

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2019-31

September 6, 2019

ATB FINANCIAL

Case File Number 001799

Office URL: www.oipc.ab.ca

Summary: The Applicant, a union, requested records regarding positions excluded from the bargaining unit from ATB Financial (the Public Body). The Public Body refused access on the basis that it believed the records were excluded under section 4(1)(r) of the FOIP Act and on the basis that it did not have responsive records.

The Adjudicator determined that section 4(1)(r) did not apply to the requested records. She determined that the request was for records relating to policies and classifications regarding the following positions: administrative and support positions, budget officers, systems analysts, auditors, disbursement control officers, hearing officers who hear matters under the *Provincial Offences Procedure Act* and positions performing similar duties for the Public Body as these positions. She ordered the Public Body to search for, and produce, these kinds of records without reference to section 4(1)(r).

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 10, 72; *ATB Financial Act*, R.S.A. 2000, c. A-45.2 ss. 1, 2, 7, 10, 32; *Public Service Employee Relations Act*, c. P-43 ss. 3, 7, 12, 32

Authorities Cited: **AB:** Orders F2012-09, F2013-D-01

Cases Cited: *Alberta Treasury Branches v. Alberta Union of Provincial Employees*, 2014 ABQB 737

I. BACKGROUND

[para 1] On March 26, 2010, the Alberta Union of Provincial Employees (the Applicant) requested access to the following information from Alberta Treasury Branches:

The number of employees of the Public Body currently excluded from the bargaining unit represented by the AUPE who are excluded pursuant to the provisions of Section 12(1)(f) of the *Public Service Employee Relations Act*.

The number of classifications currently excluded, the names of those classifications, and the number of employees of the Public Body working in each of those classifications.

Any policies of the Public Body currently in effect regarding classification to the above referenced positions.

All job or classification descriptions for the above referenced positions.

[para 2] On May 21, 2010, Alberta Treasury Branches (now ATB Financial) (the Public Body) wrote the Applicant to inform it that it considered the records to be subject to section 4(1)(r) of the FOIP Act, and therefore exempt from the application of the FOIP Act.

[para 3] The Applicant requested review by the Commissioner of the Public Body's decision that section 4(1)(r) applies to the records it requested.

[para 4] In Order F2012-09, I rejected the Public Body's position that section 4(1)(r) applied to all records in its custody or control that do not reference non-arm's length transactions. I directed the Public Body to conduct a new search for responsive records, stating:

In view of the authority given to Alberta Treasury Branches by these provisions, it is possible that information regarding classifications and job descriptions is in its custody or control, but not in the custody or control of a "treasury branch". As I have not been presented with evidence as to how classifications or job descriptions are developed or brought into force within the scheme of the Alberta Treasury Branches organization I cannot state conclusively that Alberta Treasury Branches does, or does not, have responsive records in its custody or control. Rather, responsive records may potentially exist solely within the custody or control of Alberta Treasury Branches, and Alberta Treasury Branches has not submitted any evidence that would enable me to discount this possibility.

As discussed above, in my view there are two categories of records relating to Alberta Treasury Branches to which the FOIP Act applies: those in the custody or control of Alberta Treasury Branches but not a treasury branch, and those in the custody or control of a treasury branch that document a non-arm's length transaction as defined under the FOIP Act. In its submissions, as set out above, Alberta Treasury Branches states at paragraph 7 that only records documenting non-arm's length transactions are subject to the FOIP Act. From this I infer that it has not turned its mind to the possibility that records responsive to the access request may be subject to the FOIP Act if they are in the custody or control of Alberta Treasury Branches, but not "a treasury branch".

Moreover, as discussed above, I am unable to discount the possibility that records relating to employment classifications and job descriptions are in the sole custody or control of Alberta Treasury Branches, given its statutory powers and duties.

If there are responsive records in the custody or control of Alberta Treasury Branches, but not of “a treasury branch”, Alberta Treasury Branches has a duty to assist the Applicant in relation to them. I will therefore order Alberta Treasury Branches to assist the Applicant by determining whether there would be responsive records in the custody or control of Alberta Treasury Branches. If there are such records, then Alberta Treasury Branches must conduct a reasonable search for these records.

[para 5] I also noted:

In its exchangeable submissions, Alberta Treasury Branches argues that, in any event, it does not have records in its custody or control that would be responsive to the access request. As set out above, Alberta Treasury Branches states:

The AUPE access request assumes that persons excluded from their bargaining unit have been excluded from the bargaining unit because they fall within one of the PSERA exclusions. It also presumes ATB’s classifications reflect the Province’s classifications as outlined in PSERA. Neither of those assumptions are accurate.

ATB’s approach for exclusion of employees from the AUPE bargaining unit has been based on whether the employees are “employed in administrative or support services”. ATB’s employees have been excluded from AUPE’s bargaining unit if they are not employed in “administrative or support services”, which is consistent with both AUPE’s certificate with ATB and ATB’s past collective agreements with AUPE.

Therefore, simply put, ATB does not have such records within its custody or control because ATB has not excluded any employees from AUPE’s bargaining unit based on section 12(1)(f) of PSERA. This includes those documents which ATB provided to the Commissioner circa December 7, 2010, for its limited purpose of determining any potentially-affected third parties to this inquiry.

However, in its *in camera* submission, which preceded its exchangeable one, Alberta Treasury Branches did not take this approach. Rather, it raised concerns as to the amount of time that it would take to identify responsive records. Its subsequent open submission appears to involve a change in its position in this regard, or, possibly, it presents a different interpretation of the Applicant’s access request and the kinds of records that would be responsive to it. It is possible that the interpretation of the access request presented in the exchangeable submissions is one that overlooks the Applicant’s obvious intention in making the request, in favour of a narrower interpretation of its language.

Additionally, I note that in its initial reply to the Applicant, Alberta Treasury Branches stated that it would “decline access to all of the requested records”, which also indicates that at one point, certainly, it thought there were records that were responsive to the access request.

As Alberta Treasury Branches has presented different interpretations of the Applicant’s access request at different times, it is clear that it views the request to be open to different interpretations, with one being more restrictive, such that there would be no responsive records, while the other is broader, with the result that there may be many responsive records.

When a public body views an access request as open to more than one possible interpretation, it is necessary to consult with the applicant in order to determine the intent of the request and to avoid unilaterally adopting an unreasonable interpretation. In Order F2011-016, the Adjudicator

considered previous orders of this office commenting on the duties of public bodies to interpret access requests reasonably. He said:

The Applicant submits that the Public Body was too restrictive in its interpretation of the information that he requested and therefore overlooked responsive records. Previous Orders of this Office have said that a record is responsive if it is reasonably related to an applicant's access request and that, in determining responsiveness, a public body is determining what records are relevant to the request (Order 97-020 at para. 33; Order F2010-001 at para. 26). The Applicant argues that applicants should be given some latitude under the Act when framing their access requests, as they often have no way of knowing what information is actually available. I note Orders of this Office saying that a broad rather than narrow view should be taken by a public body when determining what is responsive to an access request (Order F2004-024 at para. 12, citing Order F2002-011 at para. 18).

In that order, the Adjudicator found that the public body in that case had taken too restrictive an approach in its interpretation of the kinds of information requested by the Applicant, with the result that it failed to locate records responsive to the access request. Similarly, in Order F2011-020, I found that a public body had failed to meet its duty to assist an applicant because it had adopted an overly narrow interpretation of the access request.

[para 6] The Public Body sought judicial review of Order F2012-09 (and Decision F2013-D-01 in which I provided supplementary reasons for Order F2012-09). In *Alberta Treasury Branches v Alberta Union of Provincial Employees*, 2014 ABQB 737, Manderscheid J. dismissed the Public Body's judicial review application.

[para 7] The Public Body responded to the Applicant on July 31, 2015. It stated:

We write regarding Judicial Centre of Edmonton Court File Number 1203 08936 wherein the Court of Queen's Bench of Alberta ordered Alberta Treasury Branches ("ATB") to comply with the directions contained in the Office of the Information and Privacy Commissioner ("OIPC") orders F2012-09 and F2013-D-01. The orders are regarding Alberta Union of Provincial Employees ("AUPE") access request to ATB for the following records:

- a) The number of employees of the Public Body currently excluded from the bargaining unit represented by AUPE who are excluded pursuant to the provisions of section 12(1)(f) of the Public Service Employee Relations Act ("PSERA").
- b) The number of classifications currently excluded, the names of those classifications, and the number of employees of the Public Body working in each of those classifications.
- c) Any policies of the Public Body currently In effect regarding classification to the above referenced positions.
- d) All job or classification descriptions for the above referenced positions.

We have searched our records and confirm as follows:

- a) ATB has not excluded any employees from the AUPE bargaining unit on the basis of section 12(1)(f) of PSERA. The AUPE certificate only covers ATB employees who perform administrative or clerical function. That is the only basis upon which ATB excludes employees from the AUPE bargaining unit. As we have not excluded any

employees on the basis of section 12(1)(f) PSERA, there are no records In ATB’s custody or control to provide.

b) Same as (a) above. There are no classifications excluded on the basis of section 12(1)(f) of PSERA because ATB has not excluded any employees from the AUPE bargaining certificate on that basis.

c) As no positions have been excluded on the basis of section 12(1)(f) of PSERA, ATB has no policies in place regarding classification of such positions.

d) As no positions have been excluded on the basis of section 12(1)(f) of PSERA, ATB has no job descriptions for such positions.

In any event, all of ATB’s job descriptions are in the custody or control of a treasury branch and are exempt from disclosure under the *Freedom of Information and Protection of Privacy Act*. We trust that this resolves your access request. Please feel free to contact me if you have any questions.

[para 8] The Applicant requested review of the Public Body’s new decision.

II. ISSUE

Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

[para 9] As noted above, in Order F2012-09 I directed the Public Body to search for responsive records that might be in its custody or control, and not the custody or control of a treasury branch, or branch. I also directed the Public Body to take steps to clarify the Applicant’s access request, given that it appeared that the Public Body had adopted different interpretations of the request at different times. As noted above, in its new response, the Public Body informed the Applicant that it did not have responsive records, based on its view of the application of the former section 12(1)(f) of the *Public Service Employee Relations Act*, and because it takes the position in the alternative that any responsive records would be in the custody or control of a branch (previously a “treasury branch” as defined in *ATB Financial Act*).

[para 10] I will first address the question of whether the records the Public Body has located are responsive to the access request I will then address the question of whether the records would be in the custody or control of a branch, and so exempt from the scope of the FOIP Act, or whether the Public Body has custody or control of the records vis-à-vis a branch.

Are the records the Public Body has located responsive to the access request?

[para 11] The Public Body states that it made efforts to consult with the Applicant and sought clarification of the access request; however, the Applicant did not respond to these efforts. At paragraph 27 of its submissions, the Public Body states:

The Union seeks records relating to ATB job descriptions, classifications, and policies relating to classification[my emphasis. As elaborated upon more fully in the AUPE’s written

submissions, any such records would be created and maintained by ATB's human resources department, which is located at ATB's Edmonton head office, and therefore, in ATB's submission, at a treasury branch.]

[para 12] The Applicant states:

AUPE's request, when considered broadly concerns ATB's employee classification system, and AUPE's related responsibility to represent certain ATB employees. Classification policies and descriptions that relate either to section 12(1)(f) of PSERA or to administrative and support service positions, or touch on positions with "substantially similar duties", are reasonably related to AUPE's request, and constitute responsive records that should be disclosed.

[para 13] The Public Body describes the Applicant's access request as one for records relating to ATB job descriptions, classifications, and policies relating to classification.

[para 14] The Applicant describes the access request as one for records relating to classification and policies regarding the former section 12(1)(f) of PSERA (now repealed) which dealt with the following positions: budget officers, systems analysts, auditors, disbursement control officers, hearing officers who hears matters under the *Provincial Offences Procedure Act* and those performing for an employer substantially similar duties to persons employed in any of those positions. The Applicant also requests information regarding administrative and support positions, and any positions similar to these positions.

[para 15] The Applicant's access request is somewhat narrower than the Public Body's interpretation of it, given that it relates to specific types of positions, rather than all employment positions at the Public Body. While some of the records the Public Body has located appear to be responsive to the access request, others appear to be outside the scope of the request.

[para 16] In my view, it is understandable that the Applicant did not to take steps to clarify the access request, given the Public Body's position, as stated in its letter of July 31, 2015, that section 4(1)(r) applies to the records. In other words, there would be no point in explaining to the Public Body the kinds of records that would be the subject of the access request, given the Public Body's stated position that it would refuse to provide them in any event.

[para 17] As I find below that the requested records are not exempt from the application of the FOIP Act, I must direct the Public Body to include responsive records in its response to the Applicant. In addition, so that the Public Body may meet the duty to assist, I must direct it to search for and produce records relating to policies and classifications regarding the following positions: administrative and support positions, budget officers, systems analysts, auditors, disbursement control officers, hearing officers who hear matters under the *Provincial Offences Procedure Act* and those positions with similar duties as these positions.

Are the requested records outside the scope of the FOIP Act?

[para 18] Section 4(1)(r) of the FOIP Act states:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(r) a record in the custody or control of a treasury branch other than a record that relates to a non-arm's length transaction between the Government of Alberta and another party [...]

[para 19] The Public Body's position that the records requested by the Applicant are exempt from the application of the FOIP Act is based on its view that the records are located at its head office. Under section 1(k) of the *ATB Financial Act*, a "branch" is defined as meaning "a branch established under section 10, whether the branch carries on business with the public directly or serves as an administrative or head office". (This definition applies to enactments by reference to s. 28(1)(ddd) of the *Interpretation Act*.) If the Public Body's head office, rather than the Public Body, could be said to have "custody or control" of the requested records, then the records could be said to be in the custody or control of a treasury branch within the terms of section 4(1)(r) of the FOIP Act. However, if the Public Body has custody or control over the responsive records, and a treasury branch does not have custody or control over the records, vis-à-vis the Public Body, then the FOIP Act applies to the responsive records.

[para 20] In Order F2012-09, I determined that records that could be said to be in the custody or control of a treasury branch were subject to section 4(1)(r) and excluded from the application of the FOIP Act. However, records that could be said to be within the custody or control of Alberta Treasury Branches, but not a treasury branch, do not fall within the terms of section 4(1)(r) and are subject to the FOIP Act. I directed the Public Body to conduct a search for responsive records among those records in its custody or control, but not in the custody or control of a treasury branch.

[para 21] As noted in the background, above, the Public Body has located thousands of records it now considers may be responsive. However, its position is that none of these are subject to the FOIP Act, as it considers the records it located for the inquiry to be in the custody or control of a treasury branch. The issues to be decided for this inquiry, then, is whether the records the Public Body has located are responsive, and whether they must be included in a response to the Applicant.

[para 22] The Public Body argues at paragraphs 27 – 28 of its initial submissions:

The Union seeks records relating to ATB job descriptions, classifications, and policies relating to classification. As elaborated upon more fully in the AUPE's Written Submissions, any such records would be created and maintained by ATB's human resources department, which is located ATB's Edmonton head office, and therefore, in ATB's submission, at a treasury branch.

As concluded in the 2012 OIPC Order, "[i]f it can be said that an entity, such as a treasury branch, has an enforceable right to possess records or obtain or demand them from someone

else, and has duties in relation to them, such as preserving them, it follows that this entity would have control or custody over the records". Accordingly, such records are within the custody or control of a "treasury branch" and excluded under s. 4(1)(r) of the *FOIP Act* unless they relate to a non-arm's length transaction between the Government of Alberta and the Union.

[para 23] The Applicant argues:

Additionally, ATB asserts at paras 27 and 28 of its Response that records requested by AUPE may have been created and maintained by ATB's head office and so are in the "custody and control" of a treasury branch. AUPE submits that this bare assertion should not be accepted without a review of the factors set out at paragraph 35 of its Initial Submissions, and be based on evidence provided by the ATB in this Inquiry. To do otherwise would render meaningless the finding of the Adjudicator, upheld by the Court, that records in the custody and control of "Alberta Treasury Branches" are not excluded from the *FOIP Act*:

Had the legislature intended the FOIP Act to apply to "Alberta Treasury Branches" - the Public Body - solely in relation to records containing information about non-arm's length transactions, this objective could have been achieved in a manner consistent with the ATBA and the Interpretation Act, by substituting "Alberta-Treasury Branches" for "a treasury branch" in s. 4(1)(r) of the FOIP Act [OIPC Order, para 24]

Alberta Treasury Branches v Alberta Union of Provincial Employees,
2014 ABQB 737 at para 85

[para 24] As noted in Order F2012-09, the terms "custody" and "control" have been interpreted in past orders of this office:

Previous orders of this office have considered what it means to have custody or control of records.

In Order F2002-014, former Commissioner Work considered the concepts of custody and control and said:

Under the Act, custody and control are distinct concepts. "Custody" refers to the physical possession of a record, while "control" refers to the authority of a public body to manage, even partially, what is done with a record. For example, the right to demand possession of a record, or to authorize or forbid access to a record, points to a public body having control of a record.

A public body could have both custody and control of a record. It could have custody, but not control, of a record. Lastly, it could have control, but not custody, of a record. If a public body has either custody or control of a record, that record is subject to the Act. Consequently, in all three cases I set out, an applicant has a general right of access to a record under the Act.

In Order P2010-007, the Adjudicator considered how the terms custody and control have been defined in previous orders of this office. He said:

In prior FOIP orders, the term "custody" was defined as the physical possession of a record, whereas the term "control" was defined as the authority of a public body to manage, even partially, what is done with a record. Furthermore, prior orders have held that in order for the FOIP Act to apply to the records it is sufficient for a public body to have custody or control of them; the public body does not have to have both custody and control (Order F2002-014). A recent Order of this Office also held that "bare"

possession of information does not amount to custody, as the word “custody” implies that there is some right or obligation to hold the information in one’s possession (Order F2009-023).

In Order F2010-023, I said:

In section 6 of the FOIP Act, the word “custody” implies that a public body has some right or obligation to hold the information in its possession. “Control,” in the absence of custody, implies that a public body has a right to obtain or demand a record that is not in its immediate possession.

I find that the question “Does the Public Body have a right to obtain the records?” must be answered when determining whether a public body has control over records it does not possess. If a public body has rights it may exert over a record it may be able to obtain the record; if it does not have any rights in relation to the record, it may not be able to obtain it. As the Commissioner noted in Order F2002-014, the right to demand production of records speaks strongly in favor of a finding of control.

The phrase “custody or control” refers to an enforceable right of an entity to possess a record or to obtain or demand it, if the record is not in its immediate possession. “Custody or control” also imparts the notion that a public body has duties and rights in relation to a record, such as the duty to preserve or maintain records, or the right to destroy them.

Previous orders of this office have considered a non-exhaustive list of factors compiled from previous orders of this office and across Canada when answering the question of whether a public body has custody or control of a record. In Order F2008-023, following previous orders of this office, the Adjudicator set out and considered the following factors:

- Was the record created by an officer or employee of the public body?
- What use did the creator intend to make of the record?
- Does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?
- Does the public body have a right to possession of the record?
- Does the content of the record relate to the public body’s mandate and functions?
- Does the public body have the authority to regulate the record’s use?
- To what extent has the record been relied upon by the public body?
- How closely is the record integrated with other records held by the public body?
- Does the public body have the authority to dispose of the record?

Not every factor is determinative, or relevant, to the issues of custody or control in a given case. Custody or control may be determined by the presence of only one factor. If it can be said that an entity, such as a treasury branch, has an enforceable right to possess records or obtain or demand them from someone else, and has duties in relation to them, such as preserving them, it follows that this entity would have control or custody over the records.

[para 25] Section 4(1)(r) of the FOIP Act states that the FOIP Act applies to records in the custody and control of a public body but does not apply to records in the custody and control of a treasury branch (which includes a head office).

[para 26] It is the responsibility of the Board of Directors of the Public Body to manage the business and affairs of the ATB Financial. I presume that the Board does this partly through board meetings and decision-making, and partly through hiring employees to execute its decisions and mandate and that some of these employees are located in a head office. I turn now to consideration of the factors that past orders of this office have considered indicative of custody or control to determine the extent to which a treasury branch, or the Public Body, has custody or control of records relating to classifications and hiring policies.

Was the record created by an officer or employee of the public body?

[para 27] Section 2 of the *ATB Financial Act* establishes that Alberta Treasury Branches continues as “ATB Financial” and also establishes that ATB Financial consists of its board of directors. This provision states:

2(1) The corporation known as Alberta Treasury Branches is continued as a corporation under the name ATB Financial.

(1.1) ATB Financial consists of the board of directors appointed under section 3.

(2) For the purpose of carrying on its business, ATB Financial has the capacity and, subject to this Act and the regulations, the rights, powers and privileges of a natural person.

(3) ATB Financial is for all purposes an agent of the Crown in right of Alberta, and may exercise its powers under this Act only as an agent of the Crown in right of Alberta.

(4) An action or other legal proceeding in respect of a right or obligation acquired or incurred by ATB Financial on behalf of the Crown in right of Alberta, whether in the name of ATB Financial or in the name of the Crown in right of Alberta, may be brought or taken by or against ATB Financial in the name of ATB Financial in any court that would have jurisdiction if ATB Financial were not an agent of the Crown in right of Alberta.

[para 28] Section 3 of the *ATB Financial Act* sets out duties of the board of directors and establishes its powers of delegation.

3(1) The Lieutenant Governor in Council may appoint a board of directors and a chair of the board.

(2) The board shall manage the business and affairs of ATB Financial.

(3) The board may delegate to any director, to a committee of directors or to any officer or employee of ATB Financial any of the board's powers and duties under this Act except

- (a) the power to make a recommendation under section 6,*
- (b) the power to make bylaws under section 8, and*
- (c) the board's duties under section 16.*

(4) The board may designate the offices of ATB Financial, other than the office of Chief Executive Officer, and appoint persons to those offices and specify their duties.

[para 29] Section 7 of the *ATB Financial Act* gives ATB Financial the authority to engage employees and to determine their conditions of service. It states:

7 ATB Financial may engage employees for the purpose of carrying on the business of ATB Financial and may determine their conditions of service.

[para 30] The Board of Directors of the Public Body has the statutory authority to engage employees who carry out the business of the Public Body. Among the Public Body's employees are human resources employees who created the records at issue.

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

[para 31] From my review of the records, I conclude that the purpose of those who created the records was to classify positions on behalf of the Public Body as employer and to recruit employees on behalf of the Public Body.

Does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

[para 32] The records were created, and are in the Public Body's possession, so that it could exercise its statutory function of hiring and managing employees.

If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?

[para 33] The Public Body has possession of the records. The records are also in the possession of its employees for the purposes of their duties in relation to managing human resources.

Does the public body have a right to possession of the record?

[para 34] The Public Body has the statutory power to employ employees and to manage their conditions of service. It follows that the Public Body has the right to possess records created by its employees in the exercise of this right.

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

[para 35] As noted above, the Public Body has the power to retain employees for the purpose of carrying on the business of ATB Financial and to manage the employment of its employees. I conclude that the content of the records relates to the public body's mandate and function.

Does the public body have the authority to regulate the record's use?

[para 36] The *ATB Financial Act* gives the Public Body the authority to create policies, to manage the business of ATB Financial, and to hire employees to carry out the business of ATB Financial and to manage employees. I conclude that the Public Body has the authority to authorize the creation of the records, to employ persons to create the records or to alter them, and to create policies that would determine the content of the records. I conclude that the Public Body has the authority to regulate the records' uses.

To what extent has the record been relied upon by the public body?

[para 37] The Public Body has relied on the records to engage employees to carry out the business of ATB Financial and to manage their employment.

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

[para 38] To the extent that there is any evidence on this point, I conclude that the records are integrated with other records that the Public Body uses or creates in the course of carrying on the business of ATB Financial.

Does the public body have the authority to dispose of the record?

[para 39] I am unable to identify authority in the *ATB Financial Act* that would authorize any entity, other than the Public Body or an employee acting on behalf of the Public Body, to create, alter, or delete job descriptions and employment policies.

[para 40] Review of the factors considered in prior orders as weighing in favor of finding that a public body has custody or control of records leads to the conclusion that the Public Body has both custody and control over the records at issue. Where, as here, while some degree of "custody or control" over the records resides in individual employees, that is entirely secondary and subordinate to the custody and control of the employer whose purpose is being served by their creation. In other words, insofar as the employees deal with the records on ATB's behalf, the employees' "custody and control" over them is in effect, the "custody and control" of the public body employer, ATB Financial. In such a case, the secondary degree of "custody or control" of individual

employees, in contrast to the primary and dominant custody and control of ATB, cannot be taken as intended to remove the application of the Act under section 4.

[para 41] The Public Body's argument is primarily that the records at issue are kept in its human resources department – in other words, its argument is based on the location of the records. Because the records are located at its head office, it concludes that the records are in the custody or control of its head office.

[para 42] In my view, the *ATB Financial Act* does not give any authority to a treasury branch or head office to create or manage the records at issue, such that the records could be considered to be in the custody or control of a treasury branch or head office. Rather, any authority that employees in the head office would have to create or manage the records comes from the authority of the Public Body to engage and manage employees and to create policy applying to ATB Financial.

[para 43] One provision in the *ATB Financial Act* that appears to provide branches with express responsibilities distinct from those given to the Public Body in relation to records is section 32, which addresses “property at branches”. Records regarding the property described in section 32 and transactions in relation to it would appear to be in the custody or control of a branch, and therefore outside the scope of the FOIP Act, pursuant to section 4(1)(r), given that branches are given distinct duties in relation to such property. In other words, if a record is about arm's length financial and property transactions of third parties, that record is in the custody or control of a branch and is subject to section 4(1)(r) of the FOIP Act. However, section 32 of the *ATB Financial Act* does not extend to human resources records, which are created and managed under the authority of ATB Financial, and in relation to which the *ATB Financial Act* does not impose express, distinct, duties on branches. In my view, section 32 of the *ATB Financial Act* and section 4(1)(r) of the FOIP Act operate so as to exclude arm's length banking transactions from the FOIP Act, so that arm's length ATB Financial customers are subject to the same privacy protections as the customers of other financial institutions. However, other aspects of the Public Body's operations that are not subject to section 4(1)(r), remain subject to public oversight.

[para 44] For the foregoing reasons, I find that the records the Public Body has located, but not produced to the Applicant, are not subject to section 4(1)(r) of the FOIP Act. I find that the FOIP Act applies to these records.

III. ORDER

[para 45] I make this Order under section 72 of the Act.

[para 46] I order the Public Body to respond to the Applicant. In order to respond to the Applicant, I direct the Public Body to search for and produce any records relating to policies and classifications relating to the following types of positions: administrative and support positions, budget officers, systems analysts, auditors, disbursement control officers, hearing officers who hear matters under the *Provincial Offences Procedure Act*

and those positions within the Public Body that have similar duties as these positions. The Public Body is precluded from relying on section 4(1)(r) in its response.

[para 47] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

Teresa Cunningham
Adjudicator