

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3489

Appeal MA16-581

Niagara Peninsula Conservation Authority

August 29, 2017

Summary: The appellant requested records under the *Act* from the Niagara Peninsula Conservation Authority (NPCA). The NPCA denied it had any responsive records, though in its representations in this inquiry submitted that it possessed, but did not have custody or control of, a proposal requested by the appellant. The NPCA advised the appellant that the Niagara Peninsula Conservation Foundation (NPCF) had responsive records. This order finds that the NPCF's records were in the custody or control of the NPCA at the time of the appellant's request. Further, the NPCA has failed to establish that it conducted a reasonable search for the requested records. The NPCA is ordered to conduct a search for records in accordance with these findings and issue another access decision to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 1, 4(1), *Conservation Authorities Act*, R.S.O. 1990, c. C.27, as amended, section 19.

Orders Considered: Order 120, MO-3146, MO-3170, PO-2738, PO-2020 and PO-2775-R.

Cases Considered: *Toronto Economic Development Corp. v Ontario (Information and Privacy Commissioner)*, 2008 ONCA 366; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, 1999 CanLII 3805 (ONCA); *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 FCR 110, 1995 CanLII 3574 (FCA); *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)*, 2009 ONCA 20 (CanLII), [2009] O.J. No. 90.

OVERVIEW:

[1] The appellant made a request under the *Act* to the Niagara Peninsula Conservation Authority (NPCA) for:

1. A copy of an unsolicited proposal the NPCA received from a named company
2. A copy of a 2015 contract with the named company
3. The status of the contract at the time of the request
4. A copy of the invoice for payment submitted by the named company.

[2] The NPCA issued a decision stating "A search for these records was conducted which produced no results." The appellant appealed NPCA's decision, maintaining that records responsive to his request existed at the NPCA.

[3] The issue at the mediation stage of the appeal was whether the NPCA had conducted a reasonable search for records responsive to the appellant's request. During mediation, the NPCA advised the appellant by letter that the named company did not have a relationship with the NPCA, but that it did have an existing relationship with the Niagara Peninsula Conservation Foundation (NPCF). The NPCA advised that the NPCF is not a subsidiary of the NPCA, but an independent organization which is not subject to the *Act*.

[4] The appellant maintained his view that further records responsive to his request existed at the NPCA. The appellant therefore asked that the appeal proceed to adjudication, where an inquiry is conducted.

[5] In the Notice of Inquiry for this appeal, in light of the NPCA's letter advising that the NPCF had a relationship with the company named in the appellant's request, I added the issue of whether the NPCA had custody or control of responsive records to the issues in the appeal.

[6] Representations received in the course of this inquiry were shared between the parties in accordance with IPC *Practice Direction 7*.

[7] This order finds that NPCF's records were in the custody or control of the NPCA for the purpose of the *Act* at the time of the appellant's request. It also determines that the proposal requested by the appellant in the NPCA's possession is in the custody or control of the NPCA for the purpose of section 4(1). Finally, this order finds that the NPCA has failed to establish that it conducted a reasonable search for the records requested by the appellant. In light of these findings, the NPCA is ordered to conduct a further search for records and to issue a new access decision to the appellant.

ISSUES:

[8] As outlined above, the initial issue in this appeal was whether the NPCA had conducted a reasonable search for records under section 17 of the *Act*.

[9] At the beginning of the inquiry, in light of NPCA's position that the NPCF had a relationship with the company named in the appellant's request, I added the issue of whether any responsive records were "in the custody" or "under the control" of the NPCA under section 4(1). This issue also became relevant following NPCA's statement in its representations that it had possession of the proposal requested by the appellant.

[10] In summary, the issues in this appeal are whether NPCA has custody or control of any responsive records and whether the NPCA conducted a reasonable search for responsive records.

DISCUSSION:

Background:

[11] The NPCA is one of several conservation authorities established for various Ontario watersheds under the *Conservation Authorities Act*. According to its website, the NPCA serves approximately 500,000 people in the Niagara Peninsula Watershed, which encompasses the Niagara Region and portions of the City of Hamilton and Haldimand County. The NPCA manages the impact of human activities, urban growth, and rural activities on the watershed.¹

[12] The NPCA is governed by a board of directors comprised of 15 members appointed by its member municipalities with twelve members appointed by Niagara Region, two members appointed by the City of Hamilton and one member appointed by Haldimand County.²

[13] The NPCA is subject to the access provisions of the *Act*, which apply to all municipal institutions. Conservation authorities are included in the definition of "institution" in section 2(1) of the *Act*.

A: Are any responsive records "in the custody" or "under the control" of the NPCA under section 4(1)?

[14] Section 4(1) reads, in part:

¹ <https://npca.ca/about>

² <https://npca.ca/npca-board>

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 . . .

[15] Under section 4(1), 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

[16] The NPCA advised the appellant that it had none of the requested records. It later advised the appellant that the NPCF has a relationship with the company named in his request, implying that the NPCF has the records requested by the appellant. As a result, an important question in this appeal is whether the appellant has a right of access to records held by the NPCF.

Relevance of NPCA's submissions

[17] The NPCA's initial representations make some reference to the "record at issue" (singular) which I understand to be a specific reference to the proposal in its possession, which I will discuss later in this order. The NPCA then goes on to make further submissions on the custody and control issue which refer to the "records at issue". It is not clear whether these submissions are in relation to the proposal record, to records held by the NPCF or to both. The use of the plural "records" suggest the NPCA is referring to NPCF records. What is clear is that the NPCA's position is that neither the proposal record nor any NPCF records are in the custody or control of the NPCA. I will therefore consider the NPCA's arguments in relation to both NPCF records and the proposal record to the extent those arguments are relevant. In order to do so I have set out the parties' main arguments below. I will address those that are relevant to the issue of the relationship between the NPCA and NPCF initially, leaving the remainder for the discussion regarding the proposal.

Submissions of the parties

[18] The NPCA's representations acknowledge the principle in *City of Ottawa v Ontario*⁴ (*City of Ottawa*) that information in the hands of government institutions should be denied only in limited and specific exceptions, flowing from a recognition of the purpose of the *Act* to enhance democratic values by providing its citizens with access to government information. The NPCA submits that the present appeal is one of the limited and specific exceptions.

[19] The NPCA submits that even where a record is in the institution's possession, it will not be provided to the requester unless it is in the custody or under the control of the institution. The NPCA submits that the record in issue is not in its custody or under

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

⁴ 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).

its control within the meaning of section 4(1) of the *Act*. It cites Order PO-2103 for the proposition that physical possession does not necessarily equate to custody or control.

[20] The NPCA acknowledged the factors that have been identified in previous orders as potentially relevant to the issue of custody and control.⁵ In light of those factors the NPCA made the following representations:

1. The records in issue were created as part of a relationship between two independent third parties, the NPCF and the named company.
2. The statutory framework is the starting point for any "control" analysis. Although the NPCF's conservation activities support the NPCA and other conservation organizations, the NPCA does not have a statutory power or duty to oversee, control or in any way participate in the business, management or contractual activities of the NPCF. It is not among the core or central or basic functions of the NPCA to oversee or participate in the business, management or contractual activities of the NPCF.
3. The NPCA did not pay for or otherwise participate in the creation of the records in issue and does not own the records.
4. The NPCA has no right to the possession of the records and in no way regulates the records' use, nor were its employees or agents in any way involved with the creation of the records in issue.
5. The NPCA has no power to demand access to the records and no authority to dispose of the records.

[21] The appellant submits that whatever the legal standing of the NPCA and the NPCF may be, the NPCF is in fact controlled by the NPCA. The evidence the appellant cites in support of his position are:

1. The NPCF and the NPCA share the same physical space, with the NPCF having a small office within the NPCA. Computers, telephones and other file handling systems are shared. NPCA employees move freely and often within the entire space.
2. NPCF "employees" are in fact NPCA employees who are given additional duties within the NPCF. NPCF "employees" receive their salaries from the NPCA. The NPCF's filings with the Canada Revenue Agency (CRA) record that they have no compensated employees.

⁵ These factors are outlined below.

3. The three NPCF directors at the time were also NPCA Board members, one being the Chairman of the NPCA board, one the Vice-Chair and one a board member. All three are elected officials (regional councillors).
4. A letter written by the NPCA Corporate Services Director provides a summary of the "NPCA's dealings with [named company]". The letter is written on NPCA letterhead and in describing the situation, the author of the letter makes at least eight references to the NPCA, and only two references to "the foundation".
5. That same letter states "On May 15, 2015, the NPCA received an unsolicited proposal from [named company] to raise funds on behalf of the NPCA" and continues "This proposal was presented to the Foundation Board and direction to staff was to investigate further. Between May 9th and August 11 [a named employee of the company] and the NPCA's CAO exchanged 3 positive emails..." The appellant submits that the letter establishes that not only were NPCA employees engaging with the named company, but the reference to "3 positive emails" demonstrates that the NPCA created records related to the named company.
6. The letter makes clear (at para 6) that the NPCA, not the NPCF, retained a lawyer to deal with the legal issues arising from the contract with the named company.

[22] The appellant says the NPCA's reference to the intent in enacting the *Act* as "enhancing democratic values by providing its citizens with access to government information" is exactly the justification for making the requested documents available. The appellant says the NPCA should not be allowed to move documents and files from one organization to another and claim that because it is NPCF business they are not obliged to grant access.

[23] The appellant submits that the above evidence refutes the NPCA submission that "the NPCA ... in no way regulates the records' use, nor were its employees or agents in any way involved with the creation of the records in use." The appellant again points to the letter above as evidence that at least three named NPCA employees dealt with the named company's representative and that all are NPCA employees, not NPCF employees.

[24] The appellant submits in closing:

"Freedom of information is a basic tenet of freedom and good governance. The NPCA has engaged in activities that have caused citizens to demand information in a quest to determine what their elected officials and public agencies are doing in the "public interest". Under no circumstances should the NPCA be allowed to withhold information by sliding responsibility over to the NPCF. It is clear that the NPCA was not

being forthright in the initial or the revised response to the FOI. NPCA employees are in fact the only employees who have dealt with this matter and therefore a search for documents would have turned up results, they then chose to cloak those results by labeling it a matter of NPCF business. Perhaps most disturbing in this is the involvement not only of NPCA employees but NPCA/NPCF Board members who are elected officials. I submit that this fact serves to multiply the greater public interest in having all of these documents made available.”

[25] The appellant subsequently submitted an additional NPCA email to support his claims about the interconnectedness of the NPCA and NPCF. This email was added to the appellant’s representations that were shared with the NPCA for the purpose of inviting a reply representation.

[26] The NPCA’s reply states that the NPCF is an independent registered charity, and that it receives its funding from donations from individuals, corporate sponsors, service clubs, and other charitable foundations.

[27] The NPCA states that the NPCF was fairly inactive over the past five years. It acknowledges that since 2015, three NPCA Board Members sit on the NPCF's Board of Directors as directors ex-officio, and that several staff members have been assigned to help reactivate the NPCF by assisting with fundraising efforts to enable the NPCF to become self-sufficient in the future. However, it submits this does not mean that the NPCA controls the NPCF, is synonymous with the NPCF or controls the NPCF's records, though some NPCA employees may have access to those records for a limited purpose.

[28] The NPCA representations respond to the appellant’s submissions as follows:

1. Although the NPCF's mandate is to support the NPCA's work, the two remain distinct entities with distinct purposes. The NPCF is not subject to the *Act* simply by virtue of its relationship with the NPCA.
2. While the NPCA and the NPCF currently share the same office space, the NPCA does not control the NPCF's business or other affairs and NPCA employees are not authorized to access the NPCF's records independently.
3. The NPCF's records are stored separately and are not accessible to the NPCA's employees, with the exception of the three NPCA employees that are ex-officio members of the NPCF's board of directors. All of the NPCA's and NPCF's financial records are maintained separately and independently from each other.
4. The NPCF's tax filing shows no employees because the organization was dormant and did not have any employees in 2015. The NPCF is being reactivated and hired an employee in 2016, who is paid by the NPCF, not the NPCA.

5. The NPCA says that the letter purporting to show NPCA's dealings with the named company contains incorrect information, and re-asserts that the named company interacted with the NPCF, not the NPCA.
6. With respect to the NPCA's handling of the proposal and the subsequent emails relating to it, the NPCA says that this does not establish that the NPCA controls the NPCF. It says NPCA's actions do not establish that the NPCA had custody or control over the records.
7. With regard to the appellant's statement that the NPCA not the NPCF, retained a lawyer to deal with the legal issues arising from the contract with the named company, the NPCA says the evidence merely establishes that the NPCA has retained a lawyer, which it did, because the named company commenced legal proceedings against both the NPCA and the NPCF. The NPCA further submits that the NPCF and the NPCA were represented by different lawyers in these proceedings, demonstrating their distinct nature.
8. The NPCA says it does not move documents "from one organization to another" and does not regulate the use of the NPCF's records.
9. The NPCA states that its employees dealt with the named company either on behalf of the NPCA with respect to the lawsuit that was filed against both the NPCA and the NPCF or for the limited purposes of assisting in the reactivation of the NPCF.
10. With respect to the additional email submitted by the appellant, the NPCA submits this demonstrates only that the NPCA is involved in the reactivation and redevelopment of the NPCF, not that the NPCA and the NPCF are the same entity.

[29] In addressing the possible relevance of section 2(3) of the *Act* in its reply representations, the NPCA submitted that section 2(3) does not apply to the NPCF since not all of its members or officers are appointed or chosen by or under the authority of the NPCA.

[30] The NPCA submits that the three NPCF directors referred to by the appellant were appointed by the NPCA to voluntary positions as directors ex-officio in accordance with the NPCF's by-law.

[31] The NPCA also submits that the NPCF is currently in the process of transition to an active foundation, and that it anticipates that eleven additional directors will be elected at large from the NPCF's membership in 2017 and that these eleven positions will in no way be "appointed or chosen by or under the authority" of the NPCA.

[32] The NPCA concludes its submission by suggesting that the appellant misconstrues the fact that some of the NPCA's employees are ex-officio directors of the

NPCF, or have been otherwise involved in the redevelopment of the NPCF, to mean that the NPCF is part of the NPCA or is otherwise controlled by the NPCA.

[33] I invited the appellant to respond to the NPCA's reply submissions. The appellant:

- Cited NPCF's revenues for each of the past 5 years as reported to the CRA to challenge the NPCA's claim that the NPCF remained "fairly inactive" and "dormant over the past 5 years". The appellant also says the CRA information refutes the NPCA claims that the NPCF was "dormant" during 2015 and that is why there were no compensated employees. The appellant points to NPCF's 2015 revenues being the highest in the previous five-year period according to CRA records.
- Reiterated that the NPCF relies on NPCA staff to function.

[34] The appellant submitted in sur-reply that NPCA's claims that its three employees are ex-officio members of the NPCF's board of directors is false and misleading, because the three members of the NPCF board of directors are councillors and not employees of the NPCA. He submits they are not ex-officio, as there are no regulations or procedures for the NPCF that mandate its board be comprised of NPCA board members. The appellant states that they are elected officials who sit on the board of the NPCA, and that two of them receive a small stipend and the third a small per-diem. The appellant says to call the councillors employees of the NPCA is intentionally misleading. The appellant notes that the NPCA concedes that the three NPCF directors at the time of the appellant's request were also board members of the NPCA as well as elected regional councillors.

Analysis

[35] The NPCA has custody and control of records responsive to the appellant's request if the NPCF is an institution under the *Act* or if NPCF's records are in the NPCA's custody or control. I will consider each alternative in turn.

Is the NPCF an institution under section 2(1)?

[36] Neither party argues that the NPCF is an institution under the definition in section 2(1) of the *Act*. I accept that the NPCF is not an institution under section 2(1).

Are the NPCF's records in the NPCA's custody or control under the Act?

[37] I have carefully reviewed the parties' representations, and conclude that, based on the evidence, at the time of the appellant's request that the NPCF's records were in the custody and control of the NPCA for the purposes of the *Act*.

Approach to custody and control

[38] The courts and this office have applied a broad and liberal approach to the custody or control question.⁶ In *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, after citing the following statement of the Federal Court of Appeal in *Canada Post Corp. v. Canada (Minister of Public Works)*,⁷ the court decided such an approach applied to the Ontario legislation:⁸

The notion of control referred to in [the *Act*] is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting, or "de jure" and "de facto" control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access only to those documents that the government can dispose of or which are under the lasting or ultimate control of the government.

[39] This office has developed a non-exhaustive list of factors to consider in determining whether or not a record is in the custody or control of an institution:⁹

- Was the record created by an officer or employee of the institution?¹⁰
- What use did the creator intend to make of the record?¹¹
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?¹²
- Is the activity in question a "core", "central" or "basic" function of the institution?¹³
- Does the content of the record relate to the institution's mandate and functions?¹⁴

⁶ *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, 1999 CanLII 3805 (ONCA); *Canada Post Corp. v. Canada (Minister of Public Works)* [1995] 2 FCR 110, 1995 CanLII 3574 (FCA) and Order MO-1251.

⁷ Cited above.

⁸ Cited above, at p. 245.

⁹ Orders 120, MO-1251, PO-2306 and PO-2683.

¹⁰ Order 120.

¹¹ Orders 120 and P-239.

¹² Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

¹³ Order P-912.

¹⁴ *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.); *City of Ottawa v. Ontario*, cited above and Orders 120 and 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?¹⁵
- If the institution does have possession of the record, is it more than “bare possession”?¹⁶
- 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?¹⁷
- Does the institution have a right to possession of the record?¹⁸
- Does the institution have the authority to regulate the record’s content, use and disposal?¹⁹
- 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?²⁰
- To what extent has the institution relied upon the record?²¹
- How closely is the record integrated with other records held by the institution?²²
- 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?²³

[40] As set out in *City of Ottawa*, in determining whether records are in the “custody or control” of an institution, the factors must be considered contextually in light of the purpose of the legislation.²⁴ As the court stated in that case: “Having determined that the intent of the legislature in enacting the Act was to enhance democratic values by providing its citizens with access to government information, the next stage of the analysis is to consider how a purposive interpretation of the statutory language used

¹⁵ Orders 120 and P-239.

¹⁶ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

¹⁷ Orders 120 and P-239.

¹⁸ Orders 120 and P-239.

¹⁹ Orders 120 and P-239.

²⁰ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

²¹ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.

²² Orders 120 and P-239.

²³ Order MO-1251.

²⁴ *City of Ottawa v. Ontario*, cited above.

might inform the interpretation of the Act.”²⁵

The application of the purpose of the Act to custody and control arguments involving an entity’s relationship with an institution

[41] The Ontario Court of Appeal’s decision in *City of Toronto Economic Development Corp. v Ontario (Information and Privacy Commissioner)*²⁶ (*TEDCO*) provides further support for the purposive approach to interpretation of the *Act*. It also provides an example of applying a purposive interpretation of the statutory language in context, as discussed in *City of Ottawa*. In particular, it addresses the question at issue in this appeal- whether the records of an entity are under the control of an institution for the purposes of the *Act*.

[42] *TEDCO* involved a request for records of *TEDCO* concerning the “Mega Studio Project” in the Toronto Port Lands area. The officers of *TEDCO* were appointed by the directors of *TEDCO*. The directors of *TEDCO* were appointed by Toronto’s City Council. Since all the officers of *TEDCO* were appointed by its directors, in *TEDCO* it needed to be determined if this process is effected “by or under the authority” of City Council for the purposes of section 2(3) of the *Act*. Subsection 2(3) of the *Act* 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.

[43] The court started by citing the modern approach to statutory interpretation postulated by Elmer Driedger in *Construction of Statutes* (2nd ed., 1983) at page 87:

Today there is only principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[44] The court recited the purposes of the *Act* as set out in section 1:

The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

²⁵ At para. 28.

²⁶ 2008 ONCA 366.

- (i) information should be available to the public,
- (ii) necessary exemptions from the right of access should be limited and specific, and
- (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[45] The court also referred to section 10 of the *Interpretation Act*,²⁷ which deems that *Act* to be remedial and mandates that the *Act* "shall ... receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

[46] The court then quoted La Forest J's description of the overarching purpose of access to information legislation in *Dagg v. Canada (Minister of Finance)*:²⁸

As society has become more complex, governments have developed increasingly elaborate bureaucratic structures to deal with social problems. The more governmental power becomes diffused through administrative agencies, however, the less traditional forms of political accountability, such as elections and the principle of ministerial responsibility, are able to ensure that citizens retain effective control over those that govern them; see David J. Mullan, "Access to Information and Rule-Making", in John D. McCamus, ed., *Freedom of Information: Canadian Perspectives* (1981), at p. 54.

The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479, at p. 480:

Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to

²⁷ R.S.O. 1990, c. I.11.

²⁸ 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403 at paras. 60 and 61.

participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.

[47] I note that in *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)*,²⁹ the Ontario Court of Appeal affirmed the principle that Ontario's public sector access and privacy legislation requires a broad, liberal and purposive interpretation. In restoring this office's order applying the definition of "record" in the *Act* to electronic databases maintained by the Toronto Police Services Board, the Court stated:

As recently held by this court in [*TEDCO*] at paras. 28 and 30, the *Act* should be given a broad interpretation to best ensure the attainment of its object, according to its true intent, meaning and spirit.

[48] The court preferred this approach over an approach "that would very much restrict, rather than foster, the public's right of access to electronic records."

[49] Applying the purposive approach described above, the court in *TEDCO* found that all of TEDCO's officers were "appointed or chosen by or under the authority of the council of the municipality" within the meaning of s. 2(3) of the *Act*. In articulating its reasons for this conclusion the court observed that a formal and technical interpretation of s. 2(3) runs contrary to the purpose of the *Act*. The court stated:

In light of what La Forest J. observed in the above-cited passage from Dagg, it seems to me that TEDCO is just another example of a complex bureaucratic structure of public administration. In my view, it is contrary to the purpose of the Act and access to information legislation in general to permit the City to evade its statutory duty to provide its residents with access to its information simply by delegating its powers to a board of directors over which it holds ultimate authority.

Other orders dealing with an entity's relationship with an institution

[50] In Reconsideration Order PO-2775-R, Adjudicator Hale also considered whether an entity was part of an institution for the purposes of responding to a request for information. In particular, the issue was whether Victoria University was part of the University of Toronto for the purposes of the *Freedom of Information and Protection of Privacy Act (FIPPA)*. The Order affirmed an earlier decision that Victoria University was part of the University of Toronto for the purposes of *FIPPA*. Key factors that supported the decision were evidence of a strong degree of integration of the financial, academic and administrative operations of the University and Victoria and the Legislature's

²⁹ 2009 ONCA 20 (CanLII), [2009] O.J. No. 90.

expressed intention in amending the *Act* to accommodate the inclusion of publicly funded universities as institutions. The order cites *TEDCO* and the affirmation of the *TEDCO* approach in the subsequent Ontario Court of Appeal decision in *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)* to support the decision.

[51] Order MO-3146³⁰ addressed the issue of custody and control of records of a consortium providing student transportation that had a separate legal existence from the two school boards that created it. The requester sought access to student transportation procurement records of the consortium. The board denied access, stating that the consortium was an independent entity and that the consortium, not the board, had custody and control of the responsive records. The adjudicator found that the consortium was part of the board.

[52] Adjudicator Smith acknowledged that the consortium was a separate legal entity from the board but observed that as a joint venture between the board and another school board, it was subject to the board's control through the board's control of the consortium's board of directors and other powers vested in the school boards as voting members. In addition to the co-ownership and control of the consortium by the board, the structure and purpose of the consortium, and the funding flows were factors in finding that the consortium was part of the board. The decision cites *TEDCO*, noting that it was helpful, despite section 2(3) not being in issue in the appeal.

[53] Order PO-2738 found that records of the York University Foundation (the foundation) were not in the custody or control of York University for the purposes of *FIPPA*. Crucially, despite some intermingled administrative functions, the foundation was not controlled by the University. The foundation's board contained some members affiliated with the York University but not all board members were. University foundations are established and governed by the *University Foundations Act* which provides for the appointment of board members to the foundation by the Lieutenant Governor in Council. I note for the purposes of the current appeal that no equivalent legislation exists for conservation foundations.

[54] It is clear from my review of the decisions above that in determining the custody or control issue I must adopt a purposive approach to the *Act*. *City of Ottawa* then dictates that the next stage of the analysis is to consider how a purposive interpretation of the statutory language used might inform the interpretation of the *Act* in the particular context. *TEDCO* and subsequent decisions discussed above that also deal with the question of whether an entity's records are in the custody or control of an institution for the purposes of access to information legislation, guide me in this analysis.

³⁰ One of several orders issued simultaneously that reach the same conclusion with regard to school board consortiums formed to provide transportation services.

Were the NPCF's records in the custody or control of the NPCA at the time of the appellant's request?

[55] The NPCA's initial submissions assert that it has no oversight or control over the NPCF, which is a completely separate organization that enters into contractual relations with third parties independently from the NPCA. The NPCA says the NPCF is an independent not-for-profit organization, which is not a subsidiary of the NPCA.

[56] Based on the evidence before me, at the time of the appellant's request, the only identifiable officers of the NPCF were 3 NPCA board members, in particular the Chair, Vice-Chair and a member of the NPCA board. The NPCA describes these three individuals as occupying voluntary positions as "ex-officio" directors appointed in accordance with NPCF's bylaw. These three NPCA board members were appointed to the NPCF by resolution at the NPCA's annual general meeting (AGM).³¹ The appointments refer to the members being appointed to the committee of the NPCF. This "committee" language is used because the appointments occurred in the section of the AGM dealing with appointments to Standing Committees of the NPCA. Section 19 of the *Conservation Authorities Act* that governs conservation authorities including the NPCA provides that a conservation authority may appoint an executive committee from among the members of the authority and that the chair and vice-chair of the authority shall be the chair and vice-chair of the executive committee. It appears from the NPCA's actions at the AGM that it treated and considered the NPCF as a standing committee of the NPCA.

[57] However characterized, I am satisfied from the evidence before me that the Chair, Vice Chair and the member were in control of the NPCF and maintained control over the management of its affairs. The evidence referred to by the appellant includes the NPCF's filings with the CRA, which show that the three individuals are the only named "Directors/trustees and like officials" listed, where they are listed with the titles of Chair, Vice Chair and Director.

[58] NPCA's submission that the NPCF "is currently in the process of transition to an active foundation" is speculative, and not supported by the facts or any evidence. I agree with the appellant's submission that the NPCF has not been dormant. The NPCF has been actively fundraising in recent years, and the appellant points to the NPCF's CRA filings as evidence of this. The NPCF's presence on the internet (hosted on the NPCA's website) lists fundraising events that have occurred and that are ongoing. If the NPCF can be characterized as dormant, it is only in the sense that it has become a shell whose activities appear from the evidence to have been carried out under its name by the NPCA.³² Further, the NPCA provided no evidence of the NPCF membership which it

³¹ Resolution FA-06-15 available at <https://npca.ca/sites/default/files/uploads/FINALIZED-JAN-21-2015-A-G-M-MEETING.pdf>.

³² I note that the NPCA's representations and some public statements refer to the NPCF supporting the work of the NPCA and other local environmental organizations, but in other public documents, (including

says it will draw additional directors from and none is apparent to me. I also note that at the most recent NPCA AGM in January 2017, the NPCA re-appointed the three NPCA board members discussed above as NPCF directors and added two additional NPCA board members to the NPCF "committee," as it is referred to in the NPCA AGM minutes. The AGM minutes do not refer to any proposal to add additional members from other sources to this number.

[59] I note that in correspondence from the CAO of the NPCA to one of the directors, in responding to a question asking if there are any officers of the NPCF (other than the three directors), the CAO does not name any. The only evidence before me of possible additional NPCF officers other than the three directors, is the appellant's email evidence of NPCF activities being carried out by NPCA staff. There is considerable evidence of NPCA carrying out activities on behalf of the NPCF and the NPCA acknowledges that NPCA staff have carried out NPCF functions, though it submits that this is only to assist the NPCF to transition out of dormancy. I do not consider the NPCA's submission about why NPCA staff were carrying out NPCF functions particularly relevant or credible. If anything, the evidence that NPCA employees carried out NPCF tasks further strengthens the connections between the NPCA and NPCF.

Summary

[60] It is clear on the facts before me that the NPCA, at the time of the appellant's request for records, was in control of the NPCF. At the time of the appellant's request, the board of the NPCF had been directly appointed by the NPCA at its AGM. The board appears to be the only officers of the NPCF. If, by virtue of working on NPCF business, NPCA employees are also NPCF officers, the NPCA employees clearly operate under the authority of the NPCF (and NPCA) board members. The NPCA's relationship with the NPCF is best summarised by the fact that it appeared to use the statutory process for appointments to NPCA executive committees to appoint the NPCF's only directors.³³

[61] Adopting the language of *TEDCO*, there is a significant nexus between the NPCA and the NPCF sufficient to establish that the NPCF's officers are either "appointed or chosen by" the NPCA, in the case of its three directors, or, "under the authority" of the NPCA, in the case of any NPCA employees carrying out NPCF functions. To further borrow from the language of *TEDCO*, in my view, it is contrary to the purpose of the *Act* and access to information legislation in general to permit the NPCA to evade its statutory duty to provide its residents with access to its information simply because its

its CRA filings) the NPCF is said to exist solely to support the work of the NPCA. The latter appears more accurate in light of the evidence.

³³ I note that other conservation foundations operate in Ontario to raise funds for the activities of conservation authorities in their area. Some of these conservation foundations have an active membership with boards of directors comprised wholly or substantially of individuals with no association with the conservation authority the foundation supports through fundraising.

board of directors was exercising authority as a separate legal entity over which it holds ultimate authority.

[62] Returning to the approach in *City of Ottawa*, and adapting and answering the questions asked in that decision³⁴ to apply the purpose of the *Act* to the context: Would interpreting the term "custody or control" as including records relating to the obligations of an entity that at the time of the request was under the control of elected officials of an institution, do anything to advance the purpose of the legislation? Conversely, would interpreting the language of the *Act* as not applying to records relating to the obligations of an entity that at the time of the request was under the control of elected officials of an institution interfere with a citizen's right to fully participate in democracy? The answer to both questions must, in my view, be "Yes."

[63] I note that the public record demonstrates that the appellant has a history of working to hold the NPCA to account. I am satisfied that he seeks the records for the very purposes that the *Act* was enacted to support- to enable him to scrutinize the actions of the NPCA's elected officials.

[64] The *Act* provides an important tool to promote transparency and accountability for public entities. It is clear that the *Act's* purpose is consistent with an institution providing access to information about entities that are under its control for the purpose of the *Act*. In my view, considering the purposes of the *Act* and the context, having regard to all of the circumstances set out above, I am satisfied that it is consistent with the purpose of the *Act* as articulated in previous decisions to find that NPCF's records were in the custody and control of the NPCA at the time of the appellant's request. At the time of the appellant's request (and subsequently) the NPCF was under the control of and operated by officers of the NPCA.

[65] I note that in addition to being consistent with the orders discussed above dealing with the issue of whether an institution has custody or control of the records of another entity, my finding is also consistent with decisions applying section 2(3) of the *Act*, though I am not applying that provision here.³⁵ For example, Order MO-3170 found that though there was no evidence that an entity named ServeCo's board of directors were city employees or members of city council, ServeCo's board of directors were elected and could be removed by HoldCo's sole shareholder, the city of North Bay represented by its city council. This was sufficient to find that that the city's councillors were the directing minds of ServeCo and therefore ServeCo was an institution subject to the *Act* by operation of section 2(3).³⁶

³⁴ At para. 28.

³⁵ Section 2(3) refers to municipalities.

³⁶ See also Order MO-2570, which found that the Commissioners of the Port Hope Harbour was covered by the *Act* under section 2(3) as appointments to the Harbour Commission were made under the authority of council of the Municipality of Port Hope. See also Order MO-2393 which found the Durham

Proposal

[66] Given my finding above, it is not strictly necessary to separately consider whether the sponsorship proposal requested by the appellant that is in the NPCA's possession is in its custody or control for the purpose of section 4(1) of the *Act*. This is because the NPCA has indicated that the responsive records, including the proposal, are held by the NPCF and I have found that the NPCF's records were in the custody or control of the NPCA for the purpose of the appellant's request.

[67] However, as the records held by the NPCF have not been identified with precision, I will separately consider the issue of whether the NPCA has custody or control of the proposal record in its possession.

Analysis- proposal

[68] The NPCA acknowledges that it has physical possession of the proposal. The NPCA submits that the record in issue is not in its custody or under its control within the meaning of section 4(1) of the *Act*, citing Order PO-2103 for the proposition that physical possession does not necessarily equate to custody or control.

[69] As noted by former Commissioner Linden in Order 120, physical possession is the best evidence of custody and only in rare cases can it be successfully argued that an institution did not have custody of a record in its actual possession.³⁷

[70] This is a significant factor in support of a finding that the NPCA has custody of the proposal, though, as the NPCA submits, it is certainly not determinative.

[71] Based on the evidence before me, I am not convinced that this is one of the rare cases contemplated by the former Commissioner, where possession amounts only to "bare possession." Having considered the factors relevant to the issue of custody or control, and the purpose of the *Act*, I conclude that the proposal is in the custody of the NPCA.

[72] The parties agree that the proposal was unsolicited by the NPCA (and the NPCF). However, after receiving it, the appellant's evidence establishes that NPCA's CAO engaged in correspondence about the proposal that ultimately resulted in the NPCF entering into an agreement with the named company that provided the proposal.

[73] I find that even if the proposal and agreement was addressed or directed to the

Region Non-Profit Housing Corporation was an institution for the purposes of the *Act* under section 2(3) because of the Housing Corporation's significant nexus to the Regional Municipality of Durham. In that appeal, while the council did not directly choose the Housing Corporation's officers, it did appoint its Board of Directors and the Board in turn appointed the Corporation's officers.

³⁷ See Order PO-3335 for a recent order applying this principle.

NPCF,³⁸ the evidence of the NPCA CEO's multiple dealings with the proposal, and the inter-connectedness of the NPCA and NPCF in oversight, use of staff time, and physical location, amongst other aspects, supports my finding that the proposal is in the custody or control of the NPCA.

[74] With regard to the NPCA's submission regarding the statutory framework, I understand this submission addressed the issue of whether the NPCA has custody and control of NPCF records generally, not the proposal. I note that it is not necessary for the NPCA to have both custody and control of the proposal, custody is sufficient for the purposes of the *Act*. I also note that even accepting the statutory framework is as the NPCA describes, the evidence of the practical reality of NPCA's oversight and involvement in NPCF's day to day operations is more significant as it accords with a purposive approach to the custody and control issue. I also find that the NPCA's other arguments regarding the factors relevant to custody or control do not outweigh the factors I have identified above.

[75] With regard to the NPCA's argument that its employees or agents were not involved in any way with the creation of the records in issue, I have also considered that the proposal, being unsolicited, was created by the named company. Whether an institution has custody or control of records created by a third party and supplied to an institution has been addressed in previous appeals. Order PO-2020 found that the *Act* will apply to information in the custody or control of an institution notwithstanding that it was created by a third party, and quoted from Order P-1105:

There are innumerable individuals, organizations, agencies and businesses that interact with government institutions on a daily basis. During the course of these interactions, information about these entities often comes into the possession of these institutions. In drafting its freedom of information legislation, the government determined that such information should be subject to the provisions of the Act, unless the exemptions contained in the statute applied. These exemptions are designed to not only protect the interests of government institutions, but also those of third parties (such as individuals, agencies and organizations) whose information may come into the custody or control of an institution as well. Based upon the scheme of the Act, therefore, a third party, such as the Corporation, will have the opportunity to fully argue that its interests will be harmed by the release of such information.

[76] I am therefore satisfied that even though the proposal in issue was an unsolicited communication from a third party, it is not contrary to the purpose of the *Act* to find that the proposal is in the custody or control of the NPCA.

³⁸ I note that I was not provided with a copy of the proposal in evidence, so I rely on the NPCA's representations that the proposal is addressed to the NPCF.

B: Did the NPCA conduct a reasonable search for records?

[77] The appellant maintains that the NPCA has records responsive to his request. Where a requester claims that records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.³⁹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[78] The *Act* does not require the NPCA to prove with absolute certainty that further records do not exist. However, it must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.⁴⁰ To be responsive, a record must be "reasonably related" to the request.⁴¹

[79] A reasonable search is one in which an experienced employee, knowledgeable in the subject matter of the request, expends a reasonable effort to locate records which are reasonably related to the request.⁴²

[80] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁴³

[81] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁴⁴

[82] The Notice of Inquiry sent to the NPCA required the NPCA to provide a written affidavit summarizing all steps taken in response to the request and stated:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the institution did not contact the requester to clarify the request, did it:
 - (a) choose to respond literally to the request?

³⁹ Orders P-85, P-221 and PO-1954-I.

⁴⁰ Orders P-624 and PO-2559.

⁴¹ Order PO-2554.

⁴² Orders M-909, PO-2469 and PO-2592.

⁴³ Order MO-2185.

⁴⁴ Order MO-2246.

(b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so, please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

5. Do responsive records exist which are not in the institution's possession? Did the institution search for those records? Please explain.

Parties' submissions

[83] The NPCA's submission regarding the reasonableness of its search states:

The NPCA conducted a diligent and reasonable search for the requested records, and was able to locate only a copy of [the named company's] proposal to the NPCF, which had been forwarded to the former Chief Administrative Officer of the NPCA by [the named company].

...

No other requested records were located by the NPCA.

[84] The NPCA goes on to state that the NPCA took the position that the located record is not responsive to the request because it, and any other requested records, are not in the custody or control of the NPCA. The NPCA's representations then address the custody or control issue in greater detail.

[85] The appellant's representations also focus more on the custody or control issue. However, the appellant's representations do inform whether there is a reasonable basis for concluding that responsive records may exist at the NPCA. In particular, the appellant's representations include correspondence from NPCA employees that make a number of references to the NPCA's interactions with the company named in the appellant's request. The NPCA employee correspondence also provides documentary evidence that the NPCA received an unsolicited proposal from the named company, as

the NPCA acknowledged in its representations.

Analysis

[86] I note that my earlier finding that the NPCF's records are in the NPCA's custody or control necessitates that the NPCA conduct a new search for responsive records.

[87] Putting aside the finding regarding custody and control, I also find NPCA has not provided sufficient evidence to demonstrate that it made a reasonable effort to identify and locate all responsive records within its custody or control. The NPCA's submissions comprise little more than a bare assertion that a reasonable search was conducted. The evidence requested from the NPCA in the Notice of Inquiry outlined above was not provided. That alone provides a basis for finding that the NPCA has not satisfied me that it conducted a reasonable search.

[88] In addition, I am concerned by the NPCA changing its position regarding the results of its search between its communications to the appellant and its representations in this inquiry. The NPCA's initial response to the appellant's request was to advise the appellant that "A search for these records was conducted which produced no results." Later, after the appellant appealed the NPCA's decision, the NPCA wrote a further letter to the appellant advising of the relationship between the NPCF and the named company. After advising the appellant no records were located via these two communications, the NPCA's representations state that the proposal was located but it was considered not responsive.

[89] In its reply representations, the NPCA defends its initial response that the search "produced no results" as accurate, arguing that it was consistent with its position that the NPCA does not have custody or control of the records sought by the appellant. The NPCA submits that it was not at liberty to provide the appellant with any further information about the records.

[90] The NPCA confuses two separate, albeit connected issues. There is no doubt that the proposal is a record responsive to the appellant's request. It was explicitly listed in the appellant's request as a record the appellant sought. The NPCA's position that the record is not in its custody or control is a qualitatively different response to the request than the response that no responsive records exist. The NPCA should have advised the appellant in its decision letter that the NPCA had located the proposal but that it would not be issuing a decision regarding the record because it considered it did not to have custody or control of the record for the purposes of the *Act*.

[91] Putting aside the merits of NPCA's argument about the responsiveness of the record for the moment, the fact of NPCA's shifting position about the results of its search from its decision letters to its representations, in circumstances where I lack good evidence about the nature and extent of its search efforts, further undermine a conclusion that the NPCA conducted a reasonable search for records in response to the

appellant's request.

[92] Further, I am satisfied that the appellant's representations provide a reasonable basis for concluding that records responsive to the appellant's request exist at the NPCA. The appellant provided documentary evidence, including emails from NPCA employees, of NPCA involvement with the named company. These emails indicate that the NPCA received the unsolicited proposal the NPCA ultimately acknowledged receiving in its representations. The emails also contain a statement that the NPCA signed the agreement with the named company that was requested by the appellant.

[93] 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.⁴⁵ A record within an institution's custody or control may be excluded from the application of the *Act* or may be subject to a mandatory or discretionary exemption. Accordingly, the appropriate remedy in this appeal is to order the NPCA to conduct a further search for records and, given the certainty that responsive records will be found, to issue a new access decision to the appellant.

ORDER:

1. I order the NPCA to conduct a further search for records responsive to the appellant's request in accordance with the findings of this order that:
 - a. The NPCA's records are in the custody and control of the NPCA for the purposes of the appellant's request;
 - b. The requested proposal is in the NPCA's custody or control for the purposes of section 4(1).
2. I order the NPCA to issue a new access decision to the appellant in accordance with the findings of this order, after conducting the additional search outlined above, considering the date of this order as the date of the request.

Original Signed by: _____
Hamish Flanagan
Adjudicator

_____ August 29, 2017

⁴⁵ Order PO-2836.