



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

ORDER PO-2738

Appeal PA07-158

York University



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NATURE OF THE APPEAL:

York University (the University) received a request pursuant to the *Freedom of information and Protection of Privacy Act* (the *Act*) for:

...copies in full of all documents, communications, and correspondence, including electronic, created or received by any members of the staff or Board of Directors of the York University Foundation [the YUF] that identify me or pertain or relate to [the requester].

The University responded to the requester, advising that it could not process his request, because the YUF is a separate corporation, distinct from the University.

The requester, now the appellant, appealed this decision as he believes that the YUF is a unit of the University and, as such, its records are subject to the *Act*.

As mediation was not successful in resolving the issues in this appeal, the file was transferred to me to conduct an inquiry. I sent a Notice of Inquiry, setting out the facts and issue in this appeal, to both to the University and the YUF, seeking their representations. I received representations from the University and the YUF, a complete copy of which was sent to the appellant, along with a Notice of Inquiry. I received representations from the appellant. I sent a copy of the appellant's representations to the University and the YUF seeking their reply representations. I received reply representations from both the University and the YUF. I then received unsolicited further representations from the appellant.

Subsequently, I sought and received representations from all of the parties concerning the relevance to the appeal of the recently released decision of the Ontario Court of Appeal in *City of Toronto Economic Development Corporation [TEDCO] v. Information and Privacy Commissioner/Ontario et. al.*, [2008] ONCA 366.

I then received representations from the appellant relating to an item on the University's website concerning the YUF. I sought representations from the University and the YUF in response to the representations of the appellant referring to the website. I received representations in response from the University only.

DISCUSSION:

INTRODUCTION

The scope of the right of access to records under the *Act* is set out in section 10(1), which reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution.

Here, the question is whether the appellant has a right of access to responsive records “created or received by any members of the staff or Board of Directors of the” YUF. This conclusion may be substantiated in one of four ways:

1. The YUF itself is an institution under the *Act*;
2. The YUF is considered a part of the University, which is, itself, an institution under the *Act*;
3. The YUF’s records are in the University’s custody or control, despite the fact that the YUF is not part of the University; or
4. The University has responsive records in its own custody or control.

If I find that the YUF is an institution, it would be subject to the provisions of the *Act*, as the access provisions of the *Act* apply to all provincial “institutions”. I will then order the YUF to make an access decision concerning any responsive records in its custody or control.

If I find that:

- the YUF is part of the University; or,
- the University has custody or control of the YUF’s records; or,
- the University may have responsive records in its custody or control;

then I will order the University to search for responsive records in its custody or control and make an access decision.

IS THE YUF AN INSTITUTION UNDER THE ACT?

Institution is defined in section 2(1) of the *Act* as follows:

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

The YUF is not the Assembly, a ministry or a service provider organization within the meaning of paragraphs (0.a), (a) and (a.1) of the definition of “institution” under section 2(1) of the *Act*.

Column 1 of the Schedule to Regulation 460 of the *Act* lists the agencies, boards, commissions, corporations and other bodies that are designated as institutions under the *Act*. This schedule names “York University” as an institution. The YUF is not listed as an institution in this schedule. Therefore, I find that the YUF is not an institution under the *Act*.

IS THE YUF PART OF THE UNIVERSITY?

In order to determine whether the YUF is part of the University, I will examine the existence of corporate and statutory links between the YUF and the University. The following analysis summarizes the parties’ representations concerning the formation and mission of the YUF.

Corporate Structure

The University submits that:

The York University Foundation is a separate legal entity from York University, and was incorporated under the *Canada Corporations Act* as a charitable institution in 2001...

Having a separately incorporated legal entity with its own board of directors and expert staff allows the Foundation to be focused on fundraising, and provides for greater oversight than if the fundraising activity were one function of a larger, multi-functional organization...

It is required to file its own Registered Charity Information Return which is posted on the Canada Revenue Agency website...

The ...University’s organizational chart shows a link between the Foundation and the Office of the University President. This indicates a functional relationship and not a direct reporting relationship. The Foundation’s President and CEO report directly to the Chair of the Board of Directors of the Foundation who reviews his performance and compensation. The President and CEO of the Foundation does not report directly to the University President; however, the two meet regularly to discuss and coordinate the strategic goals of each of their entities.

The YUF submits that:

The Foundation is a separate non-profit corporation from the corporation that is the University. The affairs of the Foundation are under the control and management of the Foundation’s Board of Directors. The Foundation has a Chief Executive Officer, managers and staff that are distinct from those of the University.

The appellant submits that the YUF is a subsidiary unit of the University, not an independent entity. He states that:

The YUF cannot have autonomous existence apart from the University. This is indicated by the fact that the two entities are inextricably linked through interlocking governance, in order to insure that all YUF efforts are informed by the University's "priorities." Not only is the YUF President at the same time the University's Vice President for Development, but the University's President and the Chair and Vice Chair of the University's Board of Governors all sit on the YUF Board of Directors. The YUF uses the University's logo; the YUF offices are housed in the University's facilities on the [its] campus; and the YUF shares the services of at least some University employees.

YUF's Mission

The University submits that:

The YUF's mission is to conduct fundraising to support the University's core business of teaching and research. The YUF's objectives, as stated in its Letters Patent are:

...to receive or maintain a fund or funds and to use, apply, give, serve, accumulate or distribute from time to time all or part of the fund or funds and/or the income therefrom to charitable activities to be carried on by the Corporation for the purpose of advancing those charitable objects of York University, including the following:

To encourage, promote, solicit and accept legacies, gifts, grants, settlements, bequests, endowments and donations of any kind whatsoever and to receive, manage and invest money and other property and the income or proceeds therefrom.

The YUF submits that:

Whereas the activities of the University involve teaching and research, the activities of the Foundation involve fundraising solicitations, preparing materials and other activities designed to attract and maintain donors.

The appellant does not disagree that the mission of the YUF is to fundraise for the University. He submits that the YUF is a subsidiary of the University and therefore, should be found to be a part of the University. In support of his position, he discusses in great detail the structure of the University's former Development Office which was responsible for fundraising prior to the

inception of the YUF, as well as the similarities between the function and organization of these two bodies.

Analysis/Findings

In arriving at my determination as to whether the YUF is part of the University, I have considered the parties' representations concerning the structure and organization of the University and the YUF, as well as the applicability of the above-mentioned *TEDCO* case. Concerning the latter, I find that the *TEDCO* case is not of assistance in this appeal. That case required a determination to be made as to whether *TEDCO* was part of an institution under section 2(3) of the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*).

I note, however, that the *Act* contains no equivalent of section 2(3) of the municipal *Act*, which states:

Every agency, board, commission, corporation or other body not mentioned in clause (b) of the definition of "institution" in subsection (1) or designated under clause (c) of the definition of "institution" in subsection (1) is deemed to be a part of the municipality for the purposes of this Act if all of its members or officers are appointed or chosen by or under the authority of the council of the municipality.

As the *Act* does not contain a provision equivalent to section 2(3) of the municipal *Act*, I am unable to consider whether the YUF is part of the University because "its members or officers are appointed or chosen by or under the authority of the" University. Even if they were, this would not bring it within the meaning of "institution" as defined in the *Act*.

I have considered the parties' representations concerning the formation and the mandate of the University and the YUF. I have also considered the statutory framework that these two organizations were implemented under.

The *University Foundations Act, 1992* (the *UFA*) sets out the statutory basis for the formation of university foundations. The *UFA* allows prescribed Ontario universities to establish foundations. York University is a prescribed university under the *UFA*. By the terms of the *UFA*, each foundation is a corporation without share capital and its affairs are under the control and management of the foundation's board of directors. Section 2 of the *UFA* provides that:

The objects of each foundation are to solicit, receive, manage and distribute money and other property to support education and research at the university for which the foundation is established.

The YUF was incorporated in 2001 under the *Canada Corporations Act*. The Registered Charity Information Returns for the YUF on the Canadian Revenue Agency (CRA) website indicate that the YUF was registered as a charity on March 1, 2002.

On the CRA website, the YUF was asked to:

Describe how the charity carried out its charitable purposes during the fiscal period. Give detailed information so a reader can clearly understand what the charity actually did to fulfill its mandate.

The YUF responded for the five fiscal periods ending 2003 to 2007, that:

The York University Foundation raises funds and maintains these funds in support of York University. The foundation disburses funds to the University for the purpose of advancing its academic and research activities.

The University was incorporated as a result of the *York University Act, 1959*. By the terms of this Act, the government, conduct, management and control of the University and of its property, revenues, expenditures, business and affairs was vested in its Board of Governors. The York University Senate was made responsible for the educational policy of the University. This Act was repealed and replaced in 1965. The University, its Board, Chancellor, President, Senate and all other attributes thereof, were continued by the terms of the *York University Act, 1965*. Section 4 of the *York University Act, 1965* provides that:

The objects and purposes of the University are,

- (a) the advancement of learning and the dissemination of knowledge; and
- (b) the intellectual, spiritual, social, moral and physical development of its members and the betterment of society.

The YUF is an incorporated legal entity with its own board of directors. I acknowledge that, as stated by the appellant, some of the YUF's directors are also officers of the University. This does not, however, make the YUF part of the University. To the contrary, based on the evidence, I find that the YUF is a separate corporation from the corporation that is the University. Therefore, I find that the YUF is not part of the University and that it is not subject to the provisions of the *Act*.

ARE RESPONSIVE RECORDS IN THE CUSTODY OR CONTROL OF THE UNIVERSITY?

The appellant submits that the records of the YUF are in the University's custody or under its control. He submits that:

The President and the Chairman of the Board of the University both sit on the governing body of [the] YUF. In that capacity, their fiduciary responsibility would no doubt demand that they have access to and some measure of control over YUF records. [The] YUF President [is also the University's Vice-President

of Development and] has a “dual reporting line” in that he reports both to the President of [the University and to the Board of Directors of the YUF, whose members include the President of the University...

[A]ccording to the General Agreement [between the University and the YUF], the University acts as the official agent for the YUF in the handling of investments and must, of necessity, have custody and control of records relating to those YUF activities. Finally, the very fact that the YUF records are housed on the University campus, in the University’s facilities, suggests also that “custody” must be at least a shared responsibility... [T]he YUF shares the services of at least some University employees

According to ...the General Agreement, “all donations [to the YUF] will be processed in the donor records of the York University alumni and development system,” of which the University’s Division of Advancement is the part responsible for records management... As well, because the YUF ...must work in intimate association with the various academic units of the University, those units of the University must produce and retain relevant records...

YUF media relations are handled by the University’s Division of Communication, whose director, [name, Vice-President/Marketing and Communication], has identified himself as an official spokesperson for the YUF... According to the “Protocol: Communications and Public Relations,” Appendix 5 of the General Agreement between YUF and the University, “the University and the Foundation will integrate their communications”.

The University and the YUF disagree with the appellant’s claim that the University has custody or control of the YUF’s records. Although the YUF’s offices are on the University’s campus, they submit that this co-location is “one of convenience facilitating the relationship between the two organizations and allowing exposure of donors to activities of the University”. The YUF and the University do agree that some services are rendered to the YUF by some University offices, however, they claim that these services are charged to the YUF. In particular, the YUF submits that:

When the University provides services to the YUF in connection with the administration of investments held within the endowment and managed by third party investment managers, the YUF may disclose to or consent to the managers and the University having access to information related to these investments... The YUF and the University separately contract with and provide information for accounting purposes to a third party service provider in connection with investment services. The third party investment advisor differentiates (as it is legally obligated to do) between the University’s and the YUF’s holdings and reports to each separately on their investments. The University and the YUF have separate investment committees... The two Committees meet jointly for some purposes, but vote on matters separately.

Although the YUF President and CEO is also the University's Vice-President of Development, the University states that this is a "courtesy title provided to satisfy donors that the interests of the Foundation are aligned with those of the University" and that there is no office for the University's Vice-President of Development at the University.

The YUF differentiates between its corporate and its fundraising records. Concerning its corporate records it submits that:

[it] keeps its own corporate records..., which are not integrated with those of the University and which are secured in the Foundation's premises. The head of the University (for the purposes of the *Act*) has no authority over the corporate records of the Foundation and is not an officer, agent or employee of the foundation...

The University does not have a right of possession or any authority to compel the disclosure of the Foundation's corporate records. The University does not have the right to regulate the Foundation's corporate records and more specifically, does not establish retention periods for the records or any other policies and procedures for their creation, maintenance or disposal...

In their capacity as ex officio Directors of the Foundation, the Chair of the Board of Governors and President of the University may have access to information about the YUF, but not control over its corporate records...

Concerning its fundraising records, the YUF submits that:

The YUF has its own central file plan for hard copy [fundraising] records and a staff member responsible for managing these records. The University owns the software in which the YUF's donation records are kept. It is a common practice in the fundraising sector to outsource the management and processing of donor records... Rather than hire a private sector vendor, the YUF entered into an agreement to have these services provided by the University with its existing Advancement Services staff and software. A fee is paid annually by the YUF to the University for these services. The YUF understands that the University houses the records of donations of four charities, including the YUF, which are identified by the separate charitable registration number of each charity. Access to the YUF's donation records housed in the University's system must be granted by the YUF.

In reply, the appellant maintains that the University has custody or control of the YUF's records. In support, he points out that a number of YUF personnel hold positions with the University. In particular,

- the YUF President and CEO is simultaneously the Vice-President of Development of the University;

- the YUF's Board of Directors is chaired by the same person who is the Vice-Chair of the Board of Governors of the University, in which capacity he is a member of that Board's investment, finance, and executive committees;
- a YUF director is simultaneously Chair of the Board of Governors of the University and a member of all of its committees;
- another YUF director is simultaneously President and Vice Chancellor of the University and a member of the University's Board of Governors and its committees;
- another YUF director is simultaneously Chancellor of the University and a member of its Board of Governors;
- three YUF directors are all Honorary Members of the Board of Governors of the University
- another YUF director is Chancellor Emeritus of the University;

He concludes that: "given this involvement of the Governors and top executives of the University (all of whom have foremost fiduciary responsibility to the University) at the highest decision-making levels of the YUF, it is utterly implausible that the University could fail to have control and/or custody over the records of the YUF".

Analysis/Findings

As stated above, section 10(1) reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

Under section 10(1), the *Act* applies only to records that are in the custody or under the control of an institution.

The courts and this office have applied a broad and liberal approach to the custody or control question [*Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), Order MO-1251].

Based on the above approach, this office has developed the following list of factors to consider in determining whether or not a record is in the custody or control of an institution [Orders P-120, MO-1251]. The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution? [Order P-120]

- What use did the creator intend to make of the record? [Orders P-120, P-239]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, above]
- Is the activity in question a “core”, “central” or “basic” function of the institution? [Order P-912]
- Does the content of the record relate to the institution’s mandate and functions? [Orders P-120, P-239]
- 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? [Orders P-120, P-239]
- 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? [Orders P-120, P-239]
- Does the institution have a right to possession of the record? [Orders P-120, P-239]
- Does the institution have the authority to regulate the record’s use and disposal? [Orders P-120, P-239]
- 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?
- To what extent has the institution relied upon the record? [Orders P-120, P-239]
- How closely is the record integrated with other records held by the institution? [Orders P-120, P-239]
- 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? [Order MO-1251]

Based on my review of these factors and the parties’ representations, I find that the University does not have custody or control of the YUF’s records.

The YUF’s only mandate is to raise funds for the University. The University’s mandate is different. The University’s mandate primarily concerns providing educational services to its students. Fundraising activities are not the “core”, “central” or “basic” function of the University [Order P-912].

The University does not have physical possession or a right to possession of the YUF's records. The YUF's records are not integrated with other records held by the University. The evidence shows that they are maintained separately. The University does not have the authority to regulate the YUF's records' use and disposal [Orders P-120, P-239].

Although the University does not have custody or control of the YUF's records, I find that the University may have records responsive to the appellant's request in its custody or control. In particular, as stated by the appellant, there are several YUF personnel, including its Board of Director members and its officers, who also hold positions at the University. These YUF personnel may have copies of responsive records in their possession due to their capacity as University officers, directors or employees.

The information sharing provisions of the General Agreement between the YUF and the University provide that:

- a) The University agrees that within the bounds created by University policy and privacy legislation, it will share with the Foundation, information about its donors, alumni, students and employees for the purposes of raising funds.
- b) The University also agrees to take such reasonable steps as may hereinafter be required by legislation or policy to obtain the permission of its donors, alumni, students and employees to release such information for such purposes.
- c) The parties agree and undertake that they will use any information received from the other party solely for the purpose for which it is being provided.
- d) The parties agree that should either one knowingly or unknowingly use information received from the second party in a manner or for a purpose not contemplated herein, and should any contrary act on the part of such party or its governors, directors, officers or employees give rise to any claim against the second party, the party will indemnify and hold harmless the second party, its governors, directors, officers and employees from any and all cost and damages resulting therefrom.
- e) The parties acknowledge that each party gathers and stores information about various individuals, corporations, and other organizations for its own purposes. The parties acknowledge that information gathered by one party always remains the property of the party which gathers it. This remains true when the information is stored in joint files or data bases or is disclosed to the other party. In order to carry out its activities, one party may, from time to time, permit the second party to have access to information it has gathered in order to permit the second party to carry on

activities it has agreed to undertake on behalf of the party or to permit the second party to carry on fundraising or donor relations activities.

- (f) The University will consult with the Foundation concerning the financing, ongoing support and upgrading of the data bases containing such information.

Based on these information sharing and other provisions contained in the General Agreement between the University and the YUF, as well as the regular interaction between these two organizations as outlined above, copies of responsive records may have come into the University's possession.

I am unable to determine which responsive records are in the University's custody or control as it has not responded to the appellant's request to it for copies of:

...all documents, communications, and correspondence, including electronic, created or received by any members of the staff or Board of Directors of the YUF that identify [or pertain or relate to the appellant].

Therefore, I will order the University to conduct a search for records in its custody or control responsive to the appellant's request and to issue an access decision to him.

In determining whether any responsive records are within its custody or control, the University should consider the following factors:

- If the record is not in the physical possession of the University, who has possession of the record, and why?
- Who owns the record? [Order M-315]
- Who paid for the creation of the record? [Order M-506]
- What are the circumstances surrounding the creation, use and retention of the record?
- Are there any provisions in any contracts between the University and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the University the right to possess or otherwise control the record? [*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.)]
- Was there an understanding or agreement between the University, the individual who created the record or any other party that the record was not to be disclosed to the University? [Order M-165] If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the University?
- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]
- To what extent, if any, should the fact that the individual or organization that created the record have refused to provide the University with a copy of the record determine the control issue? [Order MO-1251]

ORDER:

1. Taking into account the provisions of this order, I order the University to conduct a search for records responsive to the appellant's request within the records which are in its custody or under its control.
2. I order the University to provide the appellant with a decision letter concerning this search in accordance with the provisions of section 26 of the *Act*, treating the date of this order as the date of the request. I further order the University to provide me with a copy of its decision letter to the appellant.

Original Signed by: _____
Diane Smith
Adjudicator

_____ December 1, 2008