The exception was for “research information” of a person teaching or carrying out research at a post-secondary institution. The statutory

language has since been modified. Section 3(3)(i) now refers to “research materials” rather than “research information”; *Freedom of Information and Protection of Privacy Amendment Act*, S.B.C. 2021, c. 39, s. 2. Nothing turns on the amendment.

[6] The adjudicator held that the onus of proof lay on TRU to establish that all of the email correspondence between Dr. Tsigaris and Dr. da Silva constituted research information within the contemplation of the statute. TRU relied on an affidavit affirmed by Dr. Tsigaris in which he asserted that the records at issue relate to academic research. The adjudicator doubted the accuracy of the affidavit “with respect to each extant record” (at para. 52). He concluded that “TRU has failed to demonstrate that each of the requested records constitutes the research information of its faculty member” (at para. 55) and ordered TRU to respond to the request under Part 2 of *FIPPA*.

[7] The effect of the adjudicator’s order is that the records must be individually reviewed to ascertain whether any of the exceptions set out in ss. 12 to 22.1 of *FIPPA* prevent their disclosure to the applicant. Those exceptions do not include the “research information” exclusion in s. 3.

[8] TRU seeks judicial review of the adjudicator’s decision. It submits that the decision is unreasonable on both the issues addressed. Fundamentally, it maintains that the decision impinges upon the academic freedom of Dr. Tsigaris to pursue his research without outside interference from the university or anyone else.

[9] At the hearing of the petition, I gave counsel for the respondent (“OIPC”) leave to address the merits as contemplated in *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at paras. 68-69. In careful and helpful submissions, counsel explained and supported the adjudicator’s decision.

[10] For the reasons that follow, I am persuaded that the decision should be set aside and remitted to the adjudicator for further consideration.

[11] In my view, the adjudicator's disposition of the first issue was reasonable. It was open to the adjudicator to conclude the email correspondence in question was within TRU's custody and control.

[12] Addressing the second issue, while it was open to the adjudicator to conclude that the burden of proof lay on TRU to establish that the records at issue constituted research information, the adjudicator's order is unreasonable in the particular circumstances of this case because it is manifestly overbroad. Reading the decision as a whole, it is clear that at least some of the email correspondence between Dr. Tsigaris and Dr. da Silva qualifies for the research information exception. The adjudicator is not persuaded that all of it qualifies. But his order applies to all the correspondence, and will result in the disclosure of research information to which *FIPPA* does not apply.

[13] The adjudicator was placed in a difficult position by TRU's insistence, in its submissions to him, on an untenable position that the applicant's submission should be given no weight because it was unsworn. Nevertheless, the objectives of the access to information regime established by *FIPPA* are not secured by requiring the production and disclosure of material in respect of which the statute does not apply.

### **History of the application**

[14] TRU received and addressed the application for access to the records through a privacy and access officer. She received and acknowledged the application in December 2019. In January 2020, she advised the applicant that the records were outside the scope of *FIPPA* pursuant to s. 3(1)(e) because they related to research information of a faculty member. In early February, she advised them of their right to have her decision reviewed by OIPC. The applicant promptly applied for a review.

[15] In April 2022, OIPC informed the applicant and TRU that the matter would be referred for adjudication and established a schedule for written submissions, first from TRU, then from the applicant, and then in reply from TRU. By this time, the first

privacy officer had left TRU. On June 10, 2022, her successor submitted TRU's submission.

[16] In its submission, TRU advised that some of the email records had been purged from Dr. Tsigaris' email account at a time when he was unaware that the request for access had been referred to OIPC, and a subset of disputed records had been recovered from his email archive. TRU advised that it had obtained permission from Dr. Tsigaris to review the disputed records "for the purpose of confirming that section 3(3)(i) applies to them". It asserted that "the records are considered to be the property of Dr. Tsigaris". It provided affidavits made by Dr. Tsigaris and an assistant in the office of TRU's counsel and advanced legal and factual arguments based on those affidavits.

[17] In his affidavit, Dr. Tsigaris stated:

10. Given the nature of my relationship with Dr. Teixeira da Silva, my communications with him contained or related to developing research materials and research information. There are a small number of these communications that were entirely personal in nature but they do not relate to my employment with TRU or TRU programs or activities.'

11. Communications between myself and Dr. Teixeira da Silva were concerned with and directed to the development of research materials or related working papers, or discussion related to ongoing research on which we were collaborating.

12. Our emails contained numerous research discussion exchanges, thoughts and counter-thoughts, critical assessments of other research, ideas, future phases of the research, methodologies, documents, data, numerous versions of the published papers due to revisions, and other relevant material during, or in relation with, the research we were examining.

[Emphasis added.]

[18] On July 4, 2022, the applicant provided a written submission in opposition to TRU. The adjudicator summarizes the applicant's position as follows:

[8] The applicant believes that someone in the department leaked confidential information about departmental meetings to the foreign researcher. The applicant is not seeking access to research materials, but rather correspondence relating to professional activism.

[Emphasis added.]

[19] The applicant's submission included the following factual assertions:

17. Dr. Tsigaris and Silva have engaged in extensive activities regarding the research and public statements of a rival TRU Economics professor, Dr. Derek Pyne.

18. Dr. Tsigaris and Silva have been heavily invested in the broad topic of "predatory publishing", after Dr. Pyne published a "whistleblower" article about predatory publishing practices at the TRU Bob Gaglardi School of Business and Economics, where Dr. Tsigaris is employed.

19. Dr. Tsigaris and Silva have collaborated on numerous formal complaints to TRU about Dr. Pyne's professional work and behaviour.

20. In a coordinated manner – sometimes referring to emails the other wrote – Dr. Tsigaris and Silva have contacted numerous journalists, institutions and scholars about issues pertaining to Dr. Pyne, TRU and/or predatory publishing.

...

22. In an October 10, 2017 email to Dr. Pyne, Silva informed Dr. Pyne that internal TRU communications had been "leaked" to him.

23. In an October 12, 2017 email to Dr. Pyne (also carbon copied to four TRU officials), Silva wrote, "I am aware that there is a departmental meeting to discuss this issue today (Friday, October 13<sup>th</sup>, 2017)." Silva resides in Southwestern Japan and is not affiliated with or employed by any university or educational institution. Ordinarily, such a person should not be privy to sensitive internal information from a Kamloops-based university.

24. While theoretically, numerous people at TRU could have leaked this information to Silva, it is likely that Dr. Tsigaris supplied Silva with information about TRU institutional issues over email. To the Applicant's knowledge, no TRU faculty member other than Dr. Tsigaris has a meaningful relationship with Silva.

[Emphasis added.]

[20] On July 18, 2022, TRU submitted its reply submission. It stated:

**Characterization of the Responsive Materials** (Paras 16-24 of the Response)

26. At paragraphs 16 to 24 of the Response the Applicant makes a number of speculative assertions about the nature and character of the Responsive Records. Those statements are not supported by any sworn evidence or statements nor is their relevance to these proceedings fully explained.

27. To the extent that those statements are intended to challenge the proposition that the communications between Dr. Tsigaris and Dr. Teixeira da Silva's were in the nature of research, they should be disregarded.

28. Dr. Tsigaris is familiar with the Responsive Records, and has provided a sworn statement about the purpose and content of these records. His

sworn evidence must be accepted over the unsworn speculative statements and unfounded assertions about the nature of these materials by the Applicant.

[Emphasis added.]

[21] On August 12, 2022, the adjudicator wrote to Dr. Tsigaris. He declared that, having reviewed and deliberated on the submissions of all parties, he was unable to determine either issue without having access to the records. He ordered Dr. Tsigaris to provide the records for his review.

[22] On August 26, 2022, counsel retained jointly by TRU and Dr. Tsigaris responded to the order. Counsel submitted that the adjudicator did not have jurisdiction to make the order. She also submitted that the order had been made without procedural fairness, in that neither TRU nor Dr. Tsigaris had been afforded an opportunity to address whether it should be made. She stated her clients' intention to seek judicial review.

[23] On September 8, 2022, the adjudicator issued a ruling stating that he had reconsidered his order in light of the submission received from counsel and concluded that he ought not to have made it, having regard to the requirements of administrative fairness and the question of his authority to make the order. He advised that "I consider that the best course is for me to attempt to determine the issues in the inquiry without recourse to viewing the records".

[24] On October 26, 2022, the adjudicator issued the decision under review.

### **Standard of review**

[25] On judicial review, the court supervises the exercise of authority by governmental institutions, such as OIPC, and may intervene to quash an unreasonable decision. The essential issue is whether the adjudicator has exercised his authority reasonably according to the tests set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov].



[26] Reasonableness review requires a “reasons first” approach that starts with an analysis of the adjudicator’s reasons; *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras. 78-79. It manifests a posture of judicial restraint or deference reflecting “a respect for the distinct role of administrative decision makers”; *Vavilov* at para. 13; *Mason* at para. 57. However, judicial restraint is not an end in itself. As Jamal J., speaking for a majority, explained in *Mason* at para. 57:

Reasonableness review ... serves to “maintain the rule of law” (para. 2) and “to safeguard the legality, rationality and fairness of the administrative process” (para. 13). Thus, the purpose of reasonableness review is to uphold “the rule of law, while according deference to the statutory delegate’s decision” (*Canada Post*, at para. 29).

[27] Substantively, the hallmarks of reasonableness are summarized in *Vavilov* at paras. 99-101. A decision may be unreasonable if it is internally or externally flawed. An internal flaw is “a failure of rationality internal to the reasoning process”. An external flaw is a decision’s failure to accord with a relevant factual or legal constraint bearing upon it. They are summed up in a call for “justification, transparency and intelligibility”.

### **First issue: custody or control**

#### **The adjudicator’s reasons dealing with custody**

[28] At para. 10 of the decision, the adjudicator identifies a two-part test to determine whether a public body has custody of records, within the sense of s. 3 of *FIPPA*. The first element is physical possession, and the second asks whether the public body has a legal right to or obligation with respect to the records.

[29] TRU does not dispute the test stated by the adjudicator. It does not dispute the adjudicator’s conclusion that TRU has physical possession of email records contained within its email network.

[30] TRU challenges the adjudicator’s application of the second part of the test, namely, whether it has legal rights or obligations in connection with the emails, in the circumstances of this case.

[31] Addressing this aspect of the test, the adjudicator acknowledges that “the public body would not have legal rights and obligations for the purposes of FIPPA for records in the physical possession of public body employees that relate to matters other than the performance of the core function of the public body” (at para. 17). He refers to Dr. Tsigaris’ assertion, in his affidavit, that the records at issue consist of research materials and a few communications of a purely personal nature.

[32] At para. 21, the adjudicator refers to an assurance of academic freedom contained in the collective agreement. He states:

The collective agreement stipulates that this freedom is subject to certain conditions. Therefore, the collective agreement gives TRU the authority to ensure that faculty members exercise their academic freedom appropriately. Consequently, TRU does have limited legal rights and obligations to the information collected and created by its employees.

He adds that faculty members publish their scholarship in their capacity as employees of the university.

[33] The adjudicator concludes:

[22] TRU submits that it does not direct the research of their employees or exercise legal ownership of the artistic rights of publications independently of those employees. Nevertheless, I conclude that TRU has a vested interest in the outcome of this research. Moreover, it is reasonable to conclude that TRU hypothetically could incur legal liability as a result of the activities of its employees, where the records may be relevant. I see no reason why the principle of academic freedom cannot coexist with the universities having a legal right or obligation to the information in their possession for the purposes of FIPPA.

[34] The adjudicator therefore finds that the extant records are in the physical possession of an employee of TRU in their capacity as an employee, and not as a private citizen. He finds that TRU has both physical possession and sufficient rights and obligations with respect to establish custody (at para. 23).

#### **Assessment of TRU’s argument concerning custody**

[35] TRU’s argument centres on the adjudicator’s conclusions at paras. 21 and 22 of his reasons, summarized and quoted above. It submits that he has

misunderstood the employment relationship between TRU and its faculty and the assurance of academic freedom for faculty contained in the collective agreement. It submits that the adjudicator's conclusion that TRU has some legal right over the records is unreasonable, arguing that "the limitation in the Collective Agreement that the Adjudicator cites in no way provides the University with any rights over the Documents".

[36] TRU submits that the assurance of academic freedom afforded members of its academic faculty creates a protected sphere so that the university cannot direct members or assert rights to their work within that sphere.

[37] I am unpersuaded by TRU's argument, for two reasons.

[38] First, I think it was reasonable for the adjudicator to conclude that TRU hypothetically could incur liability as a result of the activities of faculty members, even research activities, broadly understood, conducted through email. It could be vicariously liable for defamatory communications; or deceitful or negligent communications upon which a recipient relied, to their detriment; or for discriminatory communications in connection with employment at the university and constituting a breach of s. 13 of the *Human Rights Code*, R.S.B.C. 1996, c. 210; or for breach of a promise given for good consideration, ostensibly on behalf of the university.

[39] Second, I think it was reasonably open to the adjudicator to interpret the assurance of academic freedom contained in the collective agreement as consistent with the existence of legal rights and obligations possessed by the university in connection with professional correspondence undertaken by faculty members. The clause in the collective agreement states:

9.6 Academic Freedom

The common good of society depends upon the search for knowledge and its free exposition. Academic freedom in universities and colleges is essential to both these purposes in the teaching function of the institution as well as in its scholarship and research. Faculty Members of the Faculty Association shall not be hindered or impeded in anyway by the institution or the Faculty Association from exercising their legal rights as citizens, nor shall they suffer

any penalties because of the exercise of such legal rights. The Parties agree that they will not infringe or abridge the academic freedom of any Faculty Members of the academic community. Academic members of the community are entitled, regardless of prescribed doctrine, to freedom in carrying out research and in publishing the results thereof, freedom of teaching and of discussion, freedom to criticize the institution and the faculty association, and freedom from institutional censorship. Academic freedom does not require neutrality on the part of the individual. Rather, academic freedom makes commitment possible. Academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base research and teaching on an honest search for knowledge. In exercising the freedom to comment and to criticize, academic staff members have a corresponding obligation to use academic freedom in a responsible manner by recognizing the rights of other Faculty Members of the academic community, and by affirming the rights of others to hold differing points of view.

[Emphasis added.]

[40] As described in the collective agreement, academic freedom is not unconstrained. The collective agreement refers to a duty, an “honest search for knowledge”, and an “obligation to use academic freedom in a responsible manner”. It is open to the adjudicator to infer from the statement of duty and obligation in a collective agreement that the university has an interest in both and that, as he put it, “the collective agreement gives TRU the authority to ensure that faculty members exercise their academic freedom appropriately”.

[41] I find that the adjudicator’s decision that the records in issue are in TRU’s possession is reasonable. His reasoning is internally coherent and consistent with the evidence, the statute, and common law principle. It satisfies the requirements of justification, transparency, and intelligibility.

### **The adjudicator’s reasons dealing with control**

[42] The adjudicator observes that his conclusion that the records are in TRU’s possession is sufficient and he does not need to go on to determine whether they are also under TRU’s control. He does so for completeness.

[43] The adjudicator applies a test developed in previous administrative jurisprudence. It looks to a series of indicators of control to consider when determining whether a public body exercises control over a record for the purpose of

*FIPPA*. TRU does not take issue with the test. As set out at para. 25 of the decision, the indicators are whether:

the record was created by an officer or employee of the public body in the course of carrying out their duties; the public body has statutory or contractual control over the records; the public body has possession of the records; the public body has relied on the records; the records are integrated within the public body's other records; the public body has the authority to regulate the use and disposition of the records; the content of the record relates to the public body's mandate and functions; and the contract allows the public body to inspect, review, possess or copy the records. The list of indicators is not exhaustive and not all will apply in every case.

[44] The adjudicator finds that: the records were created by an employee of TRU (Dr. Tsigaris) in the course of carrying out his duties (scholarship); there was no evidence that TRU has statutory or contractual control over the records; TRU through its employee (Dr. Tsigaris) relied on the records in the course of his employment; the records in question were contained with other records in Dr. Tsigaris' email archive relating to TRU business; TRU retained the authority to regulate the use and disposition of the records through its employee (Dr. Tsigaris) to whom it had assigned that authority; the records relate to academic research, which is a core function of the university and an essential component of its mandate; and the collective agreement was silent as to TRU's right to inspect, review, possess or copy the records, although Dr. Tsigaris and its information officers had done so.

[45] The adjudicator concludes:

[38] I find that, on balance, the indicators of control in this case support the conclusion that the records are under the control of TRU. The records relate to the conduct of academic research, which is not only an essential purpose of a university as an institution of higher learning, but also a statutory obligation.

[39] An employee of TRU, whose appointment requires that he conduct academic research, created the records in the course of that employment. The product of that research identifies the faculty member as an employee of TRU.

### **Assessment of TRU's argument concerning control**

[46] TRU submits that the adjudicator fundamentally misapprehends the principle of academic freedom and unreasonably equates Dr. Tsigaris with the university.

Here again, it invokes the notion of a protected sphere within which the faculty member is essentially autonomous, and free from interference by the university. Accordingly, it submits that the employment relationship between the university and its academic faculty is not an ordinary employment relationship. It submits that the adjudicator gives undue weight to certain factors to reverse-engineer a conclusion, citing *Vavilov* at para. 121.

[47] TRU does not point to jurisprudence supporting its proposition that the employment relationship between a university and its academic faculty is so exceptional that ordinary legal incidents of an employment relationship, such as the imputation to the employer of the knowledge obtained by the employee within the course of employment, and the imposition of vicarious liability for wrongs committed within the scope of employment, cease to apply.

[48] I am unpersuaded that the adjudicator's analysis is unreasonable. It is internally coherent and grounded in the evidence. It is consistent with common law principle and not at odds with the statutory scheme. It gives weight to the principle of academic freedom, though not to the extent proposed by TRU. It satisfies the requirements of justification, transparency, and intelligibility.

### **Conclusion as to custody and control**

[49] Much of TRU's argument on both arms of the custody and control issue is an attempt to characterize the academic university setting as one in which ordinary analysis does not apply. The argument is that academic faculty members are special: they have academic freedom, which is to say, a protected sphere of individual autonomy, within which they are free from oversight and direction by the university, and their email correspondence within that sphere should be no more subject to disclosure under *FIPPA* than would be purely personal correspondence.

[50] Counsel for OIPC submits that both arms of TRU's argument are analytically misplaced because, while *FIPPA* recognizes the importance of academic freedom, it does so under the aegis of the research information (or research materials) exception in s. 3(1)(e) (now s. 3(3)(i)). I agree with this submission. The research

information exception makes room for TRU's argument. It is unhelpful to have to deal with it separately as an argument about custody or control.

[51] The adjudicator's conclusion that TRU has both custody and control of the email records in issue is reasonable.

**Second issue: the exception for research information**

[52] Section 3(1)(e) of *FIPPA*, prior to the recent amendments, provided 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,
  - (ii) a teaching assistant or research assistant employed at a post-secondary educational body, or
  - (iii) other persons teaching or carrying out research at a post-secondary educational body;

[53] Both counsel accept that the research information (or materials) exception exists for the protection of individual academic endeavour from disclosure to third parties who may seek to exploit it for their own advantage or the disadvantage of the researcher; *Kwantlen Polytechnic University*, 2010 BCIPC 63 [*Kwantlen*] at paras. 20-21.

[54] In the decision, the adjudicator refers to this as a case governed by subsection (i) of s. 3(1)(e). In fact, Dr. Tsigaris qualifies as a person covered by subsection (iii) rather than subsection (i), because TRU is a post-secondary educational body established by a statute other than the *College and Institute Act*, R.S.B.C. 1996, c. 52 or the *University Act*, R.S.B.C. 1996, c. 468. Counsel agree that this error is inconsequential.

### **The adjudicator's reasons dealing with burden of proof**

[55] At para. 6, the adjudicator cites *Ministry of Environment*, 2015 BCIPC 28 at para. 5 for the proposition that “in cases involving s. 3(1), previous Orders have established that the public body bears the burden of establishing that the records are excluded from the scope of FIPPA”. Paragraph 5 of that decision cites three earlier decisions.

### **Assessment of TRU's argument concerning burden of proof**

[56] TRU accepts that the line of administrative jurisprudence cited by the adjudicator supports the proposition he took from it. It submits that there is another line of administrative decisions in which adjudicators have held that, dealing with the applicability of s. 3(1)(e), “it is in the interests of the parties to provide argument and evidence to support their positions”; *Kwantlen* at para. 7; *University of British Columbia*, 2014 BCIPC 50 at para. 5.

[57] TRU submits that this second line of authority is to be preferred because s. 57 of *FIPPA* imposes a burden of proof in other circumstances, but not in respect of the exclusions from the statute's application under s. 3. It submits that the line of authority relied upon by the adjudicator is inconsistent with *FIPPA* when read as a whole.

[58] I reject this submission. Administrative decision-makers are not bound by their previous decisions as a court is bound by the doctrine of *stare decisis*; *Vavilov* at para. 129. Conversely, it is not unreasonable for an adjudicator to apply an established line of administrative authority, as this adjudicator did. The inconsistency between the two lines of authority identified above is more apparent than real, because it may often be the case that it is in a party's interests to advance evidence and arguments even where the opposing party bears the burden of proof. To the extent that there is disagreement among adjudicators as to the incidence of the burden of proof, it should be resolved among them and not by the court; *Vavilov* at para. 132.



[59] That s. 57 of *FIPPA* expressly allocates the burden of proof in some cases does not imply that no burden of proof is to be implied elsewhere under the statute. Considerations such as the common law principle that one who asserts must prove, and that the burden of proof should lie with a party in respect of allegations that are particularly within its knowledge, both favour the proposition accepted by the adjudicator; *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 321; *City of Toronto*, 2011 CanLII 68455 (ON IPC) at paras. 13-19.

[60] I conclude that it was reasonable for the adjudicator to impose the burden of proof on TRU to establish that the research information exception applies.

### **The adjudicator's reasons dealing with the exception**

[61] At para. 48, the adjudicator applies a definition of research adopted in other cases. It characterizes research as an investigation into the pursuit of knowledge incorporating two elements: it is scientific or systematic taking a critical approach to evidence, and evaluates the evidence with a view to deriving something meaningful, such as new knowledge, principles, theories or facts. TRU accepts this definition for the purpose of this case.

[62] The adjudicator focuses on the passages I have quoted above from Dr. Tsigaris' affidavit and the applicant's submission in response. He views the applicant's submission as calling into question the generality of the affidavit and he is left in doubt as to whether the statements in the affidavit are correct "with respect to each extant record". He therefore finds that the affidavit is insufficient to establish that the extant records generally constitute research information. He states:

[51] The information in the article and the emails that the applicant cites has raised reasonable questions about the accuracy of the faculty member's affidavit evidence that the submissions of TRU have not allayed.

[52] The applicant requested all correspondence, not research materials specifically. I have only the word of the faculty member that all of the records are research materials, except for some personal correspondence. The faculty member has destroyed most of the records before the applicant had exhausted the statutory right of review. TRU also indicates that the faculty member initially resisted its attempts to review the extant records for the purpose of responding to the applicant's request. These actions also raise doubts about his affidavit evidence. I have no independent evidence

corroborating his claim, and without having had an opportunity to view the records, I cannot confirm whether his description is accurate with respect to each extant record.

[53] I note that TRU has had ample opportunity to provide independent evidence to corroborate the assertion of its faculty member. It has made two submissions to this Inquiry. Contrary to standard practice, it has not included copies of the extant records with its submissions to the OIPC. It has instead chosen to rely merely on the word of its faculty member as being sufficient to establish that the extant records at issue constitute research information.

[54] I find that the faculty member's affidavit is insufficient to establish that the extant records constitute research information.

[55] In summary, without further evidence or the extant records before me, I find that TRU has failed to demonstrate that each of the requested records constitutes the research information of its faculty member. It has the burden of establishing the application of s. 3(1)(e) in this inquiry, and it has not met that burden. Consequently, I am unable to find that that s. 3(1)(e) applies to the records, and TRU is not authorized to rely on it to deny access to the applicant. TRU must respond to the applicant's access request as required under Part 2 of FIPPA.

[Emphasis added.]

### **Assessment of the adjudicator's reasons**

[63] The argument advanced by TRU before the adjudicator that Dr. Tsigaris' "sworn evidence must be accepted over the unsworn speculative statements and unfounded assertions about the nature of these materials by the Applicant" was unsound. As an administrative tribunal conducting an inquiry under *FIPPA*, the adjudicator could receive and rely upon unsworn evidence. The OIPC manual, "Instructions for written inquiries", advises parties as follows (at 5):

Evidence is what a party provides, in addition to their arguments, during the inquiry to prove or disprove the issues in dispute. As OIPC inquiries are conducted through written submissions, parties can provide documentary evidence, such as affidavits, expert reports, news articles, meeting minutes, policy documents or contracts. The OIPC will also consider the record in dispute as evidence.

As an administrative tribunal, the OIPC is not bound by the ordinary rules of evidence; however, where a party is submitting an individual's written evidence, it is preferable in affidavit form.

[Emphasis removed.]

[64] It is open to an administrative tribunal to prefer unsworn over sworn assertions where the unsworn evidence is more consistent or plausible, or has a

more persuasive ring of truth; *Ghebreyohannes v. British Columbia (Superintendent of Motor Vehicles)*, 2016 BCSC 587 at para. 54.

[65] In this case, it was reasonably open to the adjudicator to doubt Dr. Tsigaris' blanket assertion that, apart from a small number of entirely personal communications, all of his email correspondence with Dr. da Silva constituted research information. The applicant quoted from email correspondence concerning departmental affairs at TRU. TRU could have provided a further affidavit from Dr. Tsigaris denying the existence of this correspondence or explaining it, but did not. The applicant asserted that Dr. Tsigaris and Dr. da Silva had "collaborated on numerous formal complaints to TRU about issues pertaining to Dr. Pyne". TRU chose not to address this assertion. The adjudicator noted that TRU chose not to make the records in issue available for inspection, "contrary to standard practice". It carried the burden of proof. It was open to the adjudicator to conclude that TRU had not met its burden, as he did, stating that "TRU has failed to demonstrate that each of the requested records constitutes the research information of its faculty member" (emphasis added).

[66] The adjudicator ended his analysis there and made an order affecting all of the documents in question. In my view, the order was unreasonable for the following reasons.

[67] The adjudicator did not reject everything in Dr. Tsigaris' affidavit. He relied on the affidavit in his analysis of the custody or control issue. Insofar as Dr. Tsigaris and Dr. da Silva had collaborated on many published articles, Dr. Tsigaris' assertion that the email correspondence "contained numerous research discussion exchanges, thoughts and counter-thoughts, critical assessments of other research, ideas, future phases of the research, methodologies, documents, data, numerous versions of the published papers due to revisions, and other relevant material during, or in relation with, the research we were examining" was entirely plausible. The applicant did not dispute that the correspondence included research information; their submission, as the adjudicator put it, distinguished between research information and "correspondence relating to professional activism". The

adjudicator's concern was that Dr. Tsigaris' evidence painted with too broad a brush. He stated: "I cannot confirm whether his description is accurate with respect to each extant record".

[68] The adjudicator reasonably doubted that all of the email correspondence constituted research information, but must have accepted that some of it probably did. In these circumstances, it was unreasonable for him to rely on TRU's burden of proof as justifying an order that treated all of the email correspondence as subject to *FIPPA* in the face of the express exclusion for research information under s. 3(1)(e). The order subverts the statutory exclusion.

[69] In the decision, the adjudicator does not mention his preliminary order, subsequently reconsidered, that Dr. Tsigaris produce the documents for his review. He does not address a submission advanced to him by counsel for TRU and Dr. Tsigaris in the submission that led to his reconsideration of the order. Counsel submitted as follows:

It is our clients' position that they are not required to produce the records in question, but that instead the Office of the Information and Privacy Commissioner ought to make determinations about the application of section 3(3)(i) to the Records based on the information and evidence provided in the inquiry. In the event that the Adjudicator requires clarification or supplemental evidence, then an opportunity to provide it ought to be offered, rather than taking the extraordinary step of requiring an individual, who is not subject to the Act, to produce records over which they maintain a personal and proprietary interest.

[Emphasis added.]

[70] The adjudicator was not bound to an all or nothing decision. He could have pursued consideration of an order that the records be produced for his review, this time on proper notice to TRU and Dr. Tsigaris. He could have accepted TRU's belated suggestion that he offer it an opportunity to provide clarification or supplemental evidence. What he could not do, consistent with *FIPPA*, was subject records containing research information to the requirements of the statute.

[71] The adjudicator was confronted with an unusual circumstance. I do not suggest that it is not generally open to an adjudicator to have regard to the absence

of convincing evidence from a party carrying the burden of proof in finding facts and making orders like the one under review. What sets this case apart is that the application of the burden of proof could only justify a conclusion in respect of some of the records in issue. It was clear and the adjudicator did not doubt that some of the records constituted research information.

[72] In light of the conclusion I have come to, I need not address TRU's submission that the procedure before the adjudicator was unfair.

### **Disposition**

[73] The decision under review is set aside. Pursuant to s. 5 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, I direct the adjudicator or another delegate of the Commissioner to reconsider and redetermine the inquiry in light of these reasons. There is no order as to costs.

“Gomery J.”