



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Bose v. Newfoundland and Labrador (Information and Privacy
Commissioner)*, 2025 NLSC 18

Date: February 6, 2025

Docket: 202401G0937

BETWEEN:

**NEIL BOSE, THE PRESIDENT AND
VICE-CHANCELLOR *PRO TEMPORE*
OF MEMORIAL UNIVERSITY OF
NEWFOUNDLAND**

APPLICANT

AND:

**MICHAEL HARVEY, IN HIS
CAPACITY AS THE INFORMATION
AND PRIVACY COMMISSIONER OF
NEWFOUNDLAND AND LABRADOR**

FIRST INTERVENOR

AND:

**MATTHEW BARTER, THE ACCESS
TO INFORMATION REQUESTER AND
COMPLAINANT BEFORE THE
COMMISSIONER**

SECOND INTERVENOR

AND:

GENESIS GROUP INC.

THIRD INTERVENOR

AND:

C-CORE

FOURTH INTERVENOR

Before: Justice Robert P. Stack

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Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: January 16, 2025

Summary:

The Information and Privacy Commissioner of Newfoundland and Labrador (the OIPC) investigated consolidated complaints regarding four access to information requests made to Memorial University of Newfoundland by student Matt Barter. Mr. Barter had sought certain financial information relating to each of Genesis Group Inc., C-Core and the Canadian Centre for Fisheries Innovation, separately incorporated entities of Memorial.

Pursuant to the *Access to Information and Protection of Privacy Act*, the Commissioner issued a Report that determined:

- a. Memorial had not conducted a search for records and could not conduct a custody or control analysis until a search for records had been done. In this regard the Commissioner determined that Memorial breached the duty to assist.
- b. Despite the finding in (a), that Memorial has custody or control over the requested information.

Memorial sought a declaration pursuant to the *ATIPPA* that it does not have to comply with the Report on the grounds that it does not have custody or control of the requested information. Genesis and C-Core intervened in the proceeding; the Canadian Centre for Fisheries Innovation did not.

It was held that the requested information pertaining to Genesis and C-Core does not relate to a Memorial matter. Even if it did, Memorial could not reasonably expect to obtain a copy of the requested information upon request. Therefore, Memorial is entitled to a declaration that it does not have to comply with the Report with respect to Genesis and C-Core.

As for the Canadian Centre for Fisheries Innovation, the Court was not provided with sufficient information to decide. Therefore, Memorial did not meet its onus under the *ATIPPA* in respect of the Canadian Centre for Fisheries Innovation and must comply with the Report as it relates thereto.

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Appearances:

Koren A. Thomson	Appearing on behalf of the Applicant
Andrew A. Fitzgerald, K.C.	Appearing on behalf of the First Intervenor
Matthew Barter	Appearing on his own behalf
J. Alexander Templeton	Appearing on behalf of the Third Intervenor
Michael Hrabowsky	Appearing on behalf of the Fourth Intervenor

Authorities Cited:

CASES CONSIDERED: *Newfoundland and Labrador v. Newfoundland and Labrador Teachers' Association*, 2018 NLCA 54; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25; *University of Toronto, Re (2021)*, 2021 CarswellOnt 11969 (Ont. Information and Privacy Comm.); *YUDC v. Information and Privacy Commissioner*, 2022 ONSC 1755; *Carter v. Municipal Construction Ltd.* (2001), 204 Nfld. & P.E.I.R. 112, 614 A.P.R. 112 (Nfld. S.C.(T.D.)); *Vaughan (City), Re (2012)*, 2012 CarswellOnt 17579 (Ont. Information and Privacy Comm.); *Kitchener (City), Re (1999)*, 1999 CarswellOnt 7704 (Ont. Information and Privacy Comm.); *Walmsley v. Ontario (Attorney General)* 1997, 101 O.A.C. 140, 34 O.R. (3d) 611 (C.A.); *Memorial University, Re (2020)*, 2020 CanLII 35643 (NL IPC)

STATUTES CONSIDERED: *Access to Information and Protection of Privacy Act*, S.N.L. 2015 c. A-1.2; *Memorial University Act*, R.S.N.L. 1990, c. M-7; *Companies Act*, R.S.N. 1970, c. 54; *Canada Not-for-Profit Corporations Act*, S.C. 2009, c. 23

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

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REASONS FOR JUDGMENT

STACK, J.:

INTRODUCTION

[2] The applicant, Memorial University of Newfoundland (Memorial), submits that at the heart of this application is a question of when, if ever, the *Access to Information and Protection of Privacy Act*, S.N.L. 2015 c A-1.2 (the “ATIPPA”) can extend to the records of third parties with corporate relationships to Memorial.

[3] Specifically, the third-party entities here are Genesis Group Inc. (Genesis), C-Core and the Canadian Centre for Fisheries Innovation (CCFI), each a separately incorporated entity (SIE) of Memorial. Genesis and C-Core are, respectively, the third and fourth intervenors. CCFI did not participate in the proceeding.

[4] The proceeding arises out of an investigation by the Information and Privacy Commissioner of Newfoundland and Labrador (the OIPC) into consolidated complaints regarding four access to information requests made to Memorial by student Matt Barter, the second intervenor, for certain information (collectively, the Requested Information) as follows:

- a. Bonuses/special payments paid to C-Core executives and bonuses paid to C-Core management employees from January 1, 2019 to October 23, 2023;
- b. All bonuses and special payments paid to Genesis executives and all incentives paid to Genesis management employees from January 1, 2019 to October 23, 2023;

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- c. All vehicle allowances paid to Genesis executive and management staff from January 1, 2019 to present; and
- d. All vehicle allowances paid to Canadian Centre for Fisheries Innovation executive and management staff from January 1, 2019 to November 2, 2023.

[5] Memorial denied the requests on the basis that it does not have custody or control of the Requested Information, being information belonging to and under the control of the SIEs.

[6] In Report A-2024-006 (the Report), the OIPC determined that:

- a. Memorial had not conducted a search for records and could not conduct a custody and control analysis until a search for records had been done. In this regard the OIPC determined that Memorial breached the duty to assist.
- b. Despite the finding in (a), that Memorial has custody and control over the Requested Information.

[7] The OIPC recommended (the Recommendations) that Memorial:

- i. Conduct a reasonable search for records;
- ii. If necessary, request responsive records from C-Core, Genesis, and CCFI; and,

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- iii. Provide its final response to the Requests to Mr. Barter within 30 business days.

[8] In this proceeding, Memorial seeks a declaration pursuant to section 50(2)(a) of the *ATIPPA* that it does not have to comply with the Recommendations on the grounds that it does not have custody or control of the Requested Information.

ISSUES

[9] Although Memorial, Genesis and C-Core each addressed the issue in their respective memorandum of fact and law, at the outset of the hearing the OIPC conceded that the SIEs are neither public bodies subject to the *ATIPPA* nor part of Memorial such as to be subject to the *ATTIPA*.

[10] Consequently, there are two issues to be decided, the first of which is comprised of two parts:

(1) Is the Requested Information within Memorial's custody or control?

(a) Does the Requested Information relate to a Memorial matter?

(b) Could Memorial reasonably expect to obtain a copy of the Requested Information upon request?

(2) Did Memorial breach the duty to assist?

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THE PROCEDURE ON AN APPLICATION PURSUANT TO SECTION 50(2) OF THE ATIPPA

[11] The purpose of the *ATIPPA* is set out in section 3(1):

3.(1) The purpose of this Act is to facilitate democracy through

- (a) ensuring that citizens have the information required to participate meaningfully in the democratic process;
- (b) increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; and
- (c) protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.

[12] It is conceded that Memorial is a public body for the purposes of section 3(1). A person may request access to a record from a public body pursuant to section 11 and, by section 8(1), has a right of access to a record in the custody or control of the public body.

[13] Following receipt of the Recommendations, Memorial applied to this Court for a declaration under section 50(2):

50. (1) This section applies to a recommendation of the commissioner under section 47 that the head of the public body

- a) grant the applicant access to the record or part of the record [...]

(2) Where the head of the public body decides not to comply with a recommendation of the commissioner referred to in subsection (1) in whole or in part, the head shall, not later than 10 business days after receipt of that recommendation, apply to the Trial Division for a declaration that the public body is not required to comply with that recommendation [...].

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[14] The review process in this Court was confirmed by the Newfoundland and Labrador Court of Appeal in *Newfoundland and Labrador v. Newfoundland and Labrador Teachers' Association*, 2018 NLCA 54, where White J.A. stated at paragraph 6:

When a decision to disclose information under the Act is appealed to the Supreme Court, it is heard as a new matter and not using an administrative law standard of review: see s. 59(1).

[15] By section 43(1), the burden of proof was on Memorial to prove that Mr. Barter had no right of access to the Requested Information. By section 59(2), the burden remains with Memorial on this application.

[16] Guidance with respect to the purpose and interpretation of access to information legislation is found in *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23, where Justice Cromwell, on behalf of the majority, stated at paragraphs 21 and 22:

21 The purpose of the Act is to provide a right of access to information in records under the control of a government institution. The Act has three guiding principles: first, that government information should be available to the public; second, that necessary exceptions to the right of access should be limited and specific; and third, that decisions on the disclosure of government information should be reviewed independently of government (s. 2(1)).

22 In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 61, La Forest J. (dissenting, but not on this point) underlined that the overarching purpose of the Act is to facilitate democracy and that it does this in two related ways: by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and officials may be held meaningfully to account to the public. This purpose was reiterated by the Court very recently, in the context of Ontario's access to information legislation, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815. The Court noted, at para. 1, that access to information legislation "can increase transparency in government, contribute to an informed public, and enhance an open and democratic society". Thus, access to information legislation is intended to facilitate one of the foundations of our society, democracy. The legislation must be given a broad and purposive interpretation, and due account must be taken of s. 4(1), that the Act is to apply notwithstanding the provision of

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any other Act of Parliament: *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110, at p. 128; *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)*, [1996] 3 F.C. 609, at para. 49, aff'd (2000), 25 Admin. L.R. (3d) 305 (F.C.A.).

[17] It is necessary when interpreting the *ATIPPA* that its purposes enumerated in section 3 are considered within the context of the access to information request and the guidance provided by the Supreme Court of Canada in *Merck Frosst* to promote accountability and transparency.

FACTS

[18] Affidavits were filed by Kelly Martin for Memorial, Karla Connolly for Genesis, and Paul Griffin for C-Core.

[19] Mr. Barter did not file an affidavit but did append to his memorandum of fact and law certain relevant information that he has received through ATIPP requests. Because he is a self-represented litigant, I permitted Mr. Barter to affirm to the truth of these matters and accepted them into evidence.

[20] What follow are the facts as I have found them.

Memorial and the SIEs

[21] Memorial is a corporation continued pursuant to section 3(1) of the *Memorial University Act*, R.S.N.L. 1990, c. M-7.

[22] Memorial's powers and authority are set out in section 3(3) of the *Memorial University Act*:

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The university shall have full power and authority to establish and maintain those faculties, colleges, schools, institutions, departments, chairs and courses that may seem appropriate to the board, and

- (a) to give instructions and training in all branches of knowledge and learning, including physical instruction and training;
- (b) to grant degrees, including honorary degrees, diplomas and certificates of proficiency;
- (c) to provide facilities for the prosecution of original research in every branch of knowledge and learning and to conduct and carry on that research work; and
- (d) generally, to promote and carry on the work of a university in all its branches.

[23] As a corporation, Memorial has the capacity to create separately incorporated entities, including the SIEs.

Genesis Group Inc.

[24] Genesis, formerly known as Seabright Corporation Limited, was originally incorporated under the *Companies Act*, R.S.N. 1970, c. 54, as a corporation with share capital. It operates as a non-profit technology incubator that facilitates entrepreneurship and provides services and mentorship to early-stage start-up companies.

[25] Memorial is Genesis' sole shareholder and ownership of voting shares of Genesis is restricted to Memorial.

[26] Genesis is governed by a 12-person Board of Directors, 11 of whom are voting directors. The directors are elected by Memorial's Board of Regents after receiving recommendations from Genesis' Board of Directors and Memorial's President.

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[27] Genesis' directors owe a fiduciary duty to act at all times in the best interests of Genesis. Genesis' By-Law No. 1 also dictates that the directors must manage Genesis' business and affairs at all times in support of Genesis' mission statement.

[28] Genesis' mission extends beyond Memorial and the university community. Specifically, Genesis' mission, as set out in its By-Law No. 1, is to perform as a technology incubator. That is, Genesis assists and encourages academics and companies associated with both Memorial and the local community in commercializing their technological ideas, concepts and intellectual property.

[29] To accomplish its mission, Genesis governs itself and operates vis-à-vis Memorial in the following ways:

- (a) Genesis does not receive funding from Memorial and Memorial does not dictate how Genesis spends the funding it receives from other sources;
- (b) Genesis secures more than approximately 50% of its annual operating revenues from private sources;
- (c) Genesis exercises its ability to freely negotiate and enter into contracts with innovation enterprises in a manner that fosters economic growth for the province as a whole, while also protecting such enterprises' proprietary and commercially sensitive information; and,
- (d) Genesis employs 16 people, all of whom have employment contracts with Genesis. Genesis decides how much and in what form these individuals are paid, as the conditions of employment are decided by Genesis' CEO subject to approval by the Genesis Board of Directors.

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[30] In its operations, Genesis uses assets and facilities owned by Memorial, the use of which is governed by an agreement (the Management Agreement) which provides that Genesis is appointed as Memorial's managing agent of the property.

[31] Under its By-Law No. 1, Genesis may enter into royalty and license agreements as agent of Memorial. Any royalties or other revenues generated from royalty or license arrangements are used to further Genesis' business or are held by Genesis as Memorial's agent.

[32] The Management Agreement sets out the respective responsibilities of Memorial and Genesis and the parameters of their agency relationship. Genesis is authorized to act as agent on behalf of Memorial in relation to management of Genesis' assets and Memorial is authorized to serve as payroll agent for Genesis. More detail about this latter relationship will follow.

[33] As sole shareholder of Genesis, Memorial is obligated to obtain copies of Genesis' financial statements for incorporation into Memorial's consolidated financial statements.

[34] Genesis is accountable to Memorial in its capacity as its sole shareholder. In addition to its statutory obligations, Genesis has additional obligations as set out in Genesis By-Law No. 1 to hold an annual meeting with Memorial (the AGM Requirement) where Genesis provides its special purpose financial statements, its auditor's report, and further information respecting its financial position as required.

[35] The Requested Information is not specified in any of the reports or statements provided to Memorial by Genesis under the AGM Requirement or its governing legislation. The Requested Information also does not appear as a line item in Memorial's consolidated financial statements.

[36] Genesis voluntarily submitted the Requested Information to the Auditor General on a confidential basis and repeatedly advised the Auditor General that the

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information being provided was confidential employee information that the Auditor General lacked jurisdiction to audit or include within the Independent Audit Report.

C-Core

[37] C-Core is a not-for-profit corporation incorporated under the *Canada Not-for-Profit Corporations Act*, S.C. 2009, c. 23. Under this legislation, corporations have members instead of shareholders.

[38] Memorial's President is the sole member of C-Core. Accordingly, C-Core presents its financial reporting to the President, which includes a copy of its annual audited financial statements as well as recommendations as to individuals to receive appointment or reappointment to C-Core's Board of Directors.

[39] In addition to statutory obligations, the relationship between C-Core and Memorial is governed by an agreement (the Relationship Agreement).

[40] C-Core's mandate extends beyond Memorial and the university community. It works with industry to provide engineering solutions to meet the needs of resource industries. C-Core provides research-based advisory services and funds its operations from project revenues from C-Core research projects.

[41] C-Core does not act as agent for Memorial in any capacity. C-Core and Memorial have what they describe as a "synergistic relationship that contributes to the mandates of both organizations."

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[42] As outlined in the Relationship Agreement, C-Core supports Memorial's mandate by fulfilling the following responsibilities:

- (a) Encourages and enables student participation in a variety of programs;
- (b) Supports delivery of academic programs and provides opportunities for research related to its business from time to time;
- (c) Offers opportunities for Memorial students to gain work-related experience;
- (d) Assists and works with Memorial to identify and achieve desirably faculty appointments to Memorial; and,
- (e) Complies with any lease agreements with Memorial from time to time in respect of any premises of Memorial which are occupied by C-Core.

[43] C-Core supports its mandate by, among other things:

- (a) Raising or earning money in such a manner as C-Core sees fit to fund the business activities of C-Core;
- (b) Accepting any bequests, gifts or donations, or providing a fund or endowment and invest any such funds and apply the income arriving therefrom, or to resort to the capital thereof, for any of the objects of C-Core;
- (c) Operating and managing its business in such a manner as to incur operating costs which do not exceed the moneys made available to C-Core for such operation;
- (d) Hiring in its own name, supervising or dismissing as may be necessary from time to time all persons required for proper operation of the business of C-Core;
- (e) Specifying duties and arranging for the preparation of any work schedules necessary to direct the activities of any persons employed by C-Core, and provide such supervision as may be reasonably necessary in C-Core's opinion to verify the adequacy with which any duties and work is being performed; and
- (f) Holding regular meetings of its Board of Directors at least semi-annually, keeping minutes of those meetings and ensuring that all corporate record-

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keeping is done in accordance with its governing legislation, including the filing of annual returns, notices of directors, and holding annual member meetings.

[44] The Relationship Agreement provides that C-Core has sole authority to hire employees required to facilitate C-Core's operations. C-Core must ensure all employment advertising and letters of offer of employment by C-Core shall be on the letterhead of C-Core and clearly state that C-Core is the employer.

[45] According to the Relationship Agreement, any contracts, cheques, pay stubs, purchase orders, T-4 slips or other documents whereby C-Core undertakes any obligations or liabilities, must clearly indicate that the obligor is C-Core and not Memorial.

[46] C-Core is contractually authorized under the Relationship Agreement to sever its relationship with Memorial and convert to a corporation with share capital operating for profit.

[47] C-Core funds the costs of its own payroll and does not receive annual or supporting operational funding from Memorial.

[48] Memorial is the payroll agent for C-Core as authorized by the Relationship Agreement. More detail about this relationship will follow.

[49] C-Core and Memorial are also party to a lease agreement. C-Core provided buildings to Memorial and those buildings have been leased back to C-Core for nominal rent.

[50] Unlike with Genesis, Memorial's Board of Regents does not appoint C-Core's Board of Directors and C-Core does not report or seek instruction from the Board of Regents in relation to the appointment of C-Core directors. The Board of Regents

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is not recognized in C-Core's By-Laws or the Relationship Agreement as having any authority over C-Core.

[51] C-Core manages its own policies and procedures without reference to or approval by Memorial, including its own budgeting process and strategic planning.

[52] C-Core's General Operating By-Law states that two of its directors will be drawn from Memorial; however, all directors are obliged to act honestly and in good faith with a view to the best interests of C-Core.

[53] C-Core's Board of Directors is also required to respect the confidentiality of matters brought before the Board or any committee. Further, all employees and volunteers must keep confidential any matters that come to their attention as part of their employment.

[54] C-Core submits its financial statements to the President of Memorial in their capacity as member but does not otherwise provide financial information to Memorial for its consolidated financial statements.

[55] C-Core provided financial information to the Auditor General, including the Requested Information, which was later incorporated into the Independent Audit Report of Memorial. C-Core provided this information in accordance with C-Core's powers and responsibilities under section 2.14 of the Relationship Agreement which states that C-Core will comply with audit requests or requirements from an auditing entity that Memorial is required by legislation to comply with.

Canadian Centre for Fisheries Innovation

[56] CCFI did not participate in the proceeding. Memorial did not address how the records of CCFI relate to the proceeding or the Requested Information other than

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briefly in the affidavit of Kelly Martin. She deposed that Memorial also acts as payroll agent for CCFI. Her affidavit goes on to say that Memorial's role with respect to the payroll of CCFI is the same as for Genesis and C-CORE. Unfortunately, Memorial did not provide me with any other information about the corporate structure of CCFI, its governance or its relationship to Memorial.

Matt Barter Information

[57] The information filed by Mr. Barter establishes that, in respect of Genesis and C-Core, Memorial provided them collectively approximately \$1.1 million in administrative services and rent.

Memorial's Possession of the Requested Information as Payroll Agent

[58] Because the specifics of the relationship between Memorial and each of the SIEs is important to the custody or control analysis that follows, I will provide details of those relationships, the nature of the Requested Information and how it relates to Memorial's mandate and functions.

[59] The Genesis Management Agreement and the C-Core Relationship Agreement (collectively, the Agreements) each authorizes the SIEs to use Memorial as a payroll agent.

[60] As part of these arrangements, Memorial agrees to provide payroll services for all Genesis and C-Core employees, which includes making all payroll reports, returns and remittances required by law. As noted, Memorial also acts as payroll agent for the SIEs who are not subject to an agreement, including CCFI.

[61] By providing payroll services to the SIEs, Memorial acts much like any other third-party payroll agent.

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[62] The Affidavit of Kelly Martin, Memorial's payroll manager, describes Memorial's duties as payroll agent, the particulars of which are summarized as follows:

(a) Memorial's HR Department will administer SIE payroll but the SIEs fund the cost of their own payroll. SIE employees are not paid out of Memorial's operating funds.

(b) The SIEs provide instructions to Memorial regarding each of their employee's pay and benefits structure to facilitate payroll administration. Memorial does not dictate what information is provided and can only administer payroll based on each SIE's instructions.

(c) Memorial receives the information from the SIEs using a case management system called LBI. The SIEs transmit their employee payroll information, which may include the Requested Information from time to time, via emails. Each time an SIE sends information, there is automatically a new "case" with their payroll request created through LBI.

(d) Once Memorial HR receives the information required to facilitate payroll processing, Memorial HR stores the payroll information in an online records system called On-Base. Within On-Base, only Memorial HR employees can access the SIE employee payroll information.

(e) Access to the SIE payroll information, including the Requested Information, is restricted to Memorial's HR employees who require it to administer payroll.

(f) The SIEs' payroll information is not used by Memorial's HR employees for any purpose other than administering payroll.

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(g) BannerHR is the software used by Memorial HR to facilitate payroll administration for Memorial employees and the SIEs. The SIE employee information is inputted into BannerHR by Memorial HR payroll officers to run payroll.

(h) SIE payroll information is segregated in BannerHR and is only accessible to Memorial HR's payroll employees and the SIEs themselves. Each SIE has a distinct organization number in BannerHR which allows for the segregation of information.

(i) The SIEs can run payroll reports in BannerHR which could include the Requested Information. Memorial's payroll manager can also run these reports for data quality review purposes and for the SIEs if required.

(j) Payroll reports containing SIE remuneration information are not used for the benefit of Memorial. Instead, access to SIE payroll reports in BannerHR is a restricted permission granted to Memorial's payroll employees by virtue of Memorial's role as payroll agent for the SIEs.

(k) Memorial's payroll manager has increased permissions that allow them to run more detailed payroll reports, which could include the Requested Information. Memorial's payroll manager and its payroll systems analyst have access to this data for the purposes of quality review and ensuring the SIEs have the appropriate information to support their operational decision making.

(l) Memorial's payroll manager has never been asked to produce a report with the remuneration details of any of the SIE employees for the benefit of Memorial, nor would she produce such a report to anyone internally at Memorial.

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(m) If a senior official of Memorial asked for such a report, the payroll manager would check with Memorial's Office of the General Counsel as to whether they are authorized to produce it.

(n) Memorial's payroll manager treats the SIE payroll information as belonging to the SIEs.

CUSTODY OR CONTROL

[63] In deciding whether Memorial has custody or control of the Requested Information pursuant to section 8(1) of the *ATIPPA*, the relationship between Memorial and each of Genesis, C-Core, and CCFI must be analyzed separately. This is because there may be differences in the relationships which impact the custody or control analysis.

[64] The Supreme Court of Canada delineated a two-part custody or control test in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25. The parties agree that this is the test that I should apply in this proceeding.

[65] At paragraphs 54 to 56, Charron J considered the phrase "any record under the control of a government institution":

[54] [...] the notion of control must be given a broad and liberal meaning in order to create a meaningful right of access to government information. While physical control over a document will obviously play a leading role in any case, it is not determinative of the issue of control. Thus, if the record requested is located in a Minister's office, this does not end the inquiry. The Minister's office does not become a "black hole" as contended. Rather, this is the point at which the two-step inquiry commences. Where the documents requested are not in the physical possession of the government institution, the inquiry proceeds as follows.

[55] Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. The

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Commissioner agrees that the Access to Information Act is not intended to capture non-departmental matters in the possession of Ministers of the Crown. If the record requested relates to a departmental matter, the inquiry into control continues.

[56] Under step two, all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The Commissioner is correct in saying that any expectation to obtain a copy of the record cannot be based on “past practices and prevalent expectations” that bear no relationship on the nature and contents of the record, on the actual legal relationship between the government institution and the record holder, or on practices intended to avoid the application of the Access to Information Act (*A.F.*, at para. 169). The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably should be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word “could” is to be understood accordingly.

[66] The OIPC submits that the court must apply a broad and purposive approach to the phrase “custody or control” in the access to information context which gives meaning to the requester’s statutory right of access. It is this broad approach to custody or control that is the most important aspect of this case to the OIPC. Memorial does not disagree in principle but points, however, to paragraph 48 of *National Defence* where Charron J. stated, “While control is to be given the broadest possible interpretation, it cannot be stretched beyond reason.”

[67] Applying *National Defence*, Memorial has custody or control over the Requested Information if the following two questions are answered affirmatively:

1. Do the contents of the Requested Information relate to a Memorial matter?
2. Considering all relevant factors, could a senior official at MUN reasonably be able to obtain a copy of the Requested Information?

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[68] If both questions are answered in the affirmative, then Memorial has custody or control of the Requested Information.

[69] The inquiry into custody or control ends if the Requested Information does not relate to a Memorial matter. Step one of the *National Defence* analysis therefore serves as a “useful screening device” aimed at ensuring access legislation does not capture information unrelated to matters of a public body. Obvious cases of truly independent third parties may be screened out at this initial stage, but in cases that are not patently obvious, the analysis can continue to examine the true relationship between the entities involved.

[70] If the Requested Information does relate to a Memorial matter, therefore, it is then necessary to determine whether Memorial could reasonably expect to obtain a copy of the Requested Information.

[71] Memorial, Genesis and C-Core maintain that the Requested Information does not relate to a Memorial matter. Alternatively, they say Memorial cannot reasonably expect to obtain the Requested Information from the SIEs in any capacity other than as payroll agent. The OPIC and Mr. Barter beg to differ.

Does the Requested Information relate to a Memorial matter?

[72] In determining whether Memorial has custody or control of the Requested Information the first step of the analysis asks whether the record “relates to” a Memorial matter. The terms “custody” and “control” are not defined in the *ATIPPA* and are fluid contextual concepts.

[73] Mr. Barter adopts the position of the OPIC. He goes further and takes a broad view of the *ATIPPA* and how it relates to Memorial. He submits that the operations of the SIEs relate to the mandate and function of Memorial. He then points to the fact that Memorial is experiencing severe financial constraints while at the same time providing valuable in-kind administrative and other services to Genesis and C-

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Core. The material he submitted suggests that these can be valued at approximately \$1,100,000 per year. Mr. Barter argues that the financial circumstances of Memorial could be alleviated, in part at least, by having the SIEs pay for the services received from Memorial. In his view, it would aid the analysis of the ability of the SIEs to do so if their compensation data was subject to the *ATIPPA*.

[74] Memorial, Genesis and C-Core all submit that the inquiry does not survive the first screening step. They say that the OPIC's finding, at paragraph 28 of the Report, that the Requested Information "certainly relates to a matter of importance to Memorial" as it is "expenditures made by three of Memorial's SIEs and these expenditures would have to be disclosed to Memorial in order for its audit to be accurate" is unreasonable and incorrect.

[75] Memorial points to the themes central to Memorial's mission: facilitating teaching and learning. It categorizes the Requested Information as relating to the remuneration of employees of SIEs, which is not integral to a Memorial matter. It cites *University of Toronto, Re* (2021), 2021 CarswellOnt 11969 (Ont. Information and Privacy Comm.), at paragraph 130, where the Ontario Information and Privacy Commissioner (Ontario IPC) confirmed that requested records must arise out of a decision-making function of the institution or be integral to an institutional matter to satisfy step one of the *National Defence* test. It is not enough for requested records to indirectly relate to a public body. Instead, consideration must be given to the context of the creation of a record in determining what constitutes a university matter.

[76] In that case, the University of Toronto received a request from a student at the Toronto School of Theology (TST) and the University of Toronto's conjoint ThD program seeking emails between professors of TST discussing his exam results. The university argued that it did not have custody or control of the records as they belonged to TST.

[77] The relationship between TST and the university was set out in the terms of a Memorandum of Agreement (MOA). Despite being separate legal entities, the MOA provided that the university had a limited right of access to TST data for the purpose

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of auditing student grant monies that the university flowed through to TST. TST maintained comprehensive records for students enrolled in the conjoint program but agreed to share with the university data about them related to operating funds. Consequently, the Commissioner found that the university enjoyed a limited right of access to some of TST's data, but the access did not extend to comprehensive student records.

[78] Under the terms of the MOA, the university was also an IT service provider to TST, engaged in the provision of IT and email services. Despite this, the university maintained that it had no right of access to TST data "beyond the limits enjoyed by any arm's length IT service provider."

[79] The Ontario IPC found that responsive records in the form of emails were not within the custody and control of the university, despite the relationship between the two entities. Although the emails related to the university in a broad sense because they were about a student enrolled in a joint program, this was not sufficient to satisfy step one of the *National Defence* test because the emails arose out of the decision-making functions of TST.

[80] Memorial submits, and I find as a fact, that it maintains bare possession of the Requested Information as payroll agent for the SIEs. This information does not arise out of a decision-making function of Memorial. It arises out of a decision-making function of each of the SIEs.

[81] Memorial acknowledges that there may be instances where it has custody or control of SIE information. For instance, Genesis' records relating to management of Memorial's assets may come into Memorial's possession because Genesis is Memorial's agent in this respect. In such a case, the records in question may well relate to a Memorial matter.

[82] This would be consistent with *YUDC v. Information and Privacy Commissioner*, 2022 ONSC 1755, at paragraph 48, which confirmed that York University had control over records related to renovations to a university building

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that were possessed by its subsidiary corporation, YUDC, because the records related to the university's mandate to manage and lease its real property and to have any revenues applied to achieve its objects and purposes. Memorial submits that, unlike the circumstances of *YUDC*, there is no identifiable connection between the Requested Information and Memorial's mandate or core functions. I agree.

[83] Both C-Core and Genesis hire their own employees. Genesis says that their employees are retained by signing employment contracts which assume that Genesis is a private corporation, not subject to the *ATIPPA*. Similarly, C-Core is responsible for ensuring all letters of offer of employment visibly identify C-Core as the employer. Therefore, says Memorial, records related to the remuneration of employees of C-Core and Genesis, whose functions extend beyond Memorial's mandate, do not relate to a Memorial matter.

[84] The OPIC, on the other hand, suggests that useful guidance with respect to the phrase "related to" in this jurisdiction can be found in *Carter v. Municipal Construction Ltd.* (2001), 204 Nfld. & P.E.I.R. 112, 614 A.P.R. 112 (Nfld. S.C.(T.D.)), where Green J. discussed the scope of Rule 32 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D. While not an access to information decision, the Court did opine on the meaning of "related to" in the context of document production and concluded that is to be interpreted liberally. The OPIC submits that a liberal interpretation of "related to" should also be applied in the access to information context to achieve transparency and accountability in public institutions.

[85] In *Carter*, Green J. stated at paragraph 21:

[21] I would therefore state the rule as to what constitutes a document relating to a matter in question in the proceeding as follows: A document will be said to "relate" to a matter in question in the proceeding where it is reasonable to suppose it may throw any light on the case in the sense that it contains information which may either directly or indirectly enable the party receiving or seeking the information to advance his or her own case or to damage the case of his or her adversary or which may fairly lead him or her to a train of inquiry which may do so. With all due respect to those who have expressed a contrary view, I do not believe that the test

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for determining production of documents prior to trial should be tied to the concept of relevance at trial.

[86] The Commissioner submits that the test with respect to document production in civil proceedings can easily be transposed and applied to the access to information context by inquiring as to whether the requested records in the access to information requests relate to the workings of a public body which a requester may have a statutory right to access, subject to the exceptions in the *ATIPPA*.

[87] Without deciding the matter, even if the principles in *Carter* were to apply, the Requested Information does not relate to the workings of Memorial in the sense of “throwing light on the case.” The SIE salary information in the bare possession of Memorial in its capacity as payroll agent for an SIE is not helpful in making the policies or operations of Memorial more transparent. If Memorial was not the payroll agent and each SIE performed its own payroll functions, or hired a third party to do so, then information regarding the payroll of an SIE would not be compellable in a court case involving Memorial operational matters. Unless “relate to” is strained beyond reason, the Requested Information simply does not relate to a Memorial matter.

[88] Each case under the *ATIPPA* must be decided on its peculiar facts. Although I accept that the phrase “custody or control” should be given a broad and liberal interpretation, to extend it to the Requested Information in the context of this case would be to stretch the concept beyond reason.

[89] This conclusion ends the inquiry with respect to each of Genesis and C-Core. Nevertheless, the second part of the *National Defence* test was argued extensively by the parties so I will now go on to apply that part of the test.

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Could Memorial reasonably expect to obtain a copy of the Requested Information on request?

[90] Had I found that the Requested Information relating to Genesis and C-Core relates to a Memorial matter, to determine whether Memorial could reasonably expect to obtain a copy upon request I would have been compelled to consider all relevant factors, including the substantive content of the Requested Information, the circumstances under which it was created and the legal relationship between Memorial and each SIE.

[91] The parties agree that I should apply the non-exhaustive list of potentially relevant factors identified by the Ontario IPC in *Vaughan (City), Re* (2012), 2012 CarswellOnt 17579, to aid in the determination of custody or control:

- (a) Was the record created by an officer or employee of the institution?
- (b) What use did the creator intend to make of the record?
- (c) Is the activity in question a "core", "central" or "basic" function of the institution?
- (d) Does the content of the record relate to the institution's mandate and functions?
- (e) 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?
- (f) If the institution does have possession of the record, is it more than "bare possession"?
- (g) 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?
- (h) Does the institution have a right to possession of the record?
- (i) Does the institution have the authority to regulate the record's content, use and disposal?

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- (j) 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?
- (k) To what extent has the institution relied upon the record?
- (l) How closely is the record integrated with other records held by the institution?
- (m) 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?

[92] I agree with Memorial that given the independence of the SIEs, a finding that Memorial has custody and control of the Requested Information would not serve the purposes of the *ATIPPA* as it would not provide insight into the activities and decision-making of Memorial as a public institution. Records relating to the provision of in-kind services by Memorial to the SIEs, however, is information of Memorial and is subject to the *ATIPPA*. This was established by the material submitted into evidence by Mr. Barter. To follow the expenditures of public funds by Memorial, therefore, it is only necessary to follow expenditures (directly or indirectly) by Memorial to the SIEs.

[93] Let us now look to the *Vaughan* factors to see why I have concluded that Memorial could not reasonably expect to obtain a copy of the Requested Information on request.

Was the record created by an officer or employee of the institution?

[94] The Requested Information was created by officers or employees of the respective SIE. The SIEs have full autonomy to decide the compensation and benefits structure afforded to their employees. Memorial is not involved in those decisions.

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What use did the creator intend to make of the record?

[95] At each of Genesis and C-Core, the creator of the record intended it to be used to generate and record remuneration for their employees. The Requested Information is provided to Memorial only for the purpose of fulfilling Memorial's role as payroll agent.

Is the activity in question a core, central or basic function of the institution?

[96] Remuneration of SIE employees is not in fulfillment of a core, central or basic function of Memorial. The Agreements define the respective responsibilities that C-Core and Genesis owe to Memorial, and vice versa, and they make it clear that both C-Core and Genesis hire their own employees to fulfill their own mandates.

[97] The presence of an agency relationship is an important consideration in the custody or control analysis. The Ontario IPC has noted the general principle that an agent has a duty to produce to the principal all documents they possess which relate to the principal's affairs (*Kitchener (City), Re* (1999), 1999 CarswellOnt 7704 (Ont. Information and Privacy Comm.)). However, this reasoning is not strictly applied in access to information cases, as the mere existence of an agency relationship is not necessarily determinative of control. Instead, assessment hinges on whether the agency relationship affords the right to control or possess the specific documents (*Walmsley v. Ontario (Attorney General)* 1997, 101 O.A.C. 140, 34 O.R. (3d) 611 (C.A.)). It is the Requested Information that this case relates to; a request for any other record of an SIE would have to be considered on its own merits.

[98] Although Genesis has an agency relationship with Memorial, C-Core does not. That is why it is important to distinguish the two in this analysis. The result may be the same for both, but their differing circumstances must be considered.

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Does the content of the record relate to the institution's mandate and functions?

[99] In the very broadest sense, the mandate and operation of each of Gensis and C-Core relates to Memorial's mandate and operations. In fact, one would have to question why Memorial would incorporate the SIEs and provide them with more than \$1 million in value annually if their corporate objects did not align with Memorial's mandate and function. Specifically, however, the Requested Information relates to employee remuneration information of SIEs' employees. The Requested Information itself, therefore, does not relate to Memorial's mandate and functions.

[100] I find that Genesis' mission focuses on assisting and encouraging those associated with Memorial and in the local community in the commercialization of technological ideas, concepts and intellectual property. As a social enterprise, Genesis' mission is to create a culture of entrepreneurship and the development of sustainable businesses for the benefit of the province as a whole. Thus, the work of Genesis enhances the role of Memorial in respect of its Faculty of Business (and perhaps others) and in terms of its outreach to the broader community.

[101] I find that C-Core's mandate involves working with industry to provide engineering solutions to meet the needs of resource industries. C-Core provides research-based advisory services and funds their operations from project revenues from C-Core research projects. Similarly, then, the work of C-Core enhances the role of Memorial in respect of its Faculty of Engineering (and perhaps others) and in terms of its outreach to the broader community.

[102] As we saw above, however, the fact that the activities of Genesis and C-Core are broadly related to the mandate and functions of Memorial does not mean that the Requested Information is.

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Does the institution have more than bare possession or any right of possession to the record?

[103] Memorial's possession of the Requested Information is not sufficient to establish custody or control under the *ATIPPA*; Memorial has bare possession of the Requested Information for payroll processing only.

[104] I do not agree that Memorial has more than bare possession of the Requested Information on the basis that Memorial prepares consolidated financial statements incorporating the financial statements of the SIEs. Those SIE financial statements may well be subject to the *ATIPPA*. However, Memorial has bare possession of the Requested Information only because Memorial is the SIEs' payroll agent. Memorial does not have possession of the Requested Information by virtue of obtaining copies of the SIEs' financial statements.

[105] As stated above, this case is analogous to *University of Toronto*, at paragraph 135, where the Ontario IPC acknowledged that the University of Toronto had access to the responsive records because it provided IT services to TST and its member schools. The emails requested existed on the university's servers. However, when viewed in the context of all relevant factors, and the purpose of the access legislation, the university's possession of the records was not sufficient to determine a locus of control.

Does the institution have authority to regulate the record's content, use and disposal?

[106] A public body's ability to regulate the content, use and disposal of a record held by an entity not subject to the *ATIPPA* is indicative of control. That ability is absent here.

[107] As we have seen, Memorial's use of the Requested Information is defined by Memorial's relationship to the SIEs as their payroll agent. Information pertaining to

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remuneration of SIEs is only accessed by Memorial's human resources employees to administer SIE payroll.

[108] Under the Agreements, Memorial houses financial records for the benefit of the SIEs, but the Agreements do not confer rights to Memorial to regulate, use, or dispose of those records.

Are there any limits on the use to which the institution may put the record?

[109] The Agreements define how Memorial is expected to use SIE payroll information. Memorial's use of the Requested Information is strictly limited to administering payroll. The restrictions on the use of the Requested Information are detailed in the affidavit of Kelly Martin and are set out above.

[110] Restrictions on access to the Requested Information are built into the Agreements and the operating software, BannerHR.

[111] Access to detailed payroll reports, which could include the Requested Information, is limited to Memorial's payroll manager and payroll systems analyst. These reports are used to ensure data is available to the SIEs to enable their internal operational decision-making.

[112] I find that Memorial's human resource employees have a restricted right of access to the Requested Information.

To what extent does the institution rely upon the record?

[113] Memorial does not rely on the Requested Information other than to the extent necessary to satisfy its role as payroll agent for the SIEs. Memorial has no control

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over the Requested Information beyond receiving it from the SIEs, inputting it into BannerHR to process payroll, and providing access to each SIE for its own purposes.

How closely is the record integrated with other records held by the institution?

[114] SIE payroll information, including the Requested Information, is segregated within BannerHR through codification and other systems relied on by Memorial to process SIE payroll. Accordingly, I find that the Requested Information is not closely integrated with Memorial's payroll or other records.

Conclusion on Custody or Control

[115] I find that the Requested Information pertaining to Genesis and C-Core does not relate to a Memorial matter. Even if it did, Memorial could not reasonably expect to obtain a copy of the Requested Information upon request. Pursuant to section 50(2) of the *ATIPPA*, Memorial is entitled to a declaration that it does not have to comply with the Recommendations with respect to the Requested Information relating to Genesis and C-Core.

[116] The Requested Information relating to CCFI was: All vehicle allowances paid to CCFI executive and management staff from January 1, 2019 to November 2, 2023. Although it is likely that the CCFI Requested Information would be treated similarly to that of Genesis and C-Core, I do not have enough information before me to decide the matter. Consequently, Memorial has not met its onus under the *ATIPPA* in respect of CCFI and, therefore, it must comply with the Recommendations with respect to CCFI. In respect of the Report, therefore, I confirm that Memorial must conduct a reasonable search for records relating to the Request regarding CCFI and, if necessary, request responsive records from CCFI.

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THE DUTY TO ASSIST

[117] I find that Memorial did not breach the duty to assist by failing to search for records that Memorial determined were not within its custody or control. Specifically, Memorial does not have a duty to search for records relating to Genesis and C-Core to which the *ATIPPA* does not apply. But what about the Requested Information related to CCFI?

[118] The OIPC did not address the duty to assist in its memorandum of fact and law.

[119] Section 13(1) of the *ATIPPA* governs a public body's duty to assist an applicant:

The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.

[120] In *Memorial University (Re)*, 2020 CanLII 35643 (NL IPC), at paragraph 20, citing the OIPC Report A-2018-020, the OIPC recognized three components of the duty to assist:

It is a long held position of this Office that the duty to assist has three components, as outlined in Report A-2009-011:

[80] ...First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a reasonable search for the requested records. Third, it must respond to the applicant in an open, accurate and complete manner.

[121] The OIPC's conclusion that Memorial breached the duty to assist was partly based on the determination that the SIEs are significantly connected to Memorial and that by failing to conduct a search for records, Memorial ignored those

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connections. I have found that the connection between Memorial and each of Genesis and C-Core is not strong enough to place the Requested Information relating to those two entities under the custody or control of Memorial. On the record before me, however, I am unable to determine whether CCFI is connected to Memorial such that, in the words of the Report, CCFI is “part of Memorial and subject to the *ATIPPA, 2015*”.

[122] Memorial states in its memorandum of fact and law that it did not determine from the outset that it did not have responsive records. Instead, it says, it undertook careful consideration of the Requests and considered how Memorial would come to have possession of such information. It concluded that the Requested Information belongs to the SIEs and is not within Memorial’s custody or control. Accordingly, it determined that the *ATIPPA* did not apply to the Requested Information. There was no evidence adduced to this effect, however.

[123] Nevertheless, I agree with Memorial that a requirement to search for records despite determining that the records are outside of Memorial’s custody or control does not make logical sense. If Memorial were to receive a request for records that it confirms are not within its custody or control, it would be a waste of resources for Memorial to conduct a search for those records. Of course, if, following an application or appeal, it was held that Memorial did have custody or control of such records, it would then have to conduct a reasonable search.

[124] As to CCFI, I do not have an evidentiary basis upon which I can find that the Requested Information relating to it is not within the custody or control of Memorial. Because the onus in this application falls on Memorial and it has not met the onus, the Report of the OIPC stands vis-à-vis CCFI. Consequently, Memorial has breached its duty to assist Mr. Barter in respect of the Request relating to CCFI.

COSTS

[125] Memorial has asked for leave to come back after this decision is rendered to make submissions on costs.

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[126] Genesis and C-Core confirm that they do not seek costs. They say that this is public interest litigation and therefore an award of costs would not be appropriate.

[127] The OIPC says that its efforts in this matter were to assist the public. Counsel for the OPIC added that parties normally do not seek costs against the OIPC and it does not seek costs against them.

[128] Mr. Barter simply asked that, if unsuccessful, an order of costs not be made against him.

[129] Memorial shall have leave to seek a date to make submissions on costs. If, however, after 21 days from the release of these Reasons it has not sought a date for a hearing on costs, then the final order shall include that there is no order as to costs.



ROBERT P. STACK
Justice