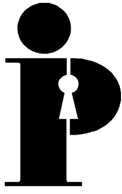

ORDER PO-2981

Appeal PA10-75

York University

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

OVERVIEW

In June 2009, York University (the university) hosted a conference called "Israel/Palestine: Mapping Models of Statehood and Paths to Peace."[1] Aspects of the conference's organization and agenda proved to be extremely controversial within the university and larger community. There was a campaign to cancel the conference and allegations were made that the conference's programming and funding had been interfered with by university administration, the federal government and other external actors.

In July of the same year, the university's president asked former Supreme Court Justice Frank Iacobucci to conduct a review of the conference and make recommendations respecting the responsibilities of the university and its faculty and best practices for organizing future events of this nature.[2]

In this context, an individual submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act)* to the university for "copies of all submissions made to the Iacobucci Review." In the decision letter sent to the requester, the university denied the request because:

> … the records you seek are not in the University's custody or control. Mr. Iacobucci was asked by the President to undertake an independent review of the Conference and to submit a written report with recommendations. The report, once received by the President, will be in the University's custody and control, and then made public.

The appellant appealed the university's decision to this office. Following efforts to reach a mediated resolution, the appeal was assigned to me to conduct an inquiry. I sought and received representations from the university and Mr. Iacobucci. The appellant decided not to submit representations during the inquiry.

In this order, I conclude that any responsive records that exist are not in the university's custody or under its control.

---

[1] As described on the conference's website, "[t]he purpose of this conference is to explore which state models offer promising paths to resolving the Israeli-Palestinian conflict, respecting the rights to self-determination of both Israelis/Jews and Palestinians. Mindful of the fraught context in which debates relating to Israel/Palestine unfold, the conference aims to open up measured and thoughtful conversations on the range of possible paths out of the current impasse." Source: http://www.yorku.ca/ipconf/.

[2] As outlined by York University President Mamdouh Shoukri, the terms of reference for the "Independent Review" by Mr. Iacobucci were to: 1. review the experience with the planning, organizing and delivery of the "Mapping" conference; 2. advise on the responsibilities of faculty members and university administrators in relation to conferences of this type, particularly conferences sponsored by the university; and 3. provide advice on best practices for the successful planning and execution of such events in light of York University policies and procedures pertaining to academic conferences.

DISCUSSION

ARE SUBMISSIONS TO THE IACOBUCCI REVIEW IN THE UNIVERSITY'S CUSTODY OR UNDER ITS CONTROL?

The sole question before me is whether the records that would be considered responsive to the request are "in the custody or under the control" of the university for the purpose of section 10(1) of the *Act*, which states, 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 ...

In other words, the *Act* applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is in the custody or under the control of an institution; it need not be both.[3]

A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it (Order PO-2836). A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 65, or may be subject to a mandatory or discretionary exemption (in sections 12 through 22 and section 49).

The courts and this office have applied a broad and liberal approach to the custody or control question.[4] Based on this approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution.[5]

In the representations provided by Mr. Iacobucci, he advises:

> … The purpose of my retainer was limited to making recommendations to the President for him to consider and forward, if he agreed, for adoption by the appropriate bodies of York University.
>
> In carrying out my duties, I asked for submissions from those who wished to make representations and met with many individuals. I deliberately did not reveal with whom I met or from whom I received submissions. In some cases, individuals expressly asked me not to reveal that I had talked to them…

---

[3] See Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

[4] *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.), and Order MO-1251.

[5] The factors established in previous decisions of this office such as Orders 120, P-239, MO-1251, and PO-2683 were outlined for the parties in the Notice of Inquiry sent to invite representations on the issue.

> … I accepted the assignment from the President on the understanding that:
>
> 1. I would be an independent adviser who would be free to conduct my review without any direction nor influence from any official of York University or of anyone else; and
>
> 2. No official of York University or anyone else had the right to receive the information I received whether it was orally given or in written form; if anyone asked for such information, I would have refused to provide it.
>
> It was fundamental to my role that I served as an independent reviewer and as such that was a clear condition of my accepting this role. Consequently, it is my belief that the submissions I received were entirely within my custody and control, not that of York University.

The university's position respecting custody or control of the Iacobucci Review submissions incorporates, and expands upon, the position taken by Mr. Iacobucci. The university sets out the terms of reference for the Iacobucci Review (see footnote 2, above) and refers to a July 31, 2009 news release from the university president in which he states: "I invite other members of the community to communicate their suggestions and recommendations directly with him by e-mail at iacobucc@yorku.ca." The university continues by noting that:

> The independence of the Iacobucci Review was an important factor: there had been concerns expressed on the part of some of the conference organizers that York University administration had interfered in the conference planning, and so it was especially important that the review be independent and understood by the larger community to be independent. … Justice Iacobucci was asked explicitly to conduct an independent review, not to serve as York University's agent.

The university provided comments responsive to the list of factors considered by this office in determining the issue of custody or control, which can be summarized as follows:

- Mr. Iacobucci, the individual responsible for accumulating the submissions as background documentation and for creating the report based on that documentation, is not an officer or employee of the institution. Moreover, the university does not have custody of any submissions, which are in the physical possession of Mr. Iacobucci at his law office, and has not seen any submissions, notwithstanding the fact that some of those submissions may have been made by faculty, staff, students, conference speakers or delegates or members of the broader university community;

- The university neither created nor used the submissions, and it has no right to possess them. In the circumstances, the university has not asked Mr. Iacobucci or the wider community to provide copies of any submissions;

- The university does not have the authority to regulate the content, use and disposal of the submissions, which were intended to provide background information to Justice Iacobucci;

- The university set up an email account for Mr. Iacobucci as "a convenience for communicating for him. The permissions on the email account allowed only Mr. Iacobucci and certain of his staff to have access. The account no longer exists… [T]he account was used infrequently for making submissions; sometimes it was used by individuals to contact Mr. Iacobucci in order to make an appointment to meet with him;"

- The president's power, pursuant to section 13(2)(f) of *The York University Act, 1965*, to "examine all the activities of the university and developments in higher education" did not result in the creation of the submissions, and was manifest only in the commissioning of the report;

- While the outcome of the review may support the university's core function (e.g. "the pursuit, preservation and dissemination of knowledge."), the independent review itself cannot be considered a core function;

- The university cannot comment on whether the content of the submissions relates to its mandate and functions because it has not seen the submissions;

- The submissions are not integrated with the university's records at all and are not, therefore, subject to its records retention policies. Only the final report is a university record;
- Neither Mr. Iacobucci nor his law firm are institutions under the *Act*;

- Mr. Iacobucci was paid for preparing the report with recommendations but no one was paid to make submissions to him for his review; and

- No provisions, contractual or otherwise, exist that would endow the university with the right to possess or otherwise control the records.

The university compares and contrasts the terms of engagement for the Iacobucci Review with the fact situation in Order MO-1892, which addressed records collected by the Honourable Coulter Osborne in reviewing the City of Toronto's selection of bids to renovate and operate Union Station. The university states:

> The terms of engagement with [Mr.] Iacobucci were such that he would determine his own approach to conducting the independent review. … An analogous situation to this request occurred at the City of Toronto when an individual sought access … to the notes made by the City's appointed investigator [Osborne]… Adjudicator Donald Hale found the following:

- The City did not have actual physical possession of the records;

- Mr. Osborne was retained as an independent contractor and was not acting as an officer or employee of the City;

- The City, pursuant to the *Municipal Act* had the ability to retain the services of individuals to independently perform functions on terms established by the City;

- It was implicit in the arrangement between Mr. Osborne and the City that he be entitled to conduct his investigation privately and without interference from Council or the City's administration;

- The City and Mr. Osborne maintained that the records sought by the appellant were used by and relied upon solely by Mr. Osborne in the conduct of his investigation; and

- The records had never been seen by City staff and had not been used by them in any way.

The university submits that all of the above points are reflected in the facts of the current appeal and notes that Order MO-1892 was upheld by the Divisional Court.[6] The university's representations include an excerpt from the reasons in *David* that I will be referring to it in my reasons, below.

I asked the university to specifically comment on the possible relevance of Orders PO-2836, PO-2842, and PO-2846 in the circumstances of this appeal. In these orders, I found that emails residing on the servers of three Ontario universities that had been sent to, or by, certain faculty members carrying out duties for an external funding agency were in the custody of each of these institutions for the purposes of section 10(1) of the *Act*. I then determined that the records in those appeals must be dealt with in accordance with the *Act*.[7] In response, the university argues that the orders are distinguishable on several grounds, chiefly because making "unsolicited" submissions to Mr. Iacobucci was: entirely voluntary; did not represent a core or central mandate of the university; constituted personal (rather than professional) communication; and would not contravene the university's computing services policy, described in greater detail in an earlier part of the representations.[8]

---

[6] *David v. Ontario (Information and Privacy Commissioner) et al,* [2006] O.J. No. 4351 (Div. Ct.) (*David*).

[7] See Orders PO-2836 (Wilfrid Laurier University), PO-2842 (University of Ottawa), and PO-2846 (University of Guelph). The faculty members whose emails were the subject of the request had participated in a peer review process whereby the requester's applications for research funding through the Social Sciences and Humanities Research Council of Canada were adjudicated.

[8] The university refers both to its "computing policies and procedures" and the Senate Policy on Computing and Information Technology Facilities: http://www.yorku.ca/univsec/policies/document.php?document=77. These policies give the university the power to regulate and discipline users of the university's IT systems.

In conclusion, the university submits that in the particular context of their creation, and "regardless of how submissions were prepared or provided, the intention was that these submissions would not only be confidential, but also entirely under Justice Iacobucci's custody and control for his use only."

As noted in the introductory section of this order, the appellant did not provide representations to me during the inquiry. However, the appellant's comments from earlier correspondence with this office can be summarized as follows:

- All submissions were to be made through a university email account that the university established for this purpose, which "flagged" for parties that that Mr. Iacobucci was carrying out his work as part of the university's work (Order MO-1892);
- Although only Mr. Iacobucci may have printed off submissions, the fact that the submissions were sent to a university email address and exist on the university server establishes that such submissions are in the university's custody;
- The university paid Mr. Iacobucci to conduct the review (Order M-506), but his letter of appointment being the only document that approximates a "contract" for the review suggests that he was not working as an "independent contractor";[9]
- Alternatively, Mr. Iacobucci was functioning as the university's agent, and as the principal in the relationship, the university is entitled at the termination of the relationship to receive all of the documents prepared by the agent (Mr. Iacobucci) concerning its (the university's) affairs. This control exists *de jure,* even if not *de facto* (Orders MO-1251 and PO-2683);
- The principles governing the review are reflected in the "letter of appointment" sent by the university president to Mr. Iacobucci and these focus on academic freedom, which is "one of the core, central, basic functions of universities";
- Records generated by the review are central to the university's work and to its interest in learning from the conference experience which suggests that it is the university and not Mr. Iacobucci that has the "ultimate interest in possessing and controlling the records" (Orders P-120 and P-239);
- Disclosure of submissions would promote a "fulsome understanding" of how the principles of academic freedom were honoured, or not, in these particular circumstances;

[9] At paragraphs 36-40 and elsewhere, the appellant presents argument respecting Mr. Iacobucci's role as counsel for the university in the context of previous indications that the university intended to claim solicitor-client privilege over responsive records, in the alternative. As the exemption relating to solicitor-client privilege (in section 19 of the *Act*) is not before me in this appeal, however, I will not address the appellant's representations on the subject further.

- The submissions to Mr. Iacobucci's review should be disclosed so that the academic community and conference organizers can evaluate the basis of his recommendations;

- Were such submissions made to any of the university committees or bodies that share the mission of promoting academic freedom, such as a senate committee, these submissions would be public and accessible to third parties. That the submissions in this matter were made to an outside party should not effectively permit the university to "abandon" its control over the records and concurrent responsibility to make them available to the public (Order MO-1892); and

- the personal notes of Mr. Osborne in Order MO-1892 and the submissions made to Mr. Iacobucci are a basis for distinction because the latter "belong to the university's deliberations over the core theme of academic freedom and its fragility in the context of intense external and political pressure."

Other portions of the appellant's letter of appeal are concerned with matters not directly related to the issue of custody or control over responsive records, and I will not deal with these submissions.

I now turn to my analysis and findings respecting the issue of custody or control over submissions to the Iacobucci Review.

As stated, in order for a record to be subject to an access request under the *Act,* it must be either in the custody or under the control of the institution. In the circumstances of this appeal, I accept that any responsive records (submissions) which may exist are not, and never have been, in the university's possession. Notwithstanding the fact that at one time, submissions may have transited through, or resided on, the university's server, I am satisfied in the particular circumstances of this appeal that responsive records are not in the university's custody.[10] This conclusion leaves only the determination of whether such records are nonetheless in the control of the university for the purpose of section 10(1) of the *Act*.

I will begin by addressing the appellant's stated motivation in seeking access to the submissions made to Mr. Iacobucci. The appellant argues that the submissions should be disclosed so that the academic community and conference organizers can evaluate the basis of Mr. Iacobucci's recommendations. The appellant states that disclosure of the submissions would permit the public to understand how the principles of academic freedom were honoured, or not, in these particular circumstances. The appellant also argues that the desire to learn from the conference experience "suggests that it is the university and not Mr. Iacobucci that has the ultimate interest in possessing and controlling the records."

---

[10] This finding alone is sufficient to distinguish the present appeal from the facts in Orders PO-2836, PO-2842 and PO-2846 where I found that the responsive records were in the "custody" of the universities.

In my view, the appellant's stated motivation relates to three of the four rationales advanced in the *Williams Commission Report* for enacting public sector access to information legislation in the first place: accountability, public participation, and fairness in decision-making.[11] Moreover, I accept that the focus of the Iacobucci Review on "lessons learned" from the Mapping Models conference falls within the ambit of the university's "core, central or basic" function. I also accept that it is at least arguable that the content of the submissions made to Mr. Iacobucci may relate to the university's mandate and functions; i.e. "the pursuit, preservation and dissemination of knowledge." Importantly, however, it does not necessarily follow that the submissions made to Mr. Iacobucci are under the control of the university for the purpose of the *Act*.

The appellant expresses concern that the university could be permitted to abandon its responsibilities to transparency under the *Act* merely because the submissions were made to an outside party. The Court in *David* (cited above) addressed a similar argument as follows:

> The applicant submitted that, as the Commissioner had found that the records in question related directly to the City's mandate and function, therefore the City could not escape its responsibilities as to records by delegating the activity to an outside person. In my opinion, if the City had purported to assign to Mr. Osborne the responsibility of actually performing one of the City's core functions, there might well be some force in this submission. But that is not this case. Mr. Osborne was not performing contract procurement on behalf of the City. He was conducting an external arm's-length review of how the City had proceeded in a particular case (at paragraph 30).

In this appeal, Mr. Iacobucci was not organizing an academic conference himself, but rather reviewing the university's hosting of the Mapping Models conference. Further, I agree with the university's position that the Divisional Court decision in *David* provides a situation analogous to the one before me.

One of the key features in this appeal, as was the case in *David*, is the nature of Mr. Iacobucci's arrangement with the university. There, the Divisional Court recognized that Adjudicator Donald Hale's reasoning revolved around Mr. Osborne's retainer by the city on an individual *ad hoc* basis. Starting at page 12 of MO-1892, Adjudicator Hale stated:

> Addressing first the appellant's contention that the affected person was acting as a contract employee of the City while conducting his investigation, I rely on the findings of Assistant Commissioner Mitchinson in Order PO-2306 where he held that:

---

[11] The "Williams Commission Report" refers to the Report *of the Commission on Freedom of Information and Individual Privacy / 1980*, vol. 2, at pp. 77-79, as cited by the Divisional Court in *City of Ottawa v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835 at paragraphs 25-26. The fourth rationale relates to privacy protection.

> Canadian courts have made it clear that there is no conclusive test that can be universally applied to determine whether a person is an employee or an independent contractor. However, the presence of certain indicators suggests which arrangement is likely to exist [*671122 Ontario v. Sagaz Industries Canada Inc.* [2001] S.C.J. No. 61.]. In my view, there is little to indicate that the affected party in this case was acting as an officer or an employee of the Ministry in conducting his investigations. He did not enter into a contract for general employment, but rather a contract to perform a described service within a specified period of time. The affected party also did not receive a salary or hourly rate for his services, but was paid on the basis of an invoice submitted to the Ministry in accordance with the terms of his retainer.

> Similarly, I find that the affected person was retained as an independent contractor and was not acting as an officer or employee of the City. Although he did not enter into a contract for the provision of his services, I find that the Council resolutions respecting his engagement by the City, the manner in which he was remunerated and the independence granted to him in the conduct of the investigation all point to this conclusion. This finding weighs strongly in favour of a conclusion that the City does not have control over the affected person's notes.

In the reasons for judgment upholding Order MO-1892, Justice Lane had the following to say regarding the nature of Mr. Osborne's arrangement:

> If Mr. Osborne was an independent contractor, as in effect, the Commissioner found he was, and as I also think, it seems to me that the information was collected by him, not by the City. The separation of Mr. Osborne's inquiry from the City provides a guarantee that the City will not have access to the information gathered by him save to the extent that it may be referred to in the report, which is all that the City contracted to receive from Mr. Osborne. The evidence is that Mr. Osborne gathered information from many people who knew that he was doing so for the purposes of his report, in at least some cases on a "without attribution" basis, and that he used the information for that purpose alone and destroyed much of it when he had finished with it. This is consistent with his submission (and the City's) that the information was never expected, by either the City or himself, to be available to the City.[12]

Many of the reasons outlined by Adjudicator Hale and Justice Lane, above, are equally applicable to my determination of the issue of custody or control over submissions made to the Iacobucci Review. On the evidence before me, I am satisfied that Mr. Iacobucci was retained as an independent contractor, as that term has been discussed in past orders of this office dealing

---

[12] At paragraph 29 of *David*, and as also set out in the university's representations in this appeal.

with custody or control, and not as an employee of the university. I accept that no written contract existed between the university and Mr. Iacobucci for the review, but that the arrangement was spelled out in the July 29, 2009 engagement letter, with its attached terms of reference, from the president of the university. The evidence also suggests that Mr. Iacobucci's remuneration for his work had been settled in separate (verbal) discussions between them, rather than in any written format.

Another context in which to evaluate whether an institution exercises the requisite degree of control over records created by (or, in this matter, for) a third party is the statutory framework in which the arrangement or relationship arises.[13] The university relies on section 13(2)(f) of *The York University Act, 1965* in taking the position that the president is entitled to retain the services of outside individuals to perform functions for the university on terms established by the university. This provision permits the president to "examine all the activities of the university and developments in higher education." Having reviewed this provision, I accept that section 13(2)(f) of *The York University Act, 1965* conferred upon the president the power to appoint Mr. Iacobucci to conduct an independent review of the Mapping Models conference. However, I find that in exercising this statutory power to appoint Mr. Iacobucci to examine the university's activities, no concomitant power or control over submissions to Mr. Iacobucci for that review was created. In other words, I find that the university was entitled to receive the commissioned report at the conclusion of Mr. Iacobucci's review, but not the submissions which formed the background for it.

This finding brings me to consideration of the appellant's alternative argument that Mr. Iacobucci was acting as an agent of the university. The appellant argues that as the principal in the relationship, the university was "entitled at the termination of the relationship to receive all of the documents prepared by the agent (Mr. Iacobucci) concerning its (the university's) affairs." I disagree with this characterization of the relationship. This contention was also raised in Order MO-1892, where (at page 8), Adjudicator Hale responded by stating:

> The appellant maintains that during the conduct of his investigation the affected person was acting as an "agent" for the City and that any records generated as a result of that principal and agent relationship ought to be the property of the City. This issue was canvassed by Assistant Commissioner Mitchinson in Order PO-2306 as follows:
>
> > In approaching the 'control' analysis, it is useful to ascertain whether or not elements of agency are present and, if so, whether any existing agency relationship carries with it the right of possession of any records in question. A finding one way or another, however, is not necessarily determinative [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.)].

[13] See Order PO-2306, which refers to Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner),* cited above.

> ‘Agency’ is the relationship between one party (the principal) and another (the agent) whereby the latter is empowered to act on behalf of and represent the former. Agency can emerge from the express or implied consent of principal and agent [*Royal Securities Corp. v. Montreal Trust Co.*, [1967] 1 O.R. 137 (H.C.), affirmed [1967] 2 O.R. 200 (C.A.)]. Anyone doing something for another person can be an agent for that limited purpose [*Penderville Apartments Development Partnership v. Cressey Developments Corp.* (1990), 43 B.C.L.R. (2d) 57 (C.A.)]. An agent, though bound to exercise authority in accordance with all lawful instructions that may be given from time to time by the principal, is not subject in its exercise to the direct control or supervision of the principal. However, there must be some degree of control or direction of the agent by the principal [*Royal Securities Corp.*]. Among other things, an agent has a general duty to produce to the principal all documents in the agent’s hands relating to the principal’s affairs [F.M.B. Reynolds, *Bowstead on Agency, 15th ed.*, (London: Sweet and Maxwell, 1985), Article 51 at p. 191; *Tim v. Lai,* [1986] B.C.J. No. 3171 at pp. 10-11 (S.C.)].

He then went on to apply these principles to the facts before him in that appeal … [finding that there was no agency relationship entitling the institution to control the records at issue.] …

I find that the approach taken by the Assistant Commissioner in Order PO-2306 is equally applicable here. In my view, evidence of a principal and agent relationship has not been provided in this situation. Even if elements of agency had been established, I am not satisfied based on the evidence before me that it went so far as to include the right of the part of the City to control the use of the notes taken by the affected person. …

Similarly, in this appeal, I find that there is not sufficient evidence of an agency relationship between the university and Mr. Iacobucci to allow me to conclude that the former could – as principal – assert a right to control submissions which came into the latter’s possession in the course of conducting the review of the Mapping Models conference.

There are other factors relevant to my determination of custody or control in this appeal. I accept, for example, that as with Mr. Osborne’s Union Station Inquiry, the Iacobucci Review was an independent arm’s length exercise. The gathering of information for the Iacobucci Review was conducted at arm’s length and for the very good reason that the conduct of the university administration was itself the subject of the review.[14] As Adjudicator Hale stated in Order MO-1892:

[14] See also paragraph 27 of *David*, cited above, where the court makes a similar observation.

> … it is implicit in the arrangement made between the affected person and the City that he be entitled to conduct his investigation privately and without interference from Council or the City's administration. Part of that implicit arrangement, in my view, includes the notion that the affected person was empowered to conduct his review in whatever manner he saw fit, without interference from City staff or Council members. I find that it is consistent with the affected person's independence to conclude that the records that he created remained his property and were not "compellable" by representatives of the City. This is a very significant consideration favouring a finding that the City does not exercise the requisite degree of control over the records to bring within the ambit of the *Act*.[15]

In this appeal, I accept the evidence provided by Mr. Iacobucci that he understood he would be "free to conduct [his] review without any direction or influence from any official of York University or of anyone else." I also find that the university had no statutory or contractual right to dictate to Mr. Iacobucci, or any third party wishing to make submissions to Mr. Iacobucci, what form those submissions should take or how Mr. Iacobucci should use or maintain those submissions. Indeed, I also find that the university did not have the authority to regulate the content, use and disposal of the submissions, which were intended to provide background information to Mr. Iacobucci.

In my view, the university has no statutory or contractual basis upon which to assert the right to possess or dispose of the submissions; nor is there any reasonable basis upon which I could conclude that the university has a property right in the submissions, notwithstanding that it may effectively have paid Mr. Iacobucci to receive them for the purpose of gathering background information for his review.

Significantly, in my view, and as I remarked earlier in these reasons, the university does not now, and never has been, in possession of submissions made to Mr. Iacobucci. The university advises that it has never made any request for them from Mr. Iacobucci or any other party that may have provided submissions to him. There is also no evidence before me regarding the nature, or current existence, of submissions made, electronic or otherwise, other than the university's statement that they were kept at Mr. Iacobucci's law office. Regardless, I accept that possession of any such records that exist is retained solely by Mr. Iacobucci, and I take note of Mr. Iacobucci's evidence that he would not have provided copies of the submissions voluntarily had he been asked to so.

I am also not persuaded that the university's creation of a temporary email address and provision of administrative support for the review ought to weigh in favour of a finding of control over the submissions by the university. The evidence before me establishes that the email account was set up to allow only Mr. Iacobucci and certain of his staff to have access and has since been deleted. In my view, this demonstrates that the university intended to establish a different system of storage and maintenance for the submissions to Mr. Iacobucci (Order P-267). I accept that no other party, including the university, was ever intended to have access to, or exert control over,

[15] At page 13.

any submissions that may have transited through the university email address for the purpose of the review. In the circumstances, I find that any submissions made to Mr. Iacobucci's temporary email address were not sufficiently integrated into the university's information management systems that they could be considered part of the university's general record-holdings or be subject to its records retention policies.

In summary, I conclude that the totality of the evidence does not support a finding that the university has "some right to deal with the records and some responsibility for their care and protection" in the circumstances of this appeal (Order P-239). Accordingly, in the particular context in which individuals or organizations provided submissions to Mr. Iacobucci for the purpose of his review of the June 2009 Israel/Palestine: Mapping Models of Statehood and Paths to Peace Conference at York University, I find that any such records that might exist are not in university's custody or under its control for the purpose of section 10(1) of the *Act*.

ORDER

I dismiss this appeal.

Original Signed by: July 13, 2011
Daphne Loukidelis
Adjudicator