Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

Reconsideration Order PO-2775-R

Appeal PA07-266

Order PO-2683

University of Toronto

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND TO THE RECONSIDERATION:

On June 10, 2008, I issued Order PO-2683 which required the University of Toronto (the University) to disclose to the requester/appellant certain portions of the record at issue in that appeal. The request had been originally submitted to Victoria University (Victoria) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for access to:

> [t]he report written in 2005 by [a named consultant] for the United Church of Canada/Victoria University Archives Task Force that was formed as part of what was described as a program renewal exercise.

A record meeting this description was identified, and is referred to in this reconsideration order as the "record" or the "record at issue."

Victoria is federated with the University and describes itself as "in the University of Toronto". Order PO-2683 directed the University, which is an institution under the *Act*, to disclose the non-exempt portions of the record.

On June 25, 2008, Victoria submitted a request for a reconsideration of the decision in Order PO-2683, arguing that there was a jurisdictional defect in the order because it ought to have directed Victoria to comply with the order, rather than the University. Victoria stated, among other things, that Order PO-2683 was "erroneously sent to the University of Toronto" and that "it does not cite the correct institution". Victoria sought a reconsideration of the decision and asked that I "either re-issue the Order naming an institution subject to the Act or quash the Order on the grounds that the IPC exceeded its jurisdiction".

On July 3, 2008, I responded to Victoria, indicating that in order to give effect to the order, "it was necessary for me to instruct a scheduled institution under the *Act*, in this case the University of Toronto, to make the required disclosure." I also noted that Victoria's letterhead includes the words "Victoria University in the University of Toronto."

On July 7, 2008, I received a request for reconsideration of Order PO-2683 from the University on the grounds that it had not been given the opportunity to make submissions in the course of the inquiry or participate in the request or mediation stage of the appeal. It argued that it was required by Order PO-2683 to release records "which it has not seen, which pertain to a matter in which it was not involved, which are not in its custody or under its control, and over which it has no rights whatsoever".

On July 11, 2008, I wrote to Victoria, the University and the appellant staying the operation of Order PO-2683 pending the resolution of the reconsideration requests. I also advised the parties that they would be receiving a Supplementary Notice of Inquiry addressing all of the outstanding issues in the appeal, in due course. On July 23, 2008, I sent a Notice of Inquiry to the University and Victoria, inviting representations on the issues raised by the University in its reconsideration request, as well as the issues that were addressed in Order PO-2683. The time for the submission of the representations of the University and Victoria was ultimately extended to August 29, 2008. I received the submissions of Victoria and the University on August 27th and 29th respectively.

On September 12, 2008, I determined that it would be useful for me to seek representations from the Ontario Ministry of Government Services (the Ministry) regarding the issues raised by the reconsideration requests, and accordingly, I invited the Ministry to provide representations. I received the representations of the Ministry, dated October 7, 2008, over the objections of the University. In a subsequent undated letter received in this office in October 2008, the Ministry essentially reiterated its representations regarding the status of Victoria under the *Act*.

On October 17, 2008, I invited the appellant to respond to the Notice of Inquiry dated July 23, 2008 provided to the University and Victoria, and also shared the representations submitted by the University, Victoria and the undated letter from the Ministry. On December 15 and 16, 2008, I received the representations of the appellant in response to the Notice of Inquiry. On February 24, 2009, I invited both Victoria and the University to reply to the appellant's representations. I received a letter from Victoria dated March 9, 2009 indicating that its position is clear from its previous submissions, and supporting the representations submitted by the University. On March 25, 2009, I received reply representations from the University.

GROUNDS FOR RECONSIDERATION

Section 18 of the IPC's *Code of Procedure* (the *Code*) sets out the grounds upon which the Commissioner's office may reconsider an order. Sections 18.01 and 18.02 of the *Code* state as follows:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
>
> (c) a clerical error, accidental error or omission or other similar error in the decision.
>
> 18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

The University submits that I erred and exceeded my jurisdiction in making Order PO-2683 because the order purported to require the University to disclose certain information contained in a record that is not within its custody or control. The University bases this position on its further argument that the record is in the record-holdings of Victoria University, which is not a scheduled institution under the *Act*. The University further submits that the academic federation which exists between it and Victoria "does not give the University of Toronto custody or control of the records of Victoria University" and that the University does not have the authority to require Victoria to provide the record to it, or to make an access decision regarding the record.

The issue to be addressed in this reconsideration is whether Victoria is part of the University for the purposes of the *Act*.

POSITIONS OF THE PARTIES

The University submits that, "as a clear matter of law and fact, Victoria University is not an 'institution' within the meaning of section 2(1) of the *Act*". Section 2(1) defines "institution" as including "any agency, board, commission, corporation or other body designated as an institution in the regulations." While the University itself is named as an institution in the Schedule to Regulation 460, it has provided me with evidence that, in its view, supports the independence of Victoria from the University. It also points out that Victoria is not listed in the Schedule to Regulation 460.

As a result, the University takes the position that because Victoria is not an institution under the *Act*, its record-holdings are not subject to requests made pursuant to the *Act*. Accordingly, the University submits that I erred and exceeded my jurisdiction in processing the appeal and in making the order.

In particular, the University submits that Victoria is not "part" of the University for the purposes of the *Act*. It submits that Victoria is an autonomous university and a separate legal entity with which the University has an academic federation. The University has provided detailed submissions to the effect that Victoria is an autonomous legal entity "with its own governance structure, its own president and executive officers, its own property, its own employees and its own records pertaining to its distinct activities." It submits further that the relationship between Victoria and the University has been delineated in a series of "federation agreements" between the two. The University indicates that the relationship is essentially in relation to academic matters.

Victoria's representations are similar to those of the University, especially as regards the autonomous nature of the relationship between them. However, Victoria states that, had Order PO-2683 directed Victoria (as opposed to the University) to disclose certain portions of the record at issue to the appellant, "it would have been in a position to comply with the order."

The Ministry acknowledges that after reviewing the representations of the University and Victoria, it believes that there exists a "question as to whether Victoria University is subject to [the *Act*]." It also indicates that "the academic federation and operational integration of Victoria University with the University of Toronto is complex." The Ministry further notes that:

> . . . unlike universities that are currently listed in Ontario Regulation 460 made under [the *Act*], Victoria and other universities federated with the University of Toronto do not receive direct operating funding from the Ontario government. These organizations do receive grants from U of T, which may represent a flow-through of operating funds provided to the main university by the government of Ontario, to support undergraduate, but not divinity or theology programs.

The Ministry goes on to submit that Victoria and other universities federated with the University have a separate legal status from the University, as evidenced by their "separate constituting legislation, governance, capital assets and financial statements". However, the Ministry also notes that "important academic and operational aspects of the two universities, especially in respect of undergraduate arts programs, have been integrated to a degree that it is difficult to always know where the two universities are separate." As a result, the Ministry submits that "certain of the records of Victoria could fall within the custody or control of [the University]".

The appellant, on the other hand, takes the position that, owing to the integrated nature of the relationship between Victoria and the University, Victoria is in fact part of the University and, therefore, its record-holdings fall within the ambit of the access provisions in the *Act*. It argues that "the Ministry's inclusion of the University of Toronto under the Schedule of Regulation 460 was intended to cover not just the University itself, but also its federated universities, such as Victoria University." The appellant also submits that "both the [University] and [Victoria] have conducted themselves as if [Victoria] were covered by the *Act*."

The appellant has provided me with a copy of Victoria's Policy on Access to Information and Protection of Privacy (Exhibit B to its representations). Victoria has confirmed that this policy has been in effect since 1995, and therefore predates the inclusion of Ontario universities as institutions under the *Act* by approximately ten years.

In addition, as Exhibit A to its representations, the appellant provided a copy of an Agreement between Victoria and the University "concerning the Administration of requests received under FIPPA legislation by the Federated Universities", dated November 23, 2005. This document clearly arises in the context of the addition of Ontario universities as institutions under the *Act*. Among other things, the agreement provides for the creation of mechanisms for the University and the Federated Universities, like Victoria, to respond to requests made under the *Act*, depending on the nature of the information sought. It describes how requests sent to a Federated University for records that are "located at the University of Toronto" are to be forwarded to the University's FIPPA Coordinator who will respond through the Federated University. A similar practice would be followed in cases where the University received a request for information held by a Federated University.

The appellant also provided additional evidence to substantiate its arguments regarding the integration of many aspects of the operations of Victoria and the University, and argues that this evidence leads to the conclusion that Victoria is part of the University. The appellant also submits that when the request that led to this appeal was submitted, it followed the protocol issued by the University and Victoria by submitting the request to the Bursar of Victoria, rather than to the FIPPA Coordinator at the University. The appellant further submits that "[w]hile the designated 'head' of the University of Toronto is the Executive Head", "the 'Agreement' attached as Exhibit A represents a delegation of authority by that Head [of the University] to the FIPPA Officer of Victoria University, with respect to those records held by Victoria University."

In addition, the appellant refers to the legislative debates regarding Bill 197, which amended the *Act* to accommodate the addition of Ontario universities as institutions in the Schedule to Regulation 460. These debates included a statement by the Parliamentary Assistant to the Minister of Finance, to the effect that the Bill proposed to "make Ontario's universities subject to the provisions of [FIPPA] and ensure that Ontario's publicly funded post-secondary institutions are even more transparent and accountable to the people of Ontario."

The appellant submitted further excerpts from the legislative debates to support its interpretation of the circumstances surrounding the amendments. On this basis, it submits that the Government clearly intended that all universities and colleges that receive the benefit of public support from the province be included under the purview of the *Act*, and has provided detailed submissions regarding the internal funding mechanisms that exist between the University and Victoria.

The appellant has also provided me with a copy of the Federation Framework Agreement (the FFA) between the University and Victoria which addresses what it describes as "collaboration" between the two universities and refers to the federation itself as a "collective endeavour". The appellant relies on the provisions of the FFA to support its arguments that the University and Victoria are sufficiently integrated to allow for a finding that Victoria is part of the University. The appellant also relies on the Financial Statements of Victoria to support its position that Victoria receives public funding indirectly through the University. In this regard, I also note that the compendium circulated with Bill 197 at the time of its introduction stated the intention that "Publicly assisted universities would be added to the Act by regulation."

In its request for relief, the appellant urges that a finding be made that the listing of the University of Toronto in the Schedule to Regulation 460 includes both the University of Toronto and its federated colleges and universities. It argues that:

> Any other finding would be contrary to the fundamental purpose of the government's 2005 amendments to the *Act*, namely, to ensure transparency and accountability in publicly funded and regulated post-secondary educational institutions.

In the first alternative, the appellant argues that the requested record is in fact in the custody or under the control of the University for the purposes of the request because of the nature of the relationship between Victoria and the University.

As a second alternative, the appellant asks that I consider crafting a remedy similar to the recommendation provided by former Commissioner Tom Wright in Order P-231, in which he found that because the Mining and Lands Commissioner of Ontario was not an institution for the purposes of the *Act*, he was unable to order it to disclose information that was not exempt under the *Act*. The appellant submits that the former Commissioner commented that, in the appellant's words, the "omission of the Mining and Lands Commissioner seemed at odds with the purpose of the *Act*, and indeed, noted that many similar tribunals were defined in the Regulations as institutions covered by the *Act*." The appellant goes on to indicate that the former Commissioner

in that case forwarded a copy of his decision to the responsible Minister at the time, along with his recommendation that the regulation be amended to include the Mining and Lands Commissioner. Former Commissioner Wright also stated in the postscript to the decision that nothing precluded the Mining and Lands Commissioner from disclosing information in accordance with the spirit and principles of the *Act*.

As part of its alternative argument, the appellant submits that Victoria "has repeatedly expressed its support for the principles and spirit of the *Act* in the instant case." The appellant urges that this office make a similar recommendation for an amendment to the regulation, which could assist it in pursuing such an amendment, if necessary, or in persuading Victoria to voluntarily disclose the information which I found was not exempt in Order PO-2683, regardless of jurisdictional issues.

In its reply representations, the University reiterates the positions taken in its August 29, 2008 representations. In addition, the University relies on Order PO-2738, in which Adjudicator Diane Smith examined whether the York University Foundation (the YUF) is part of York University for the purposes of the *Act*. In that case, the Adjudicator approached the question by considering, among other things, whether:

1. The YUF itself is an institution under the *Act*; and

2. The YUF is considered a part of the University, which is, itself, an institution under the *Act*.

As part of its submissions, the University provides answers to these two questions as they pertain to the present appeal, as follows:

1. Victoria University is not listed as an institution in *FIPPA* s. 2, nor is it scheduled in the Schedule to Regulation 460.

2. The answer is, clearly, "no". Victoria University is separately governed and managed, has its own officers, its own property, its own collective agreements with its own unions (including its own collective agreement with the requester), its own policies and its own records. It has its own students. Victoria University, acting pursuant to its own legislation, has a long and clear record of independence from the University of Toronto and has acted independently over the long course of its history since its creation by Royal Charter in 1836. It has entered into an agreement with the University of Toronto pursuant to which it has engaged in a "federation" for specified academic purposes. This federation does not in any way make Victoria University "part of" the University of Toronto. It merely guides how the University of Toronto and Victoria University accomplish those tasks in which they – as separate universities – have decided to work together.

Order PO-2738 also considered the issue of "custody or control", which I will address later in this order.

Regarding Order PO-2738, the University goes on to submit that the elements of independence are substantially stronger and clearer as between the University and Victoria than between York University and the YUF, arguing that the YUF's sole purpose is to "support the activities of York University" while Victoria "has its own mission which it has pursued independently since its creation."

The University then goes on to respond to the arguments made by the appellant.

The University provides representations concerning the document referred to in the appellant's submissions as Exhibit A, entitled "Agreement with the University of Toronto concerning the Administration of requests received under FIPPA legislation by the Federated Universities." It takes the position that "it is not accurate to label this document as an agreement" and that "it is not a University of Toronto document and it is not signed by the University of Toronto." The University is of the view that this document "merely sets out a mechanism whereby requests for information that come to the University of Toronto 'but involve information held at the Federated University' can be handled by the Federated University." It goes on to suggest that "[I]ndeed, if Victoria University were part of the University of Toronto, or its documents were within its custody or control, there would be no need for this document." [the University's emphasis]

The University then submits that the creation of Victoria's "Policy on Access to Information and Protection of Privacy", Exhibit B to the appellant's representations, demonstrates that "it (correctly) did not see itself as covered by [the *Act*]. The policy shows instead Victoria University's commendable support of access and privacy principles." It also takes the position that this document is entirely a creation of Victoria and does not indicate that Victoria is subject to the *Act*.

Similarly, it argues that regardless of what the documents which comprise Exhibit C (consisting of information on Victoria's website regarding freedom of information, as well as Victoria's freedom of information request form) might say:

> [A]s a legal matter, jurisdiction cannot be conferred by policy, practice or estoppel; if Victoria University is listed in the Schedule to regulation 460 and therefore an institution, it is covered by *FIPPA* and if not, it does not become covered by *FIPPA* or an 'institution' through its own actions, policies or decisions. It simply does not have jurisdiction to constitute itself a *FIPPA* institution.

With respect to legislative history and the actual language employed to bring universities within the ambit of the *Act*, the University submits that both support its position that only institutions listed for inclusion in Regulation 460, like the University itself, were intended to be brought

within the ambit of the *Act*. It points out that the existence of federated universities as independent entities is well known and that they are identified in other legislation such as the *Pay Equity Act*. It argues that the interests of transparency and accountability "are not served in any way by characterizing independent entities as part of listed institutions on an ad-hoc basis, without the predictability created by clear listing of institutions under *FIPPA* or the Schedule to Regulation 460."

The University goes on to comment on certain aspects of the Financial Statements of Victoria University which are relied upon by the appellant. The University points out that it does not and cannot generate, approve or audit Victoria's Financial Statements. It submits that "The University of Toronto receives funding from the Ontario government which pertains to students registered at Victoria University" and that "the University of Toronto flows government grants for Victoria University students enrolled in programs at the University of Toronto to Victoria University through a block grant that covers such students and associated administrative and operating expenses, but this does not make Victoria University part of the University of Toronto for FIPPA or any other purposes."

The University submits that Victoria has suspended its ability to grant degrees, except for theology degrees; students of Victoria University who are enrolled in the University of Toronto's programs are eligible for University of Toronto degrees. It submits that this does not make Victoria part of the University of Toronto, or give the University of Toronto access to or the ability to make decisions regarding the records generated and held by Victoria University.

With respect to certain information in a Memorandum of Agreement between the University of Toronto and the Federated Universities dated December 17, 1998 and which was in effect from July 1, 1998 to June 30, 2008 (Exhibit G to the appellant's representations, referred to in this order as the "Memorandum"), the University also submits that it retains academic control of its academic programs, including the teaching done in Arts and Science, and the standards applied for the degrees in those programs. It submits that this is necessary since the outcome of participation in Arts and Science courses may be a University of Toronto degree "and the University of Toronto must have full control over such teaching." It submits that this evidence "confirms that the two entities are in federation, in an academic sense" but "It does not indicate they are part of each other for any purpose whatsoever."

As noted above, Victoria's reply representations indicate that its position is clear from its extensive submissions, and that Victoria supports the submissions made by the University.

ANALYSIS

Section 10(1) of the *Act* grants every person a right of access to a record or a part of a record in the custody or control of an institution unless the record is exempt from disclosure under one of the exemptions enumerated under sections 12 through 22 or the head is of the opinion that the request is frivolous or vexatious. The term "institution" is defined in section 2(1) as follows:

> "institution" means,
>
> (0.a) the Assembly,
>
> (a) a ministry of the Government of Ontario,
>
> (a.1) a service provider organization within the meaning of section 17.1 of the *Ministry of Government Services Act*, and
>
> (b) any agency, board, commission, corporation or other body designated as an institution in the regulations;

Regulation 460 made under the *Act* designates the University of Toronto as an institution (see Item 154.0.4 of the Schedule to the Regulation) The Schedule does not, however, make reference to Victoria University or to any of the other federated universities which have entered into similar agreements with the University of Toronto.

Accordingly, I must determine whether Victoria is part of the University for the purposes of the *Act*.

The appellant submits that there exists a sufficiently strong connection in the relationship between Victoria and the University to enable me to make a finding that Victoria is part of the University for the purposes of the *Act* and that the University would then exercise the requisite degree of "control" over the record which is the subject of the request. In support of this contention, it relies upon evidence describing the nature of the financial, operational and academic integration between the two universities, including statements provided by the Ministry in its representations to me on this issue. The appellant referred to the Ministry's submission that "the operating, funding and accountability relationship between Victoria University and [the] University of Toronto could mean that certain of the records of Victoria could fall within the custody or control of U of T."

I have carefully reviewed the evidence tendered by the universities, the Ministry and the appellant and come to the conclusion that Victoria University is part of the University of Toronto for the purposes of the *Act*, for the following three reasons. First, the legislative history of the amendments that brought Ontario's universities under the ambit of the *Act* leads me to conclude that all universities which receive public funding were intended to be included. In my view, there is no principled reason why this would not include those universities whose largest source of public funding is derived through as a result of a flow-through of monies, like Victoria, from a scheduled university, like the University of Toronto. Second, the degree of integration of the administrative, financial and academic operations of Victoria and the University lead me to conclude that Victoria is part of the University of Toronto for the purposes of the *Act*. Finally, the actions of Victoria and the University that were apparently taken to prepare for their

inclusion in the freedom of information and privacy protection regimes under the *Act* at the time of the amendments lead me to conclude that they considered Victoria to be subject to the requirements of the *Act*. I now turn to a detailed review of these three reasons for my decision, and several related issues raised by the parties.

Legislative history and intention

In 2005, the *Act* was amended by Bill 197, the *Budget Measures Act, 2005*, to accommodate the inclusion of Ontario's publicly-funded universities as institutions for the purposes of the *Act*. These amendments, which came into force on June 10, 2006, added the definition of "educational institution" in section 2(1) of the *Act* which includes colleges of applied arts and technology, and universities. Shortly before the Bill 197 amendments to the *Act* came into force, the Schedule to Regulation 460 under the *Act* was also amended to include a number of universities, including the University of Toronto. The explanatory note to Schedule F of Bill 197 provided that:

> The *Freedom of Information and Protection of Privacy Act* is amended in order to accommodate the inclusion of universities as institutions under the Act.

In speaking to the amendments to the *Act* in the Legislature, the Minister of Finance and Chair of the Management Board of Cabinet, Mr. Dwight Duncan, stated that:

> We are introducing amendments that, if passed, will amend the Freedom of Information and Protection of Privacy Act to accommodate the inclusion of universities and colleges. This is a historic step and one this government is very proud of.

This statement was followed by the following by the parliamentary assistant to the Minister of Finance, Mr. Wayne Arthurs:

> To that end, this bill proposes to make Ontario's universities subject to the provisions of the Freedom of Information and Protection of Privacy Act and ensure that *Ontario's publicly funded post-secondary institutions are even more transparent and accountable to the people of Ontario.* That will be both our universities and our colleges of applied arts and science. [emphasis added]

In addition, a government member also speaking to the Bill before the Legislature, Ms. Liz Sandals, also indicated that:

> I also thought I might do something rather novel, which is to talk about what's actually in the bill, because there are a number of items in the budget bill [Bill 197] that are not immediately apparent. One of them is the inclusion of Ontario's universities in the Freedom of Information and Protection of Privacy Act. This has never happened before. I need to tell you that my university, the University of Guelph, has been quite supportive of the inclusion of universities in the freedom of information act.

The appellant urges me to find that by enacting Bill 197, the Legislature intended to promote transparency and accountability throughout the postsecondary education sector, specifically by extending the coverage of the *Act* to all universities and colleges that receive the benefit of public support from the Province of Ontario. The appellant goes on to argue that because Victoria receives significant public funding in order to operate, the "overarching policy purpose behind the extension of FIPPA to colleges and universities would clearly best be served by including [Victoria] among those institutions to be covered."

As indicated by the responsible Minister at the time, by enacting the amendments to the *Act* contained in Bill 197, the Legislature contemplated that Ontario's publicly-funded universities would be brought under the ambit of the *Act*. I find it illogical to differentiate between universities which receive all of their public funding directly from the Government of Ontario and those whose largest source of public funding is received as a "flow-through" from another university, as is the case with Victoria and the University.

The receipt of "flow-through" government funding, by Victoria from the University, in the form of block grants, is acknowledged by the University in its representations. It is also confirmed by Victoria's 2008 Financial Statements (Note 15, page 21):

> The relationship between the University of Toronto and Victoria University is governed by a Memorandum of Agreement [identified above as the Memorandum, which was attached as Exhibit G to the appellant's representations]. Under this [Memorandum], the University of Toronto records as income all government grants and tuition fees in respect of students of Victoria College. The [Memorandum] also provides for Victoria University to receive a block grant, which covers certain administrative and operating expenses, and an instructional grant, which supports part of the cost of Victoria University's programs.

I also note that in addition to Victoria receiving "flow-through funding," Victoria's 2008 Financial Statements seem to indicate that it receives a small amount of funding through direct government grants. The evidence thus demonstrates that Victoria receives government funding both directly and indirectly. In my view, because Victoria receives public funding from the Government of Ontario, the Legislature contemplated that it would be made subject to the *Act* as a consequence of the addition of universities, including the University of Toronto, to the list of institutions in the Schedule to Regulation 460.

Degree of integration of the universities' financial, academic and administrative operations

In support of its argument that Victoria is part of the University for the purposes of the *Act*, the appellant relies on the extract from the 2008 Financial Statements of Victoria University I have just quoted. It also refers to the Federation Framework Agreement between Victoria and the University (the FFA), which took effect on July 1, 2008, after the date of the request which gave rise to this appeal, and its predecessor document, which I have previously identified as "the Memorandum." To reiterate, the latter document is a Memorandum of Agreement between the

University of Toronto and "The Federated Universities" (which include Victoria University) that was in effect from July 1, 1998 to June 30, 2008, and was attached to the appellant's representations as Exhibit G. The appellant argues, and I concur, that based on the documentary evidence, the nature and extent of the relationship between the University and Victoria demonstrates a high degree of integration of the universities' finances, academic activities and operations.

At the top of page 5 of the Memorandum, one of the preambles states:

> [whereas] the University on behalf of its Constituent Colleges and the Federated Universities on behalf of their Arts Colleges agree that the responsibility for academic management of arts and science programs, courses and instruction should reside in the [University's] Faculty of Arts and Science, and like responsibility for other programs, courses and instruction in the appropriate Faculty or School of the University;

In a section entitled "Fundamental Principles", at paragraphs 5 and 6, the Memorandum provides that:

> The Federation between the University and the Federated Universities is founded on historic agreements whereby the Federated Universities offer programs and degrees in theology, and the University offers programs and degrees in Arts and Science. The Federated Universities make available their considerable resources to a common University enterprise of education particularly in Arts and Science, and the University commits itself to equitable compensation for services agreed upon and provided. By this Memorandum, the University and the Federated Universities acknowledge and pledge to continue the goodwill and the spirit of co-operation which makes this educational enterprise unique.
>
> In this same spirit of co-operation and mutual benefit, the University agrees to promote public awareness of the Colleges and the federation, and the Federated Universities agree to the public representation of their federation with the University of Toronto, especially in matters related to the areas under this Memorandum.

Several portions of the Memorandum directed at the funding of academic and administrative services also indicate a significant degree of integration between the University and the federated universities, including Victoria. For example, Chapter VI of the Memorandum, entitled Financial Principles, indicates at paragraph VI.1.a. that:

> The University shall provide funding to the Federated Universities at levels comparable to the costs of similar activities within the University's own operations. Where applicable, the University will endeavour to ensure that the Federated Arts Colleges [which include Victoria College in Victoria University] receive funding on a level equivalent to that received by the Constituent Colleges.

Similarly, Paragraph VI.2, entitled "Funding for the Federated Universities: Policy and Procedures" provides that:

> In light of the above principles in VI.1, the parties shall set out in an Agreement (*Funding for the Federated Universities: Policy And Procedures*) the areas for which the University will and will not provide financial support to the Federated Universities, which Agreement shall be read as part of this Memorandum. Areas for support shall include libraries, administration of academic programs, financial management, registrarial services, support for faculty members housed in Federated Arts Colleges, space, maintenance and utilities. The Agreement shall specify the basis of calculation for funding in each area and other matters relevant to funding such as budget adjustments and payment schedules. This Agreement may be modified from time to time during the term of this Memorandum with the consent of all the Heads.

Sub-paragraphs a to d of Paragraph VI.3, entitled "The Funding of College Programs and Courses, provides that:

> The University shall contribute to the funding of College programs and courses in accordance with the following principles.
>
> a. Insofar as teaching is done for Arts and Science students, in courses and programs of study approved by the Faculty of Arts and Science, final responsibility for College teaching as defined in Section II of this Memorandum must rest with the Faculty of Arts and Science. This principle extends by analogy to any College teaching for any other Faculty or School of the University.
>
> b. Any College, Constituent or Federated, may contribute from its own financial resources to the costs of teaching approved courses or programs mounted in the College. It is expected that each College will continue to seek additional sources of funding for courses and programs reflecting its distinctive character and mission within the University. Financial partnerships between the College and Faculty are to be encouraged.
>
> c. Instructional grants for College teaching will be subject to normal budgetary processes within the Faculty. In their capacity as equivalent to department chairs, constituent or federated College Principals will present their teaching program budgets to the Dean as part of periodic budget and complement planning processes. In keeping with the principles enunciated in section II above, the Faculty portion of College budgets will be adjudicated and adjusted according to principles and procedures similar to those that apply to departmental budgets.

d. The Dean of the Faculty of Arts and Science and the Principals of the Federated Universities shall develop a written Agreement by December 31, 1998 on protocols concerning the allocation of funds provided by the Faculty to the Federated Universities in support of instructional activities conducted by the Federated Universities.

The FFA, also referred to by the appellant, took effect after the date Order PO-2683 was issued. It continues a similar arrangement for the funding and provision of services between the University and the federated universities, including Victoria.

In my view, the evidence set out above describes a set of circumstances which is sufficiently compelling to enable me to make a finding that the operational and financial affairs of Victoria and the University are integrated to a very high degree. The University provides funding in the form of a Block Grant and an Instructional Grant to Victoria to enable it to conduct its Arts and Science programs, under the auspices of the University's Faculty of Arts and Science. That funding is derived from several sources, including student tuition and government grants from the Province of Ontario, which are collected and disbursed by the University to the federated universities, including Victoria.

Further, I note that Victoria has suspended its degree-granting authority for all except divinity students which results in its students receiving a degree not from Victoria but from the University. This has been the case for a number of years.

Finally, as further evidence of the integrated nature of the academic services provided by Victoria to its arts and science students, page 5 of the Memorandum of Agreement provides that "responsibility for academic management of arts and science programs, courses and instruction should reside in the Faculty of Arts and Science and like responsibility for other programs, courses and instruction in the appropriate Faculty or School of the University". This principle is reiterated in Part VI.3 of the Memorandum of Agreement entitled "The Funding of College programs and Courses" at page 12.

As noted above, the University relies on Order PO-2738, where it was held that the York University Foundation (the YUF) is not "part of" York University (York) for the purposes of the *Act*. In that decision, the Adjudicator examined the statutory basis, corporate structure and "mission" of both the YUF and York and observed that the purpose for the existence of the YUF is to fundraise for York, while York's primary activities involve research and teaching.

In my view, the situation in Order PO-2378 is totally different from the facts before me, and does not support the argument for which the University relies on it. Unlike Victoria, the YUF is not a university. It performs no educational, research or academic function and is strictly a fund-raising body. Nor does it receive public funding in support of an educational mandate. There is no sound basis upon which to conclude that the relationship between York and the YUF, on the one hand, and the University and Victoria, on the other, are analogous in any way that sheds light

on the issues to be decided in the appeal before me. As well, the extent of integration of operations and academic functions that exists between Victoria and the University are quite distinct from those that are in place between the YUF and York.

Having considered the documentary evidence and arguments provided to me, as outlined above, I conclude that the degree of integration of their financial, academic and administrative operations supports the conclusion that Victoria is part of the University for the purposes of the *Act*. In my view, this conclusion also finds support in the manner in which the University and Victoria responded to the addition of Ontario universities as institutions under the *Act*.

The actions of the universities following the enactment of Bill 197

The appellant submitted evidence in support of its position that since the enactment of legislation which brought Ontario universities under the ambit of the *Act*, the University and Victoria have created mechanisms governing how they will respond to requests made to them under the *Act* which would give rise to an expectation on the part of potential requesters that Victoria is covered under the legislation as well.

First, the appellant relies upon an Agreement written on Victoria University letterhead dated November 23, 2005 entitled "Agreement with the University of Toronto concerning the Administration of requests received under FIPPA legislation by the Federated Universities."

As noted above, the appellant submits that the Agreement represents a delegation of authority by the Head of the University to the FIPPA Officer of Victoria, with respect to those records held by Victoria. The University submits that neither it nor its head has ever delegated any authority under the *Act* to Victoria or any other entity. The University refers to the Agreement as a "memorandum" and describes it as "an administrative mechanism for separate entities which interact frequently, to channel requests correctly." The University submits that it is not a University of Toronto document; it is not signed by the University; and it is not accurate to label it as an "agreement." The University does not submit that there was no understanding reached between itself and Victoria on November 23, 2005 or that they did not intend to operate under the Agreement.

In my view, the Agreement represents an effort to assign and coordinate responsibilities among the University of Toronto and its Federated Universities in the receipt, transfer and decision-making process regarding requests for access under the *Act*. Whether or not the Agreement amounts to a delegation under section 62(1) of the *Act* (which provides for delegations of responsibilities under the *Act* by the head of an institution), the Agreement nevertheless provides evidence of a recognition by the University of Toronto and Victoria that, collectively, they would be covered by the *Act*. As well, even if the agreement does not amount to a delegation, this does not have any impact on the significant integration between the operations of the University and Victoria, as outlined in the discussion above.

Accordingly, and contrary to the assertions of the University, I find that the Agreement accurately describes an existing, detailed protocol in place which is designed to clarify responsibility for responding to requests made under the *Act* to both Victoria and the University. I do not accept the University's submission that the force of this document is in some way diminished by the fact that it is on Victoria's letterhead and is not signed by either party.

This Agreement describes the procedures which will govern how the University and each of the Federated Universities will respond to requests for information made pursuant to the *Act*. The Agreement describes how the University "will establish a fulltime FIPPA coordinator with an office and support staff" and that "each Federated University will designate a FIPPA officer who will be accountable for responding to requests for information that are sent to that university", as well as requests that are received by the University "but involve information held at the Federated University." It goes on to require that each Federated University "establish a process for responding to requests that are sent to it directly and involve only information held there" and providing for the forwarding of requests from the Federated University to the University where the information sought is located "at the University of Toronto".

The Agreement calls for the University to establish "a fulltime FIPPA coordinator," and each Federated University to designate "a FIPPA officer." Most institutions under the *Act* have created a position entitled "Freedom of Information and Privacy Coordinator" to handle their day-to-day responsibilities under the *Act*. In my view, the fact that the Agreement provides that only the University would have a FIPPA coordinator is significant and further supports my conclusion that both the University and Victoria recognized that they would be covered by the *Act*. If the University and Victoria believed that each was required to be designated as a separate institution, one might reasonably expect the Agreement to provide that each should have a separate FIPPA coordinator. The fact that the Agreement provides for only the University having a FIPPA coordinator suggests that the University and Victoria contemplated that the University would be designated as an institution, and that it would have one FIPPA coordinator for the University and its Federated Universities.

In my view, the existence of the Agreement provides evidence that the University and Victoria understood that they would fall within the ambit of the *Act.* The Agreement creates a written understanding of how requests would be handled, depending on the location of the information being sought by the requester. It is noteworthy that the Agreement demonstrates that the University and Victoria had considered issues surrounding their respective roles in the processing of requests under the *Act* at the time of the enactment of Bill 197. If Victoria and the University believed that the Federated Universities were not subject to the provisions of the *Act*, the language referred to in the Agreement respecting the transfer of requests would not have been necessary. Also, the designation of FIPPA officers by Federated Universities would make sense only if it was mutually understood that they would be covered by the *Act*.

Evidence from Victoria's website also indicates that Victoria considered itself to be subject to the *Act*. This evidence was provided in Exhibit C to the appellant's representations. In Exhibit C, the appellant provides a page taken from Victoria's website which indicates that "The

Freedom of Information Officer for Victoria University is [a named individual]" and also refers in capitalized bold lettering to the "Freedom of Information and Protection of Privacy Act (FIPPA)". In my view, the description contained in this webpage and the specific reference to the *Act* would give rise to an expectation by a potential requester that the *Act* applies to information held by Victoria.

Also in Exhibit C, the appellant provided me with a copy of a document entitled "Freedom of Information Request Form" for requests submitted to Victoria, which mirrors very closely the same request form used by the University. At the bottom of pages 1 and 2 of the form is included the following language:

> Personal information contained on this form is collected pursuant to the Freedom of Information and Protection of Privacy Act and will be used for the purpose of responding to your request. Questions about this collection should be directed to the Freedom of Information and Protection of Privacy Office for Victoria University (contact information above).

As mentioned earlier in this decision, Victoria created and adopted a Policy on Access to Information and Protection of Privacy in 1995. This policy does not assist me with respect to the issue under consideration in this order because it substantially predates the inclusion of universities as institutions under the *Act*.

Although not determinative, both the Agreement and the evidence provided in Exhibit C to the appellant's representations provide a strong indication that the University and Victoria were of the view that, once the University was included as an institution under the *Act*, Victoria and its record-holdings would also be covered.

Other Arguments

Custody or Control

The University argues that it does not have custody or control of the record at issue, and that it does not have the power to compel it to be produced to it.

In *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072, the Ontario Court of Appeal held that backup audio tapes prepared by the court reporter at certain disposition hearings before the Ontario Criminal Code Review Board were under the Board's control within the meaning of s. 10(1) of the *Act*. In responding to the Board's argument that if ordered to make access to the backup tapes available to the requesters, it would be unable to comply because it was not able to compel the court reporter to deliver the backup tapes to it, the Court stated that:

> "… the Board chose to enter into arrangements with independent court reporters to meet its court reporting requirements. Assuming the court reporter now refuses to deliver the backup tapes to the Board, the Board's failure to enter into a contractual arrangement with the reporter that would enable it to fulfil its statutory duty to provide access to documents under its control cannot be a reason for finding that the duty does not exist. Put another way, the Board cannot avoid the access provisions of the *Act* by entering into arrangements under which third parties hold custody of the Board's records that would otherwise be subject to the provisions of the *Act*."

While the matter before me is not the same circumstance that the Court of Appeal dealt with in *Ontario (Criminal Code Review Board)*, cited above, the Court's statement that institutions under the *Act* have obligations in respect of records intended to be subject to the *Act* is still relevant. In a similar vein, I find that if, as found in this order, a reading of the amended *Act* and Regulation 460, together, leads to the conclusion that Victoria is part of the University for the purposes of the *Act*, then the University must enter into arrangements to ensure that it is able to fulfil its obligations under the *Act* with respect to the record holdings of all portions of the University.

Accordingly, in my view, this argument does not support the position that Victoria is not part of the University for the purposes of the *Act*.

Pay Equity Act

In support of its position that Victoria is not part of the University for the purposes of the *Act*, the University submits that Victoria is identified as an independent entity in other legislation, such as the *Pay Equity Act*. Section 1(a) of the *Pay Equity Act* defines "public sector" to mean "all of the employers who are referred to in the Schedule." Section 1 of the Schedule to the *Pay Equity Act* provides that the public sector in Ontario consists of the bodies listed at paragraphs (a) through (i), including:

> (c) every board as defined in the *Education Act*, and every college, university or post-secondary school educational institution in Ontario the majority of the capital or annual operating funds of which are received from the Crown;
>
> (i) any authority, board, commission, corporation, office, person or organization of persons, or any class of authorities, boards, commissions, corporations, offices, persons or organizations of persons, set out in the Appendix to this Schedule or added to the Appendix by the regulations made under this Act.

The Appendix to the Schedule lists a number of bodies, including Victoria University, but not the University of Toronto.

The language "received from the Crown" in section 1(c) of the Schedule appears to be aimed at colleges and universities that receive the majority of their capital or annual operating funds *directly* from the Crown. The University has acknowledged that "the University of Toronto flows government grants for Victoria University students enrolled in programs at the University of Toronto to Victoria University through a block grant." Based on Victoria's 2008 Financial Statements, it is clear that Victoria receives the majority of its public funding indirectly through the University of Toronto. It is also clear from the Financial Statements that the majority of Victoria's overall annual funding comes not from government grants (direct or indirect), but from students' tuition fees, donations and other sources.

Victoria University appears to be separately listed in the Appendix because, while it receives public funding through the vehicle of the University of Toronto, it does not strictly qualify under the language of section 1(c) of the Schedule. Thus, in the *Pay Equity Act* the Legislature was addressing a circumstance that does not exist in the *Act*, namely, the need to capture Victoria separately because it does not fit within the category of universities described in section 1(c) of the Schedule.

In my view, the Legislature may be taken to have adopted a different approach in legislation such as the *Act* where the contracting capacity or financial obligations of specific entities are not at issue, but rather, the legislation is designed to address the transparency and privacy-protection responsibilities of a broad sector of public institutions.

The purpose of the *Pay Equity Act* is "to redress systemic gender discrimination in compensation for work performed by employees in female job classes" (see section 4(1)). The statute imposes financial obligations on private and public sector bodies that impinge on their freedom to enter into employment contracts that do not provide for equitable pay among employees. For example, section 7 of the statute requires every employer to establish and maintain compensation practices that provide for pay equity in every establishment of the employer. Where financial obligations and remedies are imposed by legislation such as the *Pay Equity Act*, it is understandable that the Legislature would take care to ensure that the entities not caught by a generic description (as in section 1(c) of the Schedule) who are intended to be made subject to those obligations and remedies as contracting parties and payors of monies are identified in their contracting capacity as a specific corporate or other entity.

In my view, therefore, the provisions in the *Pay Equity Act* are not determinative of the issue of whether Victoria is part of the University for the purposes of the *Act*. I am also not persuaded that the inclusion of Victoria University as a separate entity in the *Pay Equity Act* means that it was not intended to be included in the words "University of Toronto" in Regulation 460 under the *Act*.

CONCLUSION

The Legislature's intention in amending the *Act* was clear: it intended to "make Ontario's universities subject to the provisions of [the *Act*]" and "ensure that Ontario's publicly funded post-secondary institutions are even more transparent and accountable to the people of Ontario."

In my view, in light of the Legislature's intention in amending the *Act*, the designation of the University of Toronto in Regulation 460 was intended to include Victoria University. My conclusion is supported by the principles of statutory interpretation articulated by the Ontario Court of Appeal with respect to Ontario's access and privacy legislation.

In *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 90, the Ontario Court of Appeal ruled on the proper construction of the term "record" in s. 2(1) of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*). *MFIPPA* is the *Act*'s counterpart legislation that applies to municipal institutions; the two statutes and their regulations are similar in many respects. The Court's decision affirms the principle that Ontario's public sector access and privacy legislation (i.e., the *Act* and *MFIPPA*) requires a broad, liberal and purposive interpretation. Such an interpretation applies to both the statutes and their regulations.

In restoring this office's order applying the definition of "record" in *MFIPPA* to electronic databases maintained by the Toronto Police Services Board, the Court stated that:

> As recently held by this court in *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario* (2008), 292 D.L.R. (4th) 706, at paras. 28 and 30, the Act should be given a broad interpretation to best ensure the attainment of its object, according to its true intent, meaning and spirit.

The Court favoured "a liberal and purposive interpretation" of certain regulations under *MFIPPA* when read in conjunction with certain provisions of the statute. It stated that:

> In my view, a liberal and purposive interpretation of those regulations when read in conjunction with s. 2(1)(b), which opens with the phrase "subject to the regulations," and in conjunction with s. 45(1), strongly supports the contention that the legislature contemplated precisely the situation that has arisen in this case. In some circumstances, new computer programs will have to be developed, using the institution's available technical expertise and existing software, to produce a record from a machine readable record, with the requester being held accountable for the costs incurred in developing it.

The Court preferred this approach over the Board's proposed reading, which the Court said "coincides with the narrow approach that [the Board] has asserted throughout and advocates an interpretation of ss. 6(5) and (6) of Reg. 823 that would very much restrict, rather than foster, the public's right of access to electronic records."

In view of the Legislature's expressed intention in amending the *Act* (through Bill 197) to accommodate the inclusion of publicly funded universities as institutions, I find that the words "University of Toronto" in Regulation 460 include Victoria University. I find that a broad, liberal and purposive interpretation of the Regulation also counsels such a conclusion. The evidence before me concerning the strong degree of integration of the financial, academic and administrative operations of the University and Victoria leads to the same conclusion. For all

these reasons, I find that Victoria is part of the University for the purposes of the *Act*. Accordingly, I uphold my decision in Order PO-2683 and decline to reconsider it.

RECONSIDERATION ORDER:

1. I uphold my decision in Order PO-2683 and decline to reconsider it.

2. I order the University to disclose the portions of the record not found to be exempt in Order PO-2683 to the appellant by providing him with a copy by **May 21, 2009** but not before **May 15, 2009**.

3. In order to verify compliance with Order Provision 2, I reserve the right to require the University to provide me with a copy of the record which is disclosed to the appellant.

Original Signed by: April 20, 2009
Donald Hale
Adjudicator

POSTSCRIPT AND RECOMMENDATION:

In addition to the conclusions reached in this order, I have decided to accept the appellant's suggestion to recommend to the Ministry of Government Services that an amendment to Regulation 460, made under the *Act*, is desirable in order to fulfill the legislative intent to include publicly-funded universities within the access and privacy provisions of the *Act*. While this order deals only with Victoria, it is clear from the legislative history surrounding the amendment of the *Act*, which saw the inclusion of the university sector, that it was the intention of the Legislature that all publicly-funded universities would be subject to the *Act*.

Specifically listing all publicly funded universities in the Schedule to Regulation 460, including those universities and colleges that are federated or affiliated with universities already listed in the Schedule, would remove any uncertainty over whether those entities are subject to the *Act*. Accordingly, I am providing the Ministry of Government Services, which has responsibility for administering the *Act*, with a copy of this reconsideration order and recommend that it move expeditiously to address these issues.