Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-4029-R

Appeal PA16-290

Order PO-3922

York University

February 14, 2020

Summary: Both the university and the affected party requested a reconsideration of Order PO-3922. In Order PO-3922, the adjudicator found that the records at issue were not exempt under sections 17(1) or 18(1) of the *Freedom of Information and Protection of Privacy Act*. The university and the affected party now allege that an accidental or clerical error occurred, which has led to a fundamental defect in the adjudication process. In this Reconsideration Order, the adjudicator denies the reconsideration request and finds that the university and the affected party have not established that grounds exist under section 18.01 of the *Code* for reconsidering Order PO-3922.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 410(1).

Orders Considered: Orders MO-1200-R, PO-2738, MO-3832 and PO-3894.

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306.

BACKGROUND:

[1] This reconsideration order is with respect to Order PO-3922, in which I found that the records at issue were not exempt from disclosure under sections 17(1) or 18(1) of the *Freedom of Information and Protection of Privacy Act* (the *Act*). In response to an access request, York University (the university) had withheld four records (in full) and

one record (in part) relating to the York University Bookstore Renovations in a building on campus called York Lanes.

[2] In my inquiry, I sought representations from the university, the appellant and the affected party (a named corporation). I received representations from the university and the appellant. The affected party declined to submit representations, but relied on its earlier submissions it submitted to the university dated April 1, 2016, when the university notified it of the access request. The university's and the appellant's representations were shared with each other in accordance with section 7 of the IPC's *Code of Procedure (the Code)* and *Practice Direction Number 7*.

[3] In Order PO-3922, I found that the records at issue were not exempt under sections 17(1) (third party information) or 18(1) (institution's economic interests) of the *Act* as disclosure could not reasonably be expected to result in any of the harms set out in those sections. I ordered the university to disclose the records to the appellant.

[4] The university and the affected party then separately submitted a request for reconsideration of Order PO-3922. The basis for the reconsideration requests is their disagreement with the (implicit) finding in my order that the university has custody or control of the records at issue.

[5] I sought representations on the reconsideration from the university, the affected party and the appellant. Pursuant to section 7 of the *Code* and *Practice Direction Number 7*, the parties' representations were shared.

[6] In this Reconsideration Order, I find that the university and the affected party have not established that grounds exist under section 18.01 of the *Code* for reconsidering Order PO-3922, and I deny the reconsideration request.

RECORDS:

[7] The records at issue, which the university withheld in full, are as follows:

- three memoranda addressed to members of the affected party's Board of Directors from the affected party's staff dated March 19, 2014 (Record 2), September 15, 2014[1] (Record 3), and December 16, 2015 (Record 11); and
- a document about York Lanes refinancing and projects (Record 6).

[8] Record 4 (a memorandum addressed to members of the York University Board of Governors, Land and Property Committee) is not at issue in this reconsideration request. It has been disclosed to the appellant in accordance with Order PO-3922.

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[1] In Order PO-3922, I mistakenly stated the year as 2015 but it is 2014.

DISCUSSION:

[9] The only issue here is whether the reconsideration requests meet any of the grounds for reconsideration as set out in section 18.01 of the *Code*. Section 18.01 sets out this office's reconsideration process.

[10] Sections 18.01 and 18.02 state:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:
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> a. a fundamental defect in the adjudication process;
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> b. some other jurisdictional defect in the decision; or
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> c. a clerical error, accidental error or other similar error in the decision.
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> 18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

[11] Section 410(1) of the *Act* reads, in part:

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

[12] Therefore, in order for a record to be accessible under the *Act*, the institution receiving the access request must have custody or control of it.

[13] The university responded to the access request not by claiming the records were not in its custody or control, but by finding that the section 17(1) and 18(1) exemptions applied to them and that the records were exempt from disclosure on that basis.

[14] The university now submits, however, that there is an accidental error or clerical error in Order PO-3922. It submits that this error occurred when it originally stated that it had custody or control of the records at issue.[2] The university also submits that this error is of a fundamental nature going to the issue of whether the records at issue even fall within the ambit of the *Act*.

[15] In support of its position, the university relies on the affidavit of its Director of the Information, Privacy and Copyright Office. In this affidavit, she explains that, at the time

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[2] There is no written statement from the university that it has custody or control over the records at issue. However, it is implicit in its position as the university relied only on sections 17(1) and 18(1) to withhold the records.

of the access request, a named person was the Vice-President Finance and Administration (VPFA) of the university and, in a separate role, he was also a corporate director on the affected party's Board of Directors. She states that, after receiving the access request, her office contacted the named VPFA's office to prepare a list of responsive records in the university's possession. The affiant states that the named VPFA's assistant compiled a number of documents without clarification from the VPFA. The collection resulted in commingling records that the named VPFA held in his capacity as the affected party's board member with records that he held in his capacity as VPFA at the university.

[16] The affected party also submits that a reconsideration is appropriate because a clerical or accidental error occurred, which has led to a fundamental defect in the adjudication process. It submits that this clerical or accidental error occurred when the records at issue were collected from the named VPFA but in his role as a board member of the affected party.

[17] In support of its position, the affected party relies on the affidavit of the individual who was its president and board member at the time of the access request. In this affidavit, the president states that he was aware of the access request at the time it was made. He wrote to the university on behalf of the affected party, stating that specific records listed were memoranda from the affected party's staff to members of the affected party's Board of Directors and explaining why these records qualified for exemption under section 17(1), the mandatory third party information exemption.[3]

[18] Moreover, he states:

> Following a decision by…, the Director of the Information, Privacy & Copyright Office of York University, not to disclose these records, the requester appealed to the Information and Privacy Commissioner. *I was not aware of the appeal until I was advised of Order PO-3922*, dated January 30, 2019, determining that the mandatory third party exemption under section 17(1) of *FIPPA* did not apply to the records at issue. [Emphasis added]

[19] Although the now former president of the affected party attested that he was not aware of the appeal until he received a copy of Order PO-3922, this is not the case. During the mediation stage of the appeal, the IPC mediator exchanged communications with this individual via phone and email. During the inquiry stage, I notified and invited him to provide representations, which he declined to do. In Order PO-3922, I stated that the affected party declined to submit representations and relied on its earlier submissions dated April 1, 2016 to the university.[4]

[20] I am satisfied that the affected party received notice of the appeal before this

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[3] This letter is dated April 1, 2016.
[4] See paragraph 10 of Order PO-3922.

office. Accordingly, I find that the affected party (and the university) had notice of the appeal and were given a full opportunity to make representations.

[21] As stated above, section 18.01 sets out three possible grounds for reconsideration of an order of this office.

[22] Section 18.01(a) refers to a fundamental defect in the adjudication process. A fundamental defect would be a breach of procedural fairness, such as a party not being given notice of an appeal or not being given an opportunity to provide submissions during the inquiry.[5] Neither the university nor the affected party has raised any breach of procedural fairness, and I am not satisfied that there was a defect in the adjudication process in this case. The parties in this appeal were given notice of the appeal and were given an opportunity to provide submissions during the inquiry. The miscommunication between and within the affected party and the university does not amount to a defect in the adjudication process.

[23] Section 18.01(c) refers to a clerical error, accidental error or other similar error in the decision. A clerical error, accidental error or other similar error would commonly be a typographical error in the decision or a misplaced word, such as "not", in the decision. It is an error that generally originates with this office rather than with a party, and is usually obvious to the reader.

[24] I understand that both the university and the affected party argue that a clerical error or accidental error occurred in Order PO-3922. They argue that the clerical error or accidental error was the university's implicit position that it has custody and control of the records at issue. In my view, this is not a clerical error or accidental error in the order itself. As such, I am not satisfied that an accidental error or clerical error has occurred.

[25] Finally, section 18.01(b) refers to some other jurisdictional defect in the decision. An example of such a defect would be an adjudicator ordering a body that is not an institution under the *Act* to disclose records.

[26] In this case, the university and the affected party argue now, on reconsideration, that the university does not have custody or control of the records at issue. The parties had ample opportunity to raise this issue during the inquiry, and they did not.

[27] The reconsideration process set out in the *Code* is not intended to provide parties with a forum to re-argue their cases. In Order PO-2538-R, Adjudicator John Higgins reviewed the case law regarding an administrative tribunal's power of reconsideration, including the Supreme Court of Canada's decision in *Chandler v. Alberta Assn. of Architects*.[6] With respect to the reconsideration request before him, he concluded that:

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[5] For an example, see Order PO-3960-R.
[6] [1989] 2 S.C.R. 848.

> [T]he parties requesting reconsideration ... argue that my interpretation of the facts, and the resulting legal conclusions, are incorrect... In my view, these arguments do not fit within any of the criteria enunciated in section 18.01 of the *Code of Procedure*, which are based on the common law set out in *Chandler* and other leading cases such as *Grier v. Metro Toronto Trucks Ltd.*
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> On the contrary, I conclude that these grounds for reconsideration amount to no more than a disagreement with my decision, and an attempt to re-litigate these issues to obtain a decision more agreeable to the LCBO and the affected party. ... As Justice Sopinka comments in Chandler, "there is a sound policy basis for recognizing the finality of proceedings before administrative tribunals." I have concluded that this rationale applies here.

[28] Adjudicator Higgins' approach has been adopted and applied in subsequent orders of this office. In Order PO-3062-R, for example, Adjudicator Daphne Loukidelis was asked to reconsider her finding that the discretionary exemption in section 18(1) did not apply to the information in the records at issue in that appeal. She determined that the institution's request for reconsideration did not fit within any of the grounds for reconsideration set out in section 18.01 of the *Code*, stating as follows:

> It ought to be stated up front that the reconsideration process established by this office is not intended to provide a forum for re-arguing or substantiating arguments made (or not) during the inquiry into the appeal...

[29] I agree with these statements. A reconsideration request is not a forum to re-argue a case by presenting new evidence, whether or not that evidence was available at the time of the initial inquiry.

[30] I acknowledge that since the issue of custody or control could be seen as a threshold issue, an error in a custody or control finding could arguably amount to a jurisdictional error for the purposes of section 18.01(b) of the *Code*. If this office orders disclosure of a record and it is then discovered that the relevant institution does not have custody or control of the record, this could arguably amount to a jurisdictional error in the order.

[31] However, because the university and the affected party have raised the custody/control issue for the first time in a reconsideration request, and not during the inquiry, in my view, the onus is on them to show that the records are not in the custody or under the control of the university. In my view, to allow the parties to raise the issue for the first time on reconsideration and for me to treat the issue as if it was raised earlier would undermine the principle of finality of this office's orders.

[32] For the following reasons, I find that the university and the affected party have not established that the records at issue are not in the university's custody or control.

Has the university and/or the affected party established that the records at issue are not "in the custody" or "under the control" of the university within the meaning of section 410(1)?

[33] As stated above, section 410(1) of the *Act* provides that 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, among other exceptions that are not relevant here, an exemption from the right of access applies.

[34] Under section 410(1), therefore, records are accessible under the *Act* only if they are in the custody or under the control of an institution.

[35] 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.[7]

[36] 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.[8] 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 52, or may be subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38). However, in Order PO-3922, I found that the claimed exemptions did not apply. Neither the university nor the affected party has challenged that finding.

[37] 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.[9] The list is not intended to be exhaustive. Some of the listed factor may not apply in a specific case, while other unlisted factor may apply. Some relevant listed factors include: whether the record was created by an officer or employee of the institution;[10] whether the content of the record relates to the institution's mandate and functions;[11] and if the institution had possession of the record, whether it is more than "bare possession."[12]

[38] Some relevant factors that may apply where an individual or organization other than the institution holds the record include: if the record is not in the physical possession of the institution, who has possession of the record, and why;[13] whether there are any

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[7] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[8] Order PO-2836.
[9] Orders 120, MO-1251, PO-2306 and PO-2683.
[10] Order 120.
[11] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.) and Orders 120 and P-239.
[12] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[13] PO-2683.

provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record;[14] and whether there was an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the institution.[15]

[39] In determining whether the records are in the "custody or control" of an institution, the above factors must be considered contextually in light of the purpose of the legislation.[16]

[40] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,[17] the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

1. Do the contents of the document relate to a departmental matter?

2. Could the government institution reasonably expect to obtain a copy of the document upon request?

The university's and the affected party's representations

Background

[41] The representations of the university and the affected party provide some background to their reconsideration request.

[42] The university explains that it is a not-for-profit, charitable public institution created by the *York University Act, 1959* and continued by the *York University Act, 1965*. Its objects and purposes are set out in the latter statute and are (i) the advancement of learning and the dissemination of knowledge, and (ii) the intellectual, spiritual, social, moral and physical development of its members and the betterment of society.

[43] The affected party explains that it is a private, for-profit corporation incorporated under the *Ontario Business Corporation Act*. For a fee, the affected party advises the university on real estate and other property matters as requested by the university. The affected party notes that its fee is comparable to market fees for third party advisory services. The affected party's mandate includes developing and managing innovative, community-focused and profitable real estate projects.

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[14] *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).
[15] Orders M-165 and MO-2586.
[16] *City of Ottawa v. Ontario,* cited above.
[17] 2011 SCC 25, [2011] 2 SCR 306.

[44] The affected party was incorporated in 1985 to assist the university with the planning and development of its lands. It is a wholly-owned subsidiary of the university. The university is the sole shareholder of the affected party.

[45] The university and the affected party stress that they are separate entities. I agree, and I will not set out the parties' representations on that issue in any detail. The issue is whether the university has custody or control of the records at issue, notwithstanding the fact that the affected party and the university are separate entities.

Representations

[46] The university submits that it is specifically designated as an "institution" in the regulations but that the affected party is not designated as an "institution". As such, Part II of the *Act*, which establishes a general right of access to records in an institution's custody or control, applies to the university but not to the affected party.

[47] Both the university and the affected party rely on Order PO-2738. In that order, Adjudicator Diane Smith found that the York University Foundation (YUF) was not part of the university and furthermore, that the YUF's records were not in the university's custody or control. Adjudicator Smith considered the bodies' differing mandates, the fact they were established under separate statutes, and the fact that the two entities had some shared administrative functions. She also found that the fact that some of YUF's directors are also officers of the university was not an indicia of control. Ultimately, she found that YUF's records were not in the university's custody or control.

[48] In addition, the university and the affected party (in its reply representations) refer to the list of factors described above and make submissions on many of the factors. I will not set out their representations on the various factors here, but I have reviewed them for the purposes of making my decision.

The appellant's representations

[49] The appellant notes that the financial interests of the university and the affected party are linked and that there are closely linked administrative personnel cross-appointments between them. She submits that members of the university's administration serve on the affected party's board and members of the affected party's board participate in the university's administration.

The university's and the affected party's reply representations

[50] The university submits that the appellant's argument ignores the fact that it and the affected party are separate entities in fact and at law. It states:

> Although [the university] is the shareholder of [the affected party], [the university] does not single-handedly control [the affected party's] activities, nor does [the university], as a shareholder of [the affected party], have an

> unfettered right to access documents prepared by or in the custody of [the affected party].

[51] The affected party makes lengthy submissions on the principles that corporations are distinct legal entities, the test for piercing the corporate veil and why the test for piercing the corporate veil has not been met in this case. I will not discuss these arguments as they are not relevant to the issue of whether the university has custody or control of the records.

[52] Finally, the affected party relies on the Court of Appeal's decision in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*[18] for the principle that bodies that may be administratively structured under the Ministry of the Attorney General are not automatically subject to the *Act*. It also relies on the Court of Appeal's comment that the bodies must be connected with respect to their core functions. It submits that similarly, in this case, it and the university are not connected with respect to their core functions. Its core functions relate to the management and development of real estate projects at the university while the university's core function is that of a learning institution as defined by its enabling statute.

The parties' sur-reply representations

[53] The appellant submits that the university's VPFA had the records at issue in his possession because he needed them in order to carry out his responsibilities as VPFA. The appellant points out that one of the areas the VPFA is responsible for is campus services and business operations, which includes the bookstore and facilities development. She also submits that the named VPFA was responsible for reporting to the university president and Board of Governors on the bookstore and facilities development (including the activities of the affected party), which were under his control.

[54] The appellant submits that Order PO-2738 does not apply. She points out that Adjudicator Smith found there was virtually no overlap between the YUF's formation and mission and those of the university, unlike the current situation where the affected party is closely linked to the university in a number of ways.

[55] The appellant also points out that, in Order PO-2738, *some* of the YUF directors were also officers of the university while in this case *all* of the directors (including those listed as independent) are connected to the university. As such, she submits that it is difficult to see how the university and the affected party could operate as separate entities, when virtually all the same high ranking officers of the university and its Board of Governors are running both. The university submits, however, that three of the affected party's eight current board members are currently independent of the university. In any event, it submits that it is very common for a major shareholder to nominate one or multiple directors for the board of the corporation. The university explains that this

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[18] 2018 ONCA 559.

ensures the good governance of the corporation into which the shareholder has invested substantial funds.

[56] Finally, the appellant submits that the affected party is not a separate entity operating at arm's-length from the university. She submits that the affected party deals with matters such as university lands and facilities development that fall directly under the responsibility of the university's Board of Governors. Moreover, she submits that the affected party and the university are interconnected at diverse levels, all relating to the core functions of the university to look after its property and facilities in ways that further its educational purpose. The appellant also submits that, while in Order PO-2738, the YUF leadership reported only to its own board, the affected party reports to the VPFA, the university president and the university Board of Directors through the Land and Property Committee.

[57] The university submits, however, that the placement of the VPFA on the university's organizational chart (found on the university's website) shows that there is no chain of responsibility or direct reporting relationship between the VPFA and the affected party.

[58] The affected party relies, in this regard, on the affidavit of the university's former VPFA (who is now the affected party's president). In this affidavit, he attests that the records at issue were not connected to his work as VPFA for the university, nor did he use them for that purpose. He also attests that the affected party has no reporting relationship with the VPFA or any member of the university.

[59] The affected party submits that it only reports to its own Board of Directors as it operates in an arm's-length manner from the university.

Analysis and finding

[60] The representations of the university and the affected party have not satisfied me of any obvious error in my implicit finding that the university had custody or control of the records at issue. On that basis, I deny the reconsideration request.

[61] With respect to custody, I accept that the university's physical possession of the records at issue likely amounts to only "bare possession" of the records. I accept the evidence of the university's former named VPFA that he kept these records and other documents relating to the affected party in separate binders from documents relating to his role as the university's VPFA. I also accept the evidence that he kept these binders in his VPFA office for convenience only and because the affected party did not provide him with a dedicated office in his role as a board member.

[62] On the other hand, there is substantial evidence before me that the university has control of the records at issue. In making a finding on the issue of control, the listed factors (mentioned above) are relevant, as is the two-part test in *National Defence*.

[63] One of the factors is whether the records were created by an officer or employee of the university. Here, it is clear that they were created by the affected party, not the university.

[64] However, other factors point to a finding that the university has control over the records. Specifically, applying the two-part test in *National Defence*, the first part appears to be satisfied. The records relate to the renovation of York Lanes, a building on university land owned by the university. The *York University Act, 1965*, specifically references the university's authority to manage and lease its real property. This statute also provides that "[t]he property and the income, revenues, issues and profits of all property of the University shall be applied solely to achieving the objects and purposes of the University." The university has a direct interest in the progress and the outcome of the renovation as evidenced by Record 4 (which has been disclosed to the appellant). Record 4 is a memo from the affected party's Director Commercial Land Use to the members of the York University Board of Governors, Land and Property Committee in which he discussed the Shoppers Drug Mart lease and the York Lanes General Lease in relation to the long-term improvements to York Lanes. Thus, the record is directly and substantially related to the university's mandate to manage and lease its real property and to have any revenues applied to achieve its objects and purposes.

[65] Further, by choosing to create a corporate entity to discharge its statutory mandate to manage its real property in aid of achieving its objects and purposes, the university cannot divest itself of its responsibility and accountability in relation to records directly related to that mandate which, but for the existence of the affected party, would clearly have been within both the university's custody and control. In light of this, the decision of the Court of Appeal in *Ontario (Criminal Code Review Board) v. Doe*, 47 OR (3d) 201, is instructive, where the Court of Appeal stated (at para. 35):

> … [T]he Board chose to enter into arrangements with independent court reporters to meet its court reporting requirements. Assuming the court reporter now refuses to deliver the backup tapes to the Board, the Board's failure to enter into a contractual arrangement with the reporter that would enable it to fulfil its statutory duty to provide access to documents under its control cannot be a reason for finding that the duty does not exist. Put another way, the Board cannot avoid the access provision of the Act by entering into arrangements under which third parties hold custody of the Board's records that would otherwise be subject to the provisions of the Act.

[66] With respect to the second part of the *National Defence* test, I am satisfied on the evidence before me that the university could reasonably expect to obtain a copy of the records at issue upon request. I pause, however, on this point to note that not all relevant evidence is before me.

[67] While the university and the affected party made extensive representations on their reconsideration requests, there are gaps in the information they provided to me.

For example, I have not been provided with any contractual or other documents setting out the terms upon which the affected party arranged for the renovations at issue. As I mention in the discussion above, one of the factors relevant to the issue of control is whether there are any provisions in contracts between the institution and the entity in possession of the records that might shed light one way or the other on the institution's right to require a copy of the records, if requested. If the custody and control issue had been raised at first instance, during my inquiry, I would have asked the parties to submit any and all documents relevant to this issue. I have not done so in the context of this reconsideration, as in my view, it was up to the university and/or the affected party to establish a jurisdictional error in my order and to put forward all the necessary evidence to do so.

[68] Consequently, based on the evidence I now have before me, I am not satisfied that my implicit finding of the university having control over the records at issue was in error. The affected party was incorporated in 1985 to assist the university with the planning and development of its lands. It is a wholly-owned subsidiary of the university and the university is the sole shareholder of the affected party. It is mandated that five officers of the university (including the President, the VPFA and the General Counsel) sit on the affected party's Board of Directors. While the affected party notes that currently three of its eight board members are independent of the university, it does not address the control that these five board members exercise over its organization. In these circumstances, I find it reasonable to expect that the university could obtain a copy of the records at issue upon request.

[69] Finally, as mentioned above, the university and the affected party rely heavily on Order PO-2738. I agree with the parties that the scenario in Order PO-2738 is similar in some respects to the circumstances before me. The major difference, however, is that in Order PO-2738, the issue was framed as whether all of the YUF's records, including corporate and fundraising records, were in the university's custody or control. Here, the issue is whether the four records remaining at issue, which relate to a matter within the university's core mandate, are under the university's control. Other distinctions are the number of affected party board members that are also university officers, with the makeup of the affected party's board in this case suggesting a stronger indicia of control. I also note that Order PO-2738 was decided in 2008, before the Supreme Court's decision in *National Defence*. For these reasons, I do not take Order PO-2738 as being determinative of the custody and control issue in the present case.

[70] In sum, I have not been presented with sufficient evidence which could persuade me that the test of control in *National Defence* has not been met in this case. As this issue was first raised in a reconsideration request, I am unable to identify any jurisdictional error as a basis on which to reconsider my decision in Order PO-3922 under section 18.01(b).

[71] Accordingly, I find that neither the university nor the affected party has established any of the grounds for reconsideration under section 18.01 of the *Code*.

ORDER:

The requests for reconsideration are denied.

Original signed by | February 14, 2020

Lan An
Adjudicator