Custody or control of an Institution's affiliate records under M/FIPPA: Lessons from the York University decision

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When are records possessed by an entity that is not subject to access to information legislation considered in the "custody or control" of an institution subject to the legislation, such that the right of access applies?

Who has the right of access to information possessed by a group that is not subject to access to information legislation considered in the "custody or control" of an institution subject to the legislation?

In *York University Development Corp. v. Ontario (Information and Privacy Commissioner)*, 2022 ONSC 1755, the divisional court affirmed an Information and Privacy Commissioner of Ontario (IPC) finding that records of a corporation affiliated with the university were in the "custody or control" of the university and subject to the access rights under the *Freedom of Information and Protection of Privacy Act* (FIPPA. This case illustrates the burden of indirect application of FIPPA to records held by corporations affiliated with public bodies.

Background

Two professors requested records from York University regarding proposed renovations to a university bookstore and retail space at York Lanes. The York University Development Corporation (YUDC), a wholly owned subsidiary of the university that was created to help the university with planning and development of university lands, was responsible for the renovations. The records were in the possession of an individual who was both a board member of YUDC and an officer of the university. The University created the YUDC to assist the University with planning and development of university lands. This record-holder maintained the requested records as a member of the YUDC board but kept them in his office at the university premises.

The university was subject to FIPPA but YUDC was not.

The university denied access to the information on the basis that the exemption for third party confidential information. The requesters professors appealed the university's

denial to the IPC, who found in their favour when she determined that the third party confidential information exemption did not apply.

YUDC applied for reconsideration, newly asserting that the records were not subject to access right under FIPPA because they were not in the custody or control of the university. The IPC held that the records were in the control of the university and denied reconsideration. The development company then initiated a judicial review of the IPC decision, which was heard at divisional court.

The divisional court review

The central issue in the judicial review was whether requested records were under the control of the university. Third party records held by an institution are subject to the access rights in FIPPA if they are under the custody or control of a FIPPA-governed institution.

The divisional court affirmed the test for control of records. In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, the Supreme Court set out a two-step test for deciding whether records are controlled by an institution subject to access to information legislation:

> (i) Do the contents of the document relate to a department matter; and
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> (ii) Could the government institution reasonably expect to obtain a copy of the document on request?

In this case, the Supreme Court articulated that step one "acts as a useful screening device." 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 reasonable expectation test under step 2 is objective, and the Supreme Court articulated this question for its assessment:

> "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."

The divisional court affirmed the IPC's reasons for finding the development corporation records under control of the university by assessing the key relevant factors:

- If the university had planned and developed York Lanes itself without contracting out the work to the development corporation, the records relating to the development would be within the university's custody and control, and subject to access requests under FIPPA.

- The university could not divest itself of responsibility and accountability for records directly related to its statutory mandate by choosing to create a corporate entity to discharge its mandate to manage its real property.

The divisional court agreed with the IPC that the university bore the burden of putting forward evidence in support of its reconsideration request. It also held that evidentiary gaps supported the IPC finding that the university had control of the requested records. The court noted an absence of evidence about contract terms speaking to control of and access to documents about York Lanes and an absence of evidence about the control that university officers, who held the majority of seats on the development corporation's board of directors, did or did not have over YUDC.

> The IPC was not provided any contracts between the university and YUDC that shed light on the university's right to obtain a copy of the records if requested of the development corporation. Contract terms speaking to control of, or access to, records relating to York Lanes could have been a factor against, or in favour of, finding that the records were in the university's "control".
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> Second, because the YUDC was a wholly-owned subsidiary of the university, it was mandated that five officers of the university sit on YUDC's board. The IPC held that the majority presence of university officers on the YUDC board constituted a degree of control over the YUDC. IPC did not receive submissions speaking to the degree of control that the university officers on the board did or did not have over the YUDC.

The divisional court also upheld the IPC's rejection of arguments challenging the university's control of the records that relied on corporate law principles and "the piercing the corporate veil" — the ability of the court to hold a corporation's shareholders or directors liable rather than the corporation itself.

During the reconsideration request, YUDC argued that since corporations are distinct legal entities, the test for "piercing the corporate veil" had not been met. While the IPC accepted those arguments that YUDC was a separate legal entity, the IPC held that these submissions were not relevant to the issue of whether these third party records were in the control of the university. The divisional court agreed that the IPC did not need to apply the body of law relating to "piercing the corporate veil" in their assessment of whether the records at issue were under the control of the university.

Commentary

Many Ontario public bodies achieve their mandates by working with special purpose affiliated corporations. Affiliates will have their own record holdings that are exposed indirectly to the right of access under FIPPA (and the *Municipal Freedom of Information and Protection of Privacy Act)* based on the custody or control test.

The York University Development Corporation case illustrates the burden that faces institutions and affiliates arguing against custody or control. In particular, the IPC determined that an institution having its officers comprise a majority of the affiliate's board membership constitute a sufficient degree of control for FIPPA, and the access rights therein, to apply to the affiliate's records.

Institutions and affiliates should raise the challenge early and produce all available evidence. They should also anticipate indirect freedom of information requests and structure their relationship with a view to protecting confidential information and the potential economic harms associated with the public right of access.

To discuss how to address the custody and control issue in the context of access to information requests that include third party records and information, reach out to any of the key contacts below.

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