

## FTR Now

# IPC/Ontario Issues Significant Order on Custody and Control of University Records under FIPPA

**Date:** December 8, 2011

On November 7, 2011, the Information and Privacy Commissioner/Ontario (“IPC”) issued a significant order for Ontario universities. It held that the IPC has exclusive jurisdiction to decide whether a record is in the custody or control of a university in the context of an access request under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”). In addition, the IPC created a principle-based framework to assess whether records possessed by faculty members are in the custody or control of a university, while taking into account principles of academic freedom.

In issuing this order, the IPC has created a number of significant and potentially contentious issues that will need to be resolved, quite possibly through arbitration or bargaining. In the meantime, universities will have to consider carefully how to address the IPC’s decision in processing *FIPPA* requests for information possessed by faculty members.

## BACKGROUND TO THE ORDER

Shortly after universities were designated as institutions under *FIPPA* in 2006, the University of Ottawa received a very broad access request. The requester sought a wide variety of records, paper and electronic, in which he was mentioned or which referred to him. The request was later clarified to include virtually all communications about the requester made by members of the Association of Professors of the University of Ottawa (“APUO”), the faculty association at the University.

In response to the access request, the University in turn made a broad collection request of faculty members seeking records that might be responsive to the *FIPPA* access request. The APUO filed a grievance under the collective agreement in which the APUO argued that the University was seeking faculty records that were not in the University’s custody or control. In 2008, Arbitrator Philip Chodos upheld the APUO’s grievance, and found that the University violated its faculty collective agreement by sending an overly broad collection request. In May 2009, Arbitrator Chodos issued a second decision in which he endorsed a proposal by the APUO that only a limited number of faculty records were under the custody or control of the University. After this decision, the University denied the request with reference to the Chodos award and on the basis that it had no responsive records.

At the same time that the APUO grievance was being pursued by the parties, the University issued

an interim decision and fee estimate to the requester. This led to the initial appeal to the IPC. The IPC agreed to defer its consideration of the request for records of APUO members until the arbitration process had run its course. In the interim, the IPC sought clarification of the scope of the request, addressed the fee issue, and issued orders with respect to records sought for non-APUO employees. Following the University's determination that it had no responsive records relating to APUO members, the IPC conducted its own hearing process and issued its own findings.

## THE IPC ORDER

The IPC order was issued by Adjudicator Diane Smith, who made two key findings in the course of giving her reasons.

First, Adjudicator Smith held that the IPC has exclusive jurisdiction to decide whether a record is in the custody or control of a university in the context of an access request under *FIPPA*. While she cited several factors in support of her conclusion, she was clearly troubled by the fact that the labour arbitration process deprived the requester of his statutory right to make representations to the IPC, as well as the implication that a collective agreement could dictate the scope of the statutory concept of custody and control. In this regard, she said:

Applying the two-part test in *Weber*, it is clear that the legislature intended that issues arising from requests and appeals under the Act be determined by the head, and on appeal, by the Commissioner, and not by a labour arbitrator. Considering the governing legislation (that is, the Act) as applied to the dispute in the relevant factual matrix, as outlined in the foregoing analysis, and bearing in mind that the arbitrator's authority only arises under the collective agreement, an instrument that is not determinative of the issue of custody or control, I find that, in the context of an access-to-information request made under the Act, the Commissioner has the exclusive jurisdiction to determine this issue.

Second, Adjudicator Smith created a principle-based framework to assess whether records possessed by faculty members are in the custody or control of a university. She said:

Accordingly, I conclude that the arbitral awards are not determinative with respect to the custody or control of records that may be responsive in this case. Rather, the determination is to be made based in the principles enunciated in this order. The significant conclusions I have reached in this regard are:

1. records or portions of records in the possession of an APUO member that relate to personal matters or activities that are wholly unrelated to the university's mandate, are not in the university's custody or control;
2. records relating to teaching or research are likely to be impacted by academic freedom, and would only be in the university's custody and/or control if they would be accessible to it by custom or practice, taking academic freedom into account;

3. administrative records are prima facie in the university's custody and control, but would not be if they are unavailable to the university by custom or practice, taking academic freedom into account.

Based on these findings, Arbitrator Smith ordered the University to request that association members produce responsive records that are in the University's custody or control "taking into account" the three stipulated criteria. She also suggested that the University require faculty members to create "lists or indices of records or portions of records for which the question of custody or control may be in dispute, including a brief explanation of why a record or records would not be in the university's custody or control."

## IMPLICATIONS FOR UNIVERSITIES

The implications of this decision for universities are significant and far-reaching, and they create some tensions that are not easy to resolve.

With respect to the finding that the IPC has exclusive jurisdiction over the question of whether a record is within a university's custody or control in the context of an access request under *FIPPA*, this suggests that disputes about access to records that arise in the course of processing an access request can only be heard by the IPC and not a labour arbitrator. It is not clear that the jurisdiction question is so straightforward. Assume, for example, that a faculty member determines that he or she has custody or control over a particular record and refuses to produce it for processing. There is no doubt that this will produce a dispute under *FIPPA*, but it is difficult to see how this would not also produce a dispute under the collective agreement that rests on a question about the university's right of access to records in the possession of faculty – *a question that is entirely distinct from the question of "custody or control" under FIPPA.*

Many universities may wish to assert a right of access that is broad enough to allow for processing *FIPPA* requests in a manner that is much less cumbersome and prone to conflict than the manner invited by the IPC. Such a right is one that arises out of an employment and collective bargaining relationship, to be determined by universities and their faculty members through informal dialog, at arbitration or even at the bargaining table. The scope of academic freedom will be part of the coming dialog, but in our view academic freedom does not necessarily lead to a restriction on university access to records possessed by faculty members that precludes the efficient and effective processing of *FIPPA* access requests.

If you would like more information about this decision and how it affects your university, please feel free to contact any member of the [Information and Privacy](#) or [University](#) sector practice groups.

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