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COMMISSIONER
— for —
British Columbia

Order 02-30

UNIVERSITY OF VICTORIA

David Loukidelis, Information and Privacy Commissioner
June 27, 2002

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Summary: The applicant requested a list of all investments held by the University and by the Foundation. The University does not have custody or control of the requested Foundation records.

Key Words: public body – custody or control.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1), 4(1); *University Foundations Act*, s. 4; *University of Victoria Foundation Act, 1979*, ss. 3(3), 4, 5, 6, and 14.

Authorities Considered: **B.C.:** Order No. 308-1999, [1999] B.C.I.P.C.D. No. 21; Order 02-29, [2002] B.C.I.P.C.D. No. 29. **Ont.:** Order P-1151, [1996] O.I.P.C. No. 122; Order P-239, [1991] O.I.P.C. No. 33. **N.S.:** Report FI-00-53, [2000] N.S.F.I.P.P.A.R. No. 61.

Cases Considered: *British Columbia (Minister of Small Business, Tourism and Culture) v. British Columbia (Information and Privacy Commissioner)*, [2000] B.C.J. No. 1494; *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611; [1997] O.J. No. 2485 (C.A.).

1.0 INTRODUCTION

[1] On May 3, 2001, the applicant, who is a journalist, made a request, under the *Freedom of Information and Protection of Privacy Act* (“Act”), to the University of Victoria (“University”) for access to “a list of all investments presently held by the University and the University of Victoria Foundation”. The applicant specified that he was interested in “a list of the individual equities and bonds held, as well as the amount invested in each.”

[2] In its May 16, 2001 response, the University said the University of Victoria Foundation (“Foundation”) is “not considered a public body” under the Act, such that “the records in its custody do not fall within the Act’s scope”. The University also said that, because the Foundation’s most recent annual report, dated March 31, 2000, had been submitted to the University’s Board of Governors, it could be provided to the applicant, “as it is a University record”. The University estimated a fee of \$12.50 for locating, retrieving and producing the report. Because the applicant had requested a fee waiver in his access request, the University’s response also indicated that it was not waiving the fee as requested.

[3] On May 20, 2001, the applicant requested a review, under Part 5 of the Act, of the University’s decision to refuse to disclose records and not to waive the estimated fee. The matter did not settle during mediation by this Office, so I held a written inquiry under Part 5 of the Act. Other universities in British Columbia were given notice of the inquiry, under s. 54(b) of the Act, and invited to make submissions. Simon Fraser University (“SFU”) made submissions.

2.0 ISSUE

[4] The only issue before me in this inquiry is whether the records requested by the applicant are in the custody or under the control of the University, as contemplated by ss. 3(1) and 4(1) of the Act, such that they are within the scope of the Act. Previous decisions have established that, as is indicated in the Notice of Written Inquiry, the burden of proof lies on the public body. See, for example, Order 02-29, [2002] B.C.I.P.C.D. No. 29.

3.0 DISCUSSION

[5] **3.1 Applicable Principles** – Section 3(1) of the Act provides that it applies only to records “in the custody or under the control of a public body”. Similarly, s. 4(1) of the Act establishes a right of access to “any record in the custody or under the control of a public body”. In Order 02-29, [2002] B.C.I.P.C.D. No. 29, I discussed factors that should be considered in determining whether records are “under the control of” a public body, so as to bring them within the Act’s scope. I will not repeat that discussion here, but have applied various factors described in that decision that relate to this case.

[6] **3.2 Relationship Between the University and the Foundation** – Because a main focus here is on whether the University has statutory control over the Foundation’s records, I will first outline the statutory framework within which the Foundation exists.

There are two foundations

[7] The main thrust of the applicant’s argument is that the Foundation, as a corporation under the *University Foundations Act* (“UFA”), is to be treated as not having an existence separate from the University or from the Ministry of Finance. He argues that the Foundation’s reason for existence, being to benefit the University, makes it an

“intimate part” of the University. He argues that the UFA gives the University statutory control over the requested Foundation records. He says the Foundation receives University capital, in the form of capital that the UFA allows the University to transfer to the Foundation, and that this capital is ultimately public money, transferred to the University by the Ministry of Advanced Education. The Foundation is, the applicant submits, for all purposes a part of the University and not a separate entity. Moreover, he says, s. 3 of the UFA provides that the Foundation is an “agent of the government”. He says the UFA also provides that the Foundation is “wholly-owned” by the Ministry of Finance. Because that Ministry is a public body under the Act, the Foundation’s records are covered by the Act, he argues.

[8] Somewhat confusingly, the UFA actually governs another foundation – the Foundation for the University of Victoria – and not the University of Victoria Foundation, the foundation involved here. As provided in s. 4 of the UFA, the purposes of the Foundation for the University of Victoria are as follows:

Purposes and powers

4.(1) The purposes of each of the corporations are as follows:

- (a) to develop, foster and encourage public knowledge and awareness of the relevant university and the benefits to the people of the Province in connection with that university;
- (b) to encourage, facilitate and carry out programs and activities that will directly or indirectly increase the financial support of, or confer a benefit on, the corporation for support of the relevant university and programs in which that university is involved;
- (c) to receive, manage and invest funds and property of every nature and kind from any source for the establishment, operation and maintenance of the corporation and to further the purposes of the corporation.

[9] The Foundation was incorporated, not by the UFA, but by the *University of Victoria Foundation Act*. That Act was enacted in 1954 and replaced, in 1979, by the *University of Victoria Foundation Act, 1979* (“Foundation Act”). The Foundation Act, not the UFA, provides for the Foundation’s functioning. Section 4 of the Foundation Act sets out the Foundation’s purposes:

- 4. The university foundation shall encourage financial support of the university through donations from individuals, corporations and foundations for scholarships, bursaries and other university purposes and shall promote a continuing interest in the university and in higher education generally.

[10] It appears from s. 4 of the UFA and s. 4 of the Foundation Act that the purposes of the two university-related foundations overlap in some respects. But it is clear that the

two entities are separate, that they are governed by different statutes and that they have different governance.

[11] Under s. 5 of the Foundation Act, the Foundation is given the power to receive donations, subject to trusts or otherwise, “for the benefit of the university, its faculty and students” for educational purposes. Section 5 also gives the Foundation various corporate powers, including to buy and sell property, lease land and so on. Section 6(1) provides that, subject to any trust conditions, “all donations to or for the benefit of the” University that are made to the University, the University Foundation or other affiliated bodies, and that are accepted by the University, vest in the University or the University Foundation, “as the university board directs”. Similarly, under s. 6(2), donations made in the manner just described and accepted by the Foundation vest in the University or the Foundation, as the Foundation’s board directs.

[12] The Foundation Act provides that the Foundation is a corporation, which is governed by a board of between eight and 12 members. Section 3(3) of the Foundation Act stipulates that the University’s President and Bursar (also known as the Vice-President, Finance and Operations) sit on the Foundation’s board. The University is entitled to appoint two members to the Foundation’s board, as is the Minister of Advanced Education. All of those members are then entitled to elect between two and six other members. In her affidavit, Sheila Sheldon Collyer, who is the University Secretary, says three of the Foundation’s 12 directors are University employees. The University’s Vice-President, Development and External Relations has been appointed to the board in addition to the University’s President and its Vice-President, Finance and Operations. The Foundation’s secretary and treasurer are University employees, but Sheila Sheldon Collyer deposed that the time they spend on Foundation business is provided under the service arrangement described below.

[13] Section 14(1) of the Foundation Act requires the Foundation to “cause an independent audit” to be undertaken of its annual financial statements. Under s. 14(3), copies of the annual financial statements and the auditor’s report must be sent each year to the Ministry of Advanced Education and to the University’s board. This is how the University came to have a copy of the Foundation’s annual report for the year ended March 31, 2000 in its custody when the applicant made his request. Section 14(5) provides that the Foundation is a “public body” for the purposes of certain aspects of the *Auditor General Act*.

University provides services to the Foundation

[14] Leaving the statutory context aside for the moment, the University acknowledges that Foundation records of various kinds are “physically situated” on University property (para. 26, Sheldon Collyer affidavit). The University says this stems from what is described as a “quasi-contractual relationship”, between the University and the Foundation, under which the University provides administrative and corporate secretariat services to the Foundation (para. 20, initial submission). At para. 15 of her affidavit, Sheila Sheldon Collyer deposed that the Foundation pays a fixed amount each year to the University for such services. She deposed, in the same paragraph, that the Foundation

pays \$5,000 a year to her office for administrative services and \$25,000 to the University's Department of Financial Services, as an "administration charge".

[15] Sheila Sheldon Collyer also deposed that, as requested by the Foundation's secretary (who is also the Assistant University Secretary), her office provides corporate secretariat services such as preparing meeting agendas and minutes, sending welcoming letters to new Foundation members and other secretariat duties. She deposed that her office stores paper files for the Foundation. Services provided by the University's Department of Financial Services include accounting services, administration of the Foundation's donations database, assistance with audit of the Foundation's books and maintaining and backing-up Foundation computer files (paras. 16 and 17, Sheldon Collyer affidavit).

[16] **3.3 Discussion of Control Factors** – I will now discuss various control factors, beginning with the question of statutory control over records.

Records' relationship to University's mandate

[17] The University argues that the Foundation's records are created so the Foundation can carry out its own mandate, which is "entirely separate from the mandate of the University" (para. 28, initial submission). It is not entirely true that the mandate of the University and the Foundation are "entirely separate". There is some overlap between the Foundation's purposes, as set out in s. 4 of the Foundation Act, and the University's goals and mandate. In a broad sense, certainly, the success of the Foundation's activities will affect the University's success to some degree. In this case, any relationship between the records in issue and the University's mandate is not enough to establish that the University has control of those records. As I noted in Order 02-29, at para. 43, this control factor generally will not carry as much weight as other factors in indicating control.

No contractual control or "custody" under the Act

[18] The applicant says the University has the requested records in its "physical custody". He argues that records in the possession of an agent are "plainly under that agent's control", which means such records are covered by the Act. The University admits it possesses various Foundation records, but says they are not in the University's custody or control. They are physically located at the University only because the University provides services to the Foundation, including storage of paper and electronic records.

[19] I have already described the service relationship between the University and the Foundation, under which the University provides a variety of administrative and corporate secretariat services (para. 15, Sheldon Collyer affidavit). As I have also noted, the University, perhaps because there is no written agreement respecting this arrangement, calls this relationship "quasi-contractual". There may be no written agreement, but it seems to me the arrangement Sheila Sheldon Collyer describes can only be contractual.

[20] The evidence establishes that University employees only have access to Foundation records located on campus for the purpose of providing services to the Foundation, and in their capacities as members of the Foundation's board or as officers of the Foundation (paras. 15 and 26, Sheldon Collyer affidavit). Nothing in the material before me supports a finding that the University has a contractual right to affect the contents of the various records, to require copies of them to be given to the University to do as it sees fit with them or to affect their use or disclosure. There is no element of contractual control on the University's part over Foundation records that come into existence for the Foundation's purposes.

[21] Although Sheila Sheldon Collyer did not depose specifically that the requested records are physically located at the University, she did depose that various kinds of the Foundation's records are kept there. For the purposes of the following discussion, I have assumed that the requested records are on campus. I am persuaded that, even if the records are on the campus, the University does not have "custody" of them for the purposes of the Act. The evidence shows that the Foundation's records are kept in separate files within the University's offices and that they are not integrated with the University's files in any other way. In this respect, I agree with Review Officer Fardy, in Report FI-00-53, [2000] N.S.F.I.P.P.A.R. No. 61, at para. 11, that "[p]ossession of a document is a strong indication of custody and control, but there are cases where this is not so." Also, in Ontario Order P-239, [1991] O.I.P.C. No. 33, it was said that possession of records is not enough to establish custody. A public body will only have custody if it has "some right to deal with the records and some responsibility for their care and protection" (p. 5, Q.L.).

[22] In this vein, in Report FI-00-53, Review Officer Fardy found that records that the chair of the Nova Scotia Gaming Corporation ("NSGC") kept in his NSGC office, relating to Atlantic Lottery Corporation ("ALC"), were not in the NSGC's "custody" for the purposes of Nova Scotia's *Freedom of Information and Protection of Privacy Act*. The NSGC's chair was an ALC director. Although he kept ALC records in his office at the NSGC, they were only physically located there. The NSGC had no right to, or responsibility for, the ALC records. It did not have custody (or control) of them.

[23] In Order No. 308-1999, [1999] B.C.I.P.C.D. No. 21, my predecessor accepted that physical possession of a record is not enough to establish custody for the purposes of the Act. He agreed, at p. 9, that a public body must have "charge and control" of such records, "including some legal responsibility for their safekeeping, care, protection, or preservation". The idea that a public body must have "charge and control" of a record in order to have custody of it introduces an element of overlap between "custody" and "control". On judicial review of Order No. 308-1999, Shabbits J. agreed with my predecessor's approach, even though Shabbits J. held that the requested record was not in the custody or control of the public body in that particular case. See *British Columbia (Minister of Small Business, Tourism and Culture) v. British Columbia (Information and Privacy Commissioner)*, [2000] B.C.J. No. 1494. On the custody issue, also see *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611; [1997] O.J. No. 2485 (C.A.).

[24] Here, the University possesses Foundation records only so the University can perform its obligation to provide services to the Foundation. The University has no right to those records that would allow it to deal with them as it wishes. Nor does it have any responsibility for the records, including as to their use, disclosure or destruction, as the University considers necessary or desirable. The University's rights and responsibilities respecting the records are limited to its performance of services. This case is similar to that in Ontario Order P-1151, [1996] O.I.P.C. No. 122. There, the Ministry of Attorney General provided administrative services to a sheriff respecting jury rolls the sheriff was legally required to prepare and use in jury selection. Although the Ministry was administratively involved in operating the jury roll database and providing other support services, its activities did not give it control (or custody) of the rolls.

No statutory control over records

[25] A statutory provision may give a public body control of records for the purposes of the Act. The Foundation is identified with the University's objectives and well-being, but there is no explicit authority in the Foundation Act for the University to control Foundation records. The Foundation's only record-related obligation under the Foundation Act is to deliver its audited financial statements and auditor's report to the University. This provision cuts against the argument that the University has implicit statutory control of the records in dispute. Even if one assumes that statutory control can, in theory, be implicit, nothing in the Foundation Act establishes implicit control over these records.

Records are not integrated with the University's records

[26] At para. 46 of its initial submission, the University says that, to the best of its knowledge, University employees who sit on the Foundation's board have not intermingled Foundation records with University records. As I noted above, there is evidence before me on this point from Sheila Sheldon Collyer, who deposed that University employees on the Foundation board keep Foundation records "in their private offices, but stored separately from University records" (para. 27, Sheldon Collyer affidavit). Further, the Foundation's accounting systems and records are, she deposed, separate from the University's (para. 28, Sheldon Collyer affidavit).

4.0 CONCLUSION

[27] I have decided the requested records are not "under the control of" the University for the purposes of the Act because the evidence before me, which I have subjected to critical scrutiny, permits no other finding. The evidence shows that the Foundation and the University are separate legal entities. The University does not own the Foundation. The Foundation and the University are governed by separate statutory regimes. They have separate governing bodies, although a minority of the Foundation's board consists of University employees. University employees provide support services to the Foundation, but the Foundation pays the University for those services. The requested

records, and other Foundation records, are not integrated with University records or files. The Foundation's accounting system is separate from the University's system.

[28] Yet the fact is that the University and the Foundation have related goals and the Foundation exists to serve the interests of the University, its students and the University community. Without the University, there would be no Foundation. Moreover, the Foundation's investments and other activities will, one can infer, affect the University's interests and its finances to some degree. The Foundation is also designated as a "public body" under the *Auditor General Act*. Viewed in this light, I acknowledge that one could argue, as the applicant has forcefully done, that the Foundation ought to be covered by the Act, which would subject it to scrutiny with appropriate protections. But in light of the evidence before me – regarding this University and this foundation, at least – the decision to subject the Foundation's activities to public scrutiny and accountability under the Act does not rest with me. Only the government can decide, under s. 76.1 of the Act, to designate the Foundation as a public body covered by the Act.

[29] For the reasons given above, I find that the University does not have custody or control of the requested records for the purposes of the Act. The Act therefore does not apply to those records. Under s. 58(3)(a) of the Act, I confirm that the University performed its duties in responding to the applicant as it did.

June 27, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia