

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER PO-3894

Appeal PA16-179

University of Western Ontario

October 30, 2018

**Summary:** The university received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to two agreements entered into between the University Students' Council and third parties. The university denied access on the basis that the agreements are not in its custody or control within the meaning of section 4(1) of the *Act*. The requester appealed. In this order, the adjudicator finds that the agreement between the University Students' Council and Campus Trust, a healthcare benefits provider, is not within the university's custody or control, but that the agreement between the University Students' Council and the London Transit Authority is in the university's custody. She orders the university to issue a decision under the *Act* with respect to the latter agreement.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 10(1).

**Orders and Investigation Reports Considered:** Order P-1069.

**Cases Considered:** *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).

### BACKGROUND:

[1] The appellant submitted a request to the University of Western Ontario (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for

access to various records including the following:

- the contract between London Transit Commission and the University Students' Council for all undergraduate students' bus passes, collected through ancillary fees by Western University
- the contract between Campus Trust and the University Students' Council for undergraduate health and dental plans, collected through ancillary fees by Western University.

[2] The university issued a decision denying access to both contracts on the basis that the student council is a separately incorporated corporation not under the control of the university and that the requested records are therefore not within the custody and control of the university.

[3] The appellant appealed the university's access decision with respect to the two contracts to this office. As the appeal could not be resolved during mediation, it proceeded to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by inviting representations from the university and the University Students' Council (USC). The appellant provided representations in response, followed by reply representations from the university and the USC. I invited the appellant to make sur-reply representations but he did not do so. The parties' representations were shared with one another in accordance with this office's *Practice Direction: Sharing of Representations*.

[4] In this order, I uphold the university's decision that the Campus Trust Agreement is not in its custody or control. I do not uphold its decision that the LTC Agreement is not in its custody or control, and I order it to issue a decision under the *Act* with respect to that record.

## **RECORDS:**

[5] The records at issue are the following:

- contract between London Transit Commission and the University Students' Council for undergraduate students' bus passes (the LTC Agreement)
- contract between Campus Trust and the University Students' Council for undergraduate health and dental plans (the Campus Trust Agreement).

## **DISCUSSION:**

[6] The only issue in this appeal is whether the two agreements are "in the custody" or "under the control" of the city under section 10(1) of the *Act*, which reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[7] Pursuant to section 10(1), the *Act* applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is in the custody or under the control of an institution; it need not be both.<sup>1</sup>

[8] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.<sup>2</sup> A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 65, or may be subject to a mandatory or discretionary exemption (found at sections 12 through 22 and section 49).

[9] The courts and this office have applied a broad and liberal approach to the custody or control question.<sup>3</sup> Based on this approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.<sup>4</sup> The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other factors may apply.

- Was the record created by an officer or employee of the institution?<sup>5</sup>
- What use did the creator intend to make of the record?<sup>6</sup>
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?<sup>7</sup>
- Is the activity in question a "core", "central" or "basic" function of the institution?<sup>8</sup>
- Does the content of the record relate to the institution's mandate and functions?<sup>9</sup>

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<sup>1</sup> Order P-239 and *Ministry of the Attorney General v Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

<sup>2</sup> Order PO-2836.

<sup>3</sup> *Ontario (Criminal Code Review Board) v Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.) and Order MO-1251.

<sup>4</sup> Orders 120, MO-1251, PO-2306 and PO-2683.

<sup>5</sup> Order 120.

<sup>6</sup> Orders 120 and P-239.

<sup>7</sup> Order P-912, upheld in *Ontario (Criminal Code Review Board) v Ontario (Information and Privacy Commissioner)*, cited above.

<sup>8</sup> Order P-912.

<sup>9</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.) and Orders 120 and P-239.

- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?<sup>10</sup>
- If the institution does have possession of the record, is it more than “bare possession”?<sup>11</sup>
- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?<sup>12</sup>
- Does the institution have a right to possession of the record?<sup>13</sup>
- Does the institution have the authority to regulate the record’s content, use and disposal?<sup>14</sup>
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?<sup>15</sup>
- To what extent has the institution relied upon the record?<sup>16</sup>
- How closely is the record integrated with other records held by the institution?<sup>17</sup>
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?<sup>18</sup>

[10] The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?<sup>19</sup>

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<sup>10</sup> Orders 120 and P-239.

<sup>11</sup> Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

<sup>12</sup> Orders 120 and P-239.

<sup>13</sup> Orders 120 and P-239.

<sup>14</sup> Orders 120 and P-239.

<sup>15</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

<sup>16</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.

<sup>17</sup> Orders 120 and P-239.

<sup>18</sup> Order MO-1251.

<sup>19</sup> PO-2683.

- Is the individual, agency or group who or which has physical possession of the record an “institution” for the purposes of the *Act*?
- Who owns the record?<sup>20</sup>
- Who paid for the creation of the record?<sup>21</sup>
- What are the circumstances surrounding the creation, use and retention of the record?<sup>22</sup>
- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?<sup>23</sup>
- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the institution?<sup>24</sup> If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?
- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?
- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? Did the agent have the authority to bind the institution?<sup>25</sup>
- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?<sup>26</sup>
- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue?<sup>27</sup>

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<sup>20</sup> Order M-315.

<sup>21</sup> Order M-506.

<sup>22</sup> PO-2386.

<sup>23</sup> *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

<sup>24</sup> Orders M-165 and MO-2586.

<sup>25</sup> *Walmsley v Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) and *David v Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.).

<sup>26</sup> Order MO-1251.

[11] In determining whether records are in the “custody or control” of an institution, the above factors must be considered contextually in light of the purpose of the legislation.<sup>28</sup>

[12] In *Canada (Information Commissioner) v Canada (Minister of National Defence)*,<sup>29</sup> the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

- (1) Do the contents of the document relate to a departmental matter?
- (2) Could the government institution reasonably expect to obtain a copy of the document upon request?

## **The university’s and the USC’s representations**

### ***Background***

[13] The representations of the university and the USC provide some background to this matter.

[14] The university explains that the USC is a student-centred corporation established by Letters Patent in 1965. The USC is a democratic organization and is the voice for over 23,500 undergraduate students. Each year, the university’s undergraduate student body elects the directors, officers and councillors of the USC. The undergraduate student body makes up the USC’s membership.

[15] The USC explains that it serves a dual role for undergraduate students of the university as their advocate to university administration and governments on issues affecting students, and as the provider of services to the students including bar/restaurants, film services, retail and commercial operations, a bus pass system and health and dental coverage.

[16] The university submits that much like an employee union, the USC carries out a range of functions for its members, including organizing and funding social activities; providing support on a range of academic and welfare issues; representing students both individually and collectively; and campaigning on university, local and national issues.

[17] The university explains that one activity undertaken by the USC was to negotiate an agreement with the London Transit Commission (LTC) for annual bus passes for all undergraduate students at the university, resulting in an agreement in May 2009 (the

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<sup>27</sup> Order MO-1251.

<sup>28</sup> *City of Ottawa v Ontario*, cited above.

<sup>29</sup> 2011 SCC 25, [2011] 2 SCR 306.

"LTC Agreement"). The bus pass plan negotiated by the USC is a mandatory plan authorized by a student referendum held by the USC in 2009 that required all students at the university to pay for the plan. In 2011, the USC held a further referendum, which extended the bus pass duration from 8 months to 12 months.

[18] The USC also oversees a health insurance plan for all undergraduate students. The agreement reached between the USC and the benefit provider, Campus Trust, includes health, dental and travel benefits specifically designed for students (the "Campus Trust Agreement"). Like the bus pass, the health plan is a mandatory plan authorized by a student referendum held by the USC that required all undergraduate students at the university to participate in and pay for the plan.<sup>30</sup>

[19] The USC explains that the bus pass constitutes a free transportation service that allows undergraduate students unlimited ridership privileges on LTC regular routes. Funding for the bus pass system is derived from student activity fees and supplementary fees levied by the USC and collected on its behalf with student tuition fees. The health care coverage is paid from a portion of student activity fees due to the USC annually. The insurance is delivered by Campus Trust pursuant to an agreement and declaration of trust negotiated by the USC along with other participating organizations at Canadian universities.

[20] The university stresses that it is not a party to either the LTC Agreement or the Campus Trust Agreement. In order to fund the bus pass, the health plan and other benefits and activities arranged by the USC, the USC charges its membership a student organization fee. Through an arrangement with the university, the university collects the fee from its students as an ancillary fee and remits it to the USC for expenditure.

[21] Each year, the USC submits to the university its previous year's financial statements, its budget and a fee proposal. The university's Board of Governors then determines whether to approve the collection of the fees after reviewing the documentation. According to the university, submission of underlying agreements, such as the LTC Agreement or the Campus Trust Agreement, is not required to obtain approval.

[22] The university provides further details about the LTC Agreement in particular. In October 2009, LTC bus drivers threatened to strike. As students would be without public transportation in the event of a strike, the USC and the university held talks to determine whether they could arrange alternative transportation. The university agreed to provide alternative transportation to students at its expense and, in exchange, the USC agreed to contribute to those expenses from refunds that the USC would receive from the LTC under the LTC Agreement. Because of these exigent circumstances, the USC voluntarily provided the university with a copy of the LTC Agreement for

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<sup>30</sup> However, students covered under an equivalent extended benefit health care plan (in addition to the student's standard provincial coverage) may choose to opt out of the Campus Trust Agreement.

accounting and verification purposes related to the refund entitlement. The university explains that a copy of the LTC Agreement was discovered in the university's archives during the preparation of the university's representations for this appeal.

[23] The university explains that it incurred transportation costs during the resulting strike and received a contribution toward those costs from the USC from refunds it received from the LTC. It submits that it has not otherwise reviewed the LTC Agreement for any other purpose and that it archived the agreement. The term noted in the LTC Agreement has expired, though the university understands that the USC and LTC may have extended the LTC Agreement annually.

### *Representations*

[24] The university refers to the list of factors described above and makes submissions on many of the factors. I will not exhaustively summarize the university's representations on the various factors in this order, but I have reviewed them.

[25] The university notes that the agreements were not created by an officer or employee of the university. It submits that it has no statutory duty or express statutory power to provide its students with a health plan or a bus pass. The core, central or basic function of the university is to provide post-secondary education to its students and to conduct research, not to arrange health care benefits or public transportation for its students. The university does not administer or negotiate either the bus pass plan or the health plan.

[26] The university notes that it does not have possession of the Campus Trust Agreement, and that the USC voluntarily provided the LTC Agreement to the university due to emergency circumstances and for the limited purpose of accounting and verification of the refund entitlement related to those emergency circumstances. The university explains that although it is not within its mandate to arrange public transportation for its students, once the USC had committed to making such arrangements, students became dependent on the service. When the LTC threatened to strike, the USC became concerned that it would be unable to fulfill its commitment to its members, and both it and its members looked to the university for assistance. The university submits that but for these emergency circumstances, it would never have come into possession of the LTC Agreement and even there its use was limited solely to accounting and verification of the refund entitlement. In the university's submission, under these circumstances its possession is akin to bare possession as its use of the LTC Agreement was not related to the purposes of the agreement but to tangential accounting purposes relating to an unexpected, indeterminate, unbudgeted and potentially significant expense arising from a force majeure event.

[27] The university submits that it does not have a right to either agreement. Even under its Student Fee Policy, the university only has a right to require the USC's financial statements, budget and fee proposal to determine whether to approve the



collection of the student organization fee. It has no authority to regulate the use, content or disposal of either agreement, as it is not a party to it. The university can destroy its copy of the LTC Agreement, which is held in its archived records, at any time.

[28] The university submits that there are no provisions in any agreement between it and the USC that expressly or by implication give it the right to possess or otherwise control either the LTC Agreement or the Campus Trust Agreement. It submits that it is the customary practice of the USC and also other student, employee and faculty unions to consider records that they create to be in their custody or control and not the custody of control of the institution until such records are delivered to the institution to be used in relation to the institution's routine functioning and activities.

[29] The university also addresses the test in *National Defence*, set out above. It submits that neither agreement relates to a university matter. The university is not a party to the agreements, it has no obligations under either agreement, it did not participate in their negotiation and it makes no payment under the agreements to either vendor.

[30] The university submits that it could also not reasonably expect to receive a copy of either agreement upon request, as the agreements do not relate to the routine functioning of the university and it is not a party to either agreement. The university stresses that its only involvement in either agreement is to collect fees generally on behalf of the USC and to remit those fees to the USC for expenditure. Under its Student Fee policy, the university only requires the USC to produce its previous year's financial statement, its budget and its fee schedule in order to collect and remit the USC's student organization fee.

[31] The university submits, further, that this situation is akin to that where an institution has provided funding to an arm's length entity and has enjoyed a limited right of access to certain types of records for specific and limited circumstances. In such situations, the IPC has found that although the institution provides funding to the arm's length party, the institution does not exercise the requisite degree of control over all of the arm's length entity's records for the purpose of section 10(1) of the *Act*.<sup>31</sup> The university submits that a similar finding should be made in this case. It provides funding to the USC indirectly through its collection from its students and remittance to the USC of student organization fees. Although it has a right of access to certain types of records, it does not have a right to access the LTC Agreement or the Campus Trust Agreement. Access to documentation is limited to ensuring financial accountability for the student organization fees charged to the institution's students.

[32] The USC submits that the university plays no role in the ongoing administration

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<sup>31</sup> Here, the university cites Orders P-384, P-1069 and P-1451.

or the regular renegotiation of the agreements with the LTC and Campus Trust. In the USC's submission, the contracts reflect core activities of the USC in which the university has no participation beyond the collection and remittance to the USC of student fees authorized by the USC for such purposes. The records in question were not created by an officer or employee of the university and bear no relation to the mandate and function of the university. The university wields no power to regulate the contractual relations between the USC and either of the other parties to the contracts. The USC submits that if the university has possession of their records, such possession is bare possession.

***The appellant's representations***

[33] The appellant also filed extensive representations including attachments, all of which I have reviewed, but to which I will not refer in detail. A summary of the appellant's main arguments follows.

[34] The appellant submits that the university has general power over the USC; that the USC is not akin to an employee union; and that the USC should be considered an operation of the university subject to the university's policy's by-law and practices. The appellant submits that if the USC had not entered into the contracts in question, the university itself would otherwise have provided students with, at a minimum, bus pass coverage, if not a health plan.

[35] The appellant submits that the university controls the fees of the USC to such an extent that the USC will not engage in activities the university administration does not endorse. He submits that it is an established view that the USC ultimately answers to the senior university administration and its Board of Governors for not only its finances but for its actions.

[36] The appellant notes that USC has restrictions and limits placed on it, such as a restriction on competition for renovation contractors. He submits that the USC ultimately abides by the university's bylaw, policies, practices and timelines, in particular budget timelines. He submits that this indicates that the university has control over the USC.

[37] The appellant points out that a May 3, 2007 motion of the university's Board of Governors required additional annual reports from the USC not relating to its finances in order for it to approve the collection of student fees. He submits that this requirement was imposed not for financial reasons but to have accountability for the behaviour of the USC-run student newspaper in response to its publication of material deemed offensive by the Board. He submits that the Board took direct action to require further documents from the USC and used its leverage in order to exert power over the USC and the newspaper to control their behaviour. In the appellant's submission, the university used its power of approval and collection of fees to arbitrarily impose restrictions and change the behaviour of the USC. He submits that while the university

does not require the two agreements at issue to be provided to it in order to approve the fees, it could request them as part of its due diligence and they would have to be produced by the USC in order for the fees to be approved by the Board of Governors.

[38] The appellant disagrees with the university's submission that its functions are limited to education and research, pointing out that the university's function and operations include housing, food services, and health services. He submits that the university must consider transportation for its students to be a core function of the university in light of its decision to replace the service during the strike.

[39] The appellant also takes issue with the university's comparing the arrangement between it and the USC with that between an employer and a trade union. In the appellant's submission, the university has an interest in the USC being financially responsible and requires more than merely accepting what the USC states is their fee proposal. In 2015, the university required the USC's graduate counterpart, the Society of Graduate Students, to provide additional documents to show that it can remain financially sustainable, a requirement that the appellant states the university could reasonably be expected to apply to the USC should the USC ever be in financial distress. He submits that although the USC acts on its own in most matters, such as negotiating contracts, it is subject to the same control and approvals as a university faculty. The appellant points out that the Board of Governors does not specifically approve the union dues of its employees.

[40] In sum, the appellant argues that the USC is under the control of the university and that the university could reasonably be expected to obtain any document, and specifically the two records at issue, in the USC's possession.

### ***The university's and the USC's reply representations***

[41] The university acknowledges that it approves compulsory non-tuition related ancillary fees, including student organization fees, as it is required to do by the Ontario government according to the terms of the *Ontario Operating Funds Distribution Manual: A Manual Governing the Distribution of Ontario Government Operating Grants to Ontario Universities and University-Related Institutions*. The university submits that the USC is required to file financial statements, a budget and a fee proposal with the Board's Property and Finance Committee in the spring for the university's approval and collection of student fees from incoming students.

[42] The university submits, however, that but for the approval of fees, it is not involved in fees unless contacted by the USC or an issue arises which could reflect negatively on the university. Such was the rare case in 2007 when the student newspaper, which is funded by USC student fees, published a "spoof" issue which was deemed offensive by the university. In order to ensure the USC was accountable not just to the university, but also to the members of the undergraduate student body who took issue with the publication, the Board of Governors required the USC and the editor

of the paper to provide a report relating to the paper's ethical activities. The USC had a choice to either provide the report, or not receive fees for the paper or be permitted to distribute it on university property. It chose the former option.

[43] The USC agrees with the university that when the university threatened to withhold approval of student fees related to the student newspaper, this was an exceptional step taken in response to material widely regarded as egregious and offensive. The USC took its own measures to strengthen oversight of the paper while preserving the paper's editorial independence. The university did not participate or interfere in the USC's role as publisher or in the paper's own functioning. The USC states:

Lobbying at [the] University level and at several levels of government to improve the experience and quality of life for undergraduate students is central to the USC's mandate. The suggestion that it operates in thrall to the University is squarely contrary to the USC's mission, governance and by-laws.

The notion that the University holds power over the USC to the extent that it could require delivery [or] production of confidential USC records is equally unsupportable...

[44] The university explains that it imposed an obligation on the Society of Graduate Students because a review of its annual financial statement revealed that it was running a structural deficit, threatening its long-term viability. As a condition of approving its 2015/16 fee, the university required it to deliver a long-range sustainability plan to eliminate its structural deficit. The university submits that these two unique occasions do not establish that the university has control over the USC's records generally.

[45] Finally, the university points out that its provision of certain services to students, such as housing services, food services, student health services, and sexual assault prevention and support services is ancillary to its core mandate of education and research.

### ***Analysis and findings***

[46] The issue in this appeal is whether the university has custody or control of the two agreements at issue within the meaning of section 10(1) of the *Act*. As noted above, a record need not be both in the custody and under the control of an institution for the *Act* to apply to it. The record need only be either in the custody or under the control of the institution. For the following reasons, I find that the Campus Trust Agreement is not in the custody or control of the university, while the LTC Agreement is in the university's custody. As a result of my finding, I order the university to issue a decision under the *Act* with respect to the LTC Agreement.

### *Campus Trust Agreement*

[47] There is no dispute that the Campus Trust agreement is not in the university's physical possession. I accept the evidence of the university and the USC that the USC is an entity separate and apart from the university, incorporated under its own Letters Patent, whose functions are to act as an advocate for, and provide services to students at the university. It is also undisputed that the university was not a party to the Campus Trust Agreement.

[48] In order to determine whether the university has control over the Campus Trust Agreement, the circumstances surrounding the creation, use and retention of the agreement are important. I accept the evidence of the university and the USC that the university played no role in the agreement other than in the general sense of requiring the USC's financial statements, budget and fee proposal to determine whether to approve the collection of the student organization fee. Nothing in the materials provided by the appellant leads me to find otherwise.

[49] Because the university is not a party to the agreement, and I do not have evidence that the university otherwise dealt with the Campus Trust Agreement in any way, I accept that it does not have the authority to regulate the use, content or disposal of this agreement. I accept that the university collects students' USC fees and remits them to the USC. The university's Board of Governors also decides each year, based on review of the USC's previous year's financial statements, its budget and a fee proposal, whether to approve the collection of the fees on behalf of the USC. The evidence before me is that submission of underlying agreements, such as Campus Trust Agreement, is not required to obtain approval.

[50] The appellant points to the university's involvement in certain USC affairs as evidence of the university's general control over the USC. By way of example, the appellant points out that the university intervened when the campus newspaper published by the USC printed material that was widely considered offensive. The appellant did not point to any particular provisions of the university or USC's by-laws or agreement between the two that set out the university's power to intervene in such cases. In any event, I find that any authority the university has to intervene in such rare cases is not evidence of university control over the day-to-day activities of the USC in the normal course. I also find that the university's involvement in the USC's finances, and its requirement that the Society of Graduate Students provide further financial documentation, without more, is not evidence of control over the Campus Trust Agreement.<sup>32</sup> The appellant has not pointed to any specific provision in an agreement or by-law that permits the university to require a copy of the Campus Trust Agreement.

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<sup>32</sup> See, for example, Order P-1069, which found that records held by an outside agency are not subject to the *Act* merely because an institution has a general supervisory and monitoring role over the agency (in that case, the institution had a limited right of access to agency records to require financial accountability and periodic administrative reviews to ensure compliance with the relevant statute).

Even if the university is entitled to require a copy of it in exigent circumstances (such as if the USC were in financial distress), I have not been provided with evidence suggesting that such circumstances exist.

[51] The appellant implies that the Campus Trust Agreement relates to the university's mandate and functions by arguing that if the USC had not entered into the Campus Trust Agreement, the university itself would have. This may or may not be the case, and I do not accept the university's initial submission that the university's sole function is education and research. As the university conceded in its reply, it offers other services such as housing and food services. However, the fact that the university might have, in the absence of the Campust Trust agreement with USC, entered into a similar agreement is not, in my view, helpful to the appellant's case since the agreement in question relates to a matter that is not currently within the university's functions.

[52] The appellant raised a number of additional issues and the university addressed them in reply. For instance, the appellant points to the relationship between the USC and the university vis-à-vis the operation of facilities such as the juice bar and the recreation centre. He also mentions that the USC rents university space and the university imposes restrictions on the USC's ability to enter the free market for some services, such as the USC having to pay the university for any renovations as they have to be done by the university's contractors. The university, on the other hand, points out that it and the USC have an extensive commercial relationship which mutually benefits both parties. As a landlord, the university places certain restrictions such as requiring contractors to be retained by the university, in order to ensure work is done properly and to protect its property from liens under the *Construction Lien Act*. The university explains that it and the USC also partner to provide various resources to students, which is not indicative of a controlling relationship, but a collaborative relationship whereby both parties share a mutual objective. Finally, the appellant raised issues to do with the funding of a new turf field as an example of the university's power to exert control over the USC. The university disputes the appellant's version of the events relating to the funding of the turf field.

[53] In my view, these additional factors raised by the appellant do not assist him in his argument that the university exerts control over the USC to the extent of having control over agreements that the USC enters into with third parties. I agree with the university that the arrangements referred to by the appellant demonstrate a relationship between the university and the USC which is both commercial and collaborative. Nothing in these factors tends toward a finding that the university has control over the Campus Trust Agreement.

[54] The parties argued at some length about the extent to which the relationship between the USC and the university is akin to that between a labour union and an employer. I do not find such a comparison necessary or helpful, since determinations of custody and control under the *Act* are highly context-driven. My findings in this case are

based on the evidence before me, not on comparisons to other relationships which may or may not be analogous to that between the university and the USC.

[55] I have also considered the decision of the Supreme Court of Canada in *National Defence*,<sup>33</sup> referenced above, in which the court articulated the following two-part test for institutional control of a record that is not in its possession. The Court found that in order for control to be established, answers to both of the following questions must be yes:

1. Does the record relate to a departmental matter?
2. Could the institution reasonably be expected to obtain a copy of the record in question upon request?

[56] I find that the Campus Trust Agreement does not relate to a “university matter”. While it relates in a broad sense to the university because it provides for insurance for the university’s students, I find that this is not sufficient to establish that the record relates to a university matter within the meaning of the *National Defence* test. The context of the creation of a record is important in determining what constitutes a “university matter”, and previous orders of this office have suggested that for this part of the test to be satisfied, the records must arise out of a decision-making function of the institution or be integral to an institutional matter. That is not the case here.

[57] Even if part one of the test were satisfied, I find that part two is not. I find that the university does not have the authority to regulate the USC’s use or disposal of the Campus Trust Agreement, and I am satisfied that, in the ordinary course, the university could not reasonably be expected to obtain a copy of this agreement. The university acknowledges that it requires the USC to file financial statements, a budget and a fee proposal for the university’s approval. In my view, this requirement does not mean that the university could, in the normal course, require the USC to provide it with agreements it has reached with third parties.

[58] I find, therefore, that the *National Defence* test for control is not met.

[59] For the reasons set out above, I find that the Campus Trust Agreement is not in the custody or control of the university, and therefore, the *Act* does not apply to it.

#### *London Transit Commission (LTC) Agreement*

[60] I reach a different conclusion, however, with respect to the LTC agreement. The university acknowledges that it received a version of this agreement in 2009 when it agreed to provide alternative transportation to students in the event of a transit strike. The university explains that the USC voluntarily provided the university with a copy of

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<sup>33</sup> *Canada (Information Commissioner) v. Canada (Minister of National Defence)*. 2011 SCC 25 (CanLII).

the LTC Agreement for accounting and verification purposes. The university explains that it discovered a copy of the LTC Agreement in its archives during the preparation of its representations for this appeal.

[61] In my view, the university's possession of this record does not amount to bare possession only. The university had a right to possession of the record and a right to deal with it for reconciliation purposes. While the university did not create the record, it relied on it for these reconciliation purposes. I acknowledge that the university was not providing transportation services to its students as a matter of routine; however, this changed once the prospect of an LTC strike emerged. The record relates to the university's mandate and functions around the period of time that it provided transit services to its students. While the university does not have the authority to regulate the content of the agreement in its possession, it does have the right to regulate its use and disposal. In my view, the university is entitled to decide whether and how to store its copy of the agreement, including storing it in its archives as it has done.

[62] The university correctly points out that there must be something more than mere physical possession to establish custody for the purposes of the *Act*, and that there must be some right to deal with the records and some responsibility for their care and protection. In my view, the university acquired these rights and responsibilities with respect to the LTC Agreement when it obtained a copy for accounting purposes.

[63] I acknowledge that the university does not have the same right to deal with the LTC Agreement as does the USC. The university is not a party to the agreement, nor do I have evidence before me suggesting that there is any current transit situation that would necessitate the university relying on the agreement for reconciliation purposes. However, in my view, the fact that the university's right to deal with the record is not the same as the USC's does not mean that the university does not have custody of it for the purposes of the *Act*. The university's possession is not bare possession. In *City of Ottawa*,<sup>34</sup> the Divisional Court found that the city did not have custody over an employee's personal emails sent from the city's account because its possession of the emails on its server amounted to bare possession only. The Court also noted that the purposes of the *Act* must be borne in mind in determining questions of custody, and that disclosure of an employee's personal emails would not further the purpose of shedding light on the activities of the government. In my view, the present circumstances are distinguishable from those in *City of Ottawa*. As noted above, the university's possession is not bare possession because the university has dealt with the agreement, albeit in a limited way. Further, the agreement was used for financial reconciliation purposes between the USC and the university. In my view, the record therefore has some connection to public scrutiny of the activities of the university, an institution under the *Act*.

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<sup>34</sup> Cited above.



[64] Given the circumstances surrounding the university's acquisition and use of the LTC Agreement, I find that it is in the university's custody, and therefore the *Act* applies to it.

[65] Finally, the university points out that the version of the LTC Agreement that it holds has expired, though the university understands that the USC and LTC may have extended the LTC Agreement annually. To be clear, my finding that the university has custody of the LTC Agreement is limited to the version that it holds. I note that the London Transit Authority is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* and the appellant has the option of making an access request to that body.

**ORDER:**

1. I uphold the university's decision that the Campus Trust Agreement is not in its custody or control under section 10(1) of the *Act*.
2. I do not uphold the university's decision with respect to the LTC Agreement. I find that the LTC Agreement is in the university's custody under section 10(1).
3. I order the university to issue a decision under the *Act* to the appellant with respect to the LTC Agreement. For the purpose of the *Act's* procedural requirements relating to such a decision, the date of this order is to be treated as the date of the appellant's request.

Original Signed by: \_\_\_\_\_  
Gillian Shaw  
Senior Adjudicator

\_\_\_\_\_ October 30, 2018