



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
— for —  
British Columbia

Order F09-06

**UNIVERSITY OF BRITISH COLUMBIA**

Michael McEvoy, Adjudicator

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**Summary:** The applicant requested records from UBC relating to seven entities. UBC was able to provide some records and a few others were publicly available but for the most part UBC argued that the entities had custody and control of the requested records; it did not. UBC is found to have control of the requested records with respect to three of the entities and is ordered to respond to the applicant in respect of those access requests. All three bodies were entities created and owned 100% by UBC and accountable to it.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 3(1) and 4(1); *Interpretation Act* s. 8; *University Act*, ss. 27(1) and 47; *Access to Information Act* (Canada); *Municipal Freedom of Information and Protection of Privacy Act* (Ontario), ss. 2(1) and 2(3).

**Authorities Considered: B.C.:** Order 00-47, [2000] B.C.I.P.C.D. No. 51; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 02-19, [2002] B.C.I.P.C.D. No. 19; Order 02-30, [2002] B.C.I.P.C.D. No. 30; Order 04-08, [2004] B.C.I.P.C.D. No. 8; Order 04-19, [2004] B.C.I.P.C.D. No. 19; Order F06-01, [2006] B.C.I.P.C.D. No. 2; Order F08-01, [2008] B.C.I.P.C.D. No. 1.

**Cases Considered:** *Lacker v. Lacker*, [1982] 42 B.C.L.R. 188; *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110, [1995] F.C.J. No 241 (C.A.); *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27; *Neilson v. British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1640; *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.); *Ontario (Criminal Code Review Board) v. Doe*, (1999), 180 D.L.R. (4<sup>th</sup>) 657, 47 O.R. (3d) 201, [1999] O.J. No. 4072 (C.A.); *Sarvanis v. Canada*, [2002] 1 S.C.R. 921; *Canada*

(*Information Commissioner v. Canada (Minister of Citizenship and Immigration)*, [2003] 1 F.C. 219 (C.A.); *City of Toronto Economic Development Corp. v. Ontario (Information and Privacy Commissioner)*, [2008] O.J. No. 1799.

## 1.0 INTRODUCTION

[1] The applicant made a request to the University of British Columbia (“UBC”), under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”), for access to certain records he described as relating to a group of “UBC entities”. He listed them as follows:

1. UBC Properties Investments Ltd., and UBC Properties Trust
2. Discovery Parks Inc.
3. UBC Foundation
4. University Golf Club, and University Golf Course
5. UBC Research Enterprises Inc.
6. BC Research Inc.
7. UBC Investment Management Trust

[2] The specific records the applicant sought from UBC concerning each entity were:

- its most recent annual report
- salaries and expense figures for the president or CEO or highest ranking employee for the most recent year
- minutes of all meetings of its governing body for 2006 to date

[3] UBC replied that, for the most part, it was unable to provide the requested records because the entities were separate legal bodies and not public bodies subject to FIPPA.

[4] The applicant requested a review of UBC’s decision and, because the matter was not settled in mediation by this Office, a written inquiry was held under Part 5 of FIPPA. The applicant, UBC and the seven entities were given notice of the inquiry.<sup>1</sup>

[5] The inquiry was re-opened at UBC’s request to allow supplementary submissions concerning Order F08-01.<sup>2</sup> That order, now the subject of a judicial review application, concerned the issue of “control” under ss. 3(1) and 4(1) of FIPPA.<sup>3</sup> Subsequent to the inquiry closing, the parties were also provided the

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<sup>1</sup> All made initial submissions while only the applicant, UBC, Discovery Parks Inc. and UBC Properties Investments Ltd. made reply submissions.

<sup>2</sup> [2008] B.C.I.P.C.D. No. 1. The applicant, UBC, Discovery Parks Inc., UBC Properties Investments Ltd., BC Research Inc., the University Golf Club and the UBC Investment Management Trust all made supplementary submissions.

<sup>3</sup> The application had not been heard at the time of writing.

opportunity to comment on what, if any, relevance the recent court decision in *City of Toronto Economic Development Corp. v. Ontario (Information and Privacy Commissioner)*<sup>4</sup> might have for this inquiry.

## 2.0 ISSUE

[6] The issue in this case is whether the records covered by the applicant's request are in the custody or under the control of UBC for the purposes of ss. 3(1) and 4(1) of FIPPA.

## 3.0 DISCUSSION

[7] **3.1 Does UBC Have Custody or Control?**—Sections 3(1) and 4(1) of FIPPA provide rights of access to records which are in the custody or under the control of a public body. Section 3, which defines the scope of FIPPA, states in relevant part:

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, ...

[8] Section 4(1) of FIPPA incorporates the requirement for public body custody or control into the right of access to records:

4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant

[9] UBC is subject to FIPPA because the definition of “public body” under FIPPA’s Schedule 1 includes a “local public body”, which in turn encompasses an “educational body”, of which UBC is one.

[10] None of the entities the applicant referred to is specifically designated or defined as a public body under FIPPA. FIPPA therefore applies only if the records are under the control or in the custody of UBC. The conclusions I reach with respect to three of the entities concerning control, the issue I deal with first, require me to consider only briefly the matter of custody in relation to the remaining entities.

[11] **3.2 Interpreting Sections 3(1) and 4(1)**—Control is not defined in FIPPA and the applicant differs with UBC and UBC Investment Management Trust (“UBC IMANT”) on the manner in which control should be interpreted under ss. 3(1) and 4(1). UBC argues that control:

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<sup>4</sup> [2008] O.J. No. 1799.

...must be viewed in the sense of its literal meaning which is to “exercise authoritative or dominating influence over; authority to manage or direct; one that controls”. Following that theory, in every case, the Commissioner must look to see the true origin of the records. It cannot be the case that both the “public body” and the private [entities] have control over [r]ecords, since that would make nonsense of the literal interpretation and definition of the word “control”, that one party must always be found to be the primary data controller.<sup>5</sup>

[12] UBC IMANT contends that the “expansive” purposive approach to statutory interpretation is not absolute and is case specific.<sup>6</sup> It argues that FIPPA should be construed in a way which recognizes the Legislature’s “multiple intentions” of granting access to records as well as authorizing limited exceptions to their disclosure. UBC IMANT submits that the exceptions set out in FIPPA have not been relied upon in this inquiry since it is IMANT’s position that FIPPA does not apply to it. It adds, however, that the specified exceptions, namely those found in ss. 12, 13, 17 and 21 of FIPPA, are indications of the Legislature’s intention to limit access in circumstances such as the present inquiry.<sup>7</sup>

[13] The applicant submits that “control” should be given a liberal and purposive meaning that promotes the objectives of BC’s access and privacy legislation.<sup>8</sup>

[14] I will say at once that UBC IMANT’s submissions are not relevant to the issue at hand. The issue of whether UBC, a public body, is in control of the records is entirely separate from whether the records are subject to any exceptions to disclosure under FIPPA. Whether UBC will decide to apply any of the exceptions to the records ordered disclosed in this inquiry is entirely hypothetical and not an issue that is before me. The fact that exceptions to disclosure are provided for under s. 2 of FIPPA in no way suggests that FIPPA and “control” should be interpreted in anything other than a liberal and purposive manner as set out below.

### ***Analysis***

[15] The modern approach to statutory interpretation has been set out in numerous court decisions, notably by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*<sup>9</sup>:

...Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that

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<sup>5</sup> UBC’s initial submission, para. 152.

<sup>6</sup> UBC IMANT’s supplementary submission #2, para. 5.

<sup>7</sup> UBC IMANT’s supplementary submission #2, paras. 24 and 25.

<sup>8</sup> Applicant’s supplementary submission, p. 2.

<sup>9</sup> [1998] 1 S.C.R. 27, at para. 21.

statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states

Today there is only one 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.

[16] This was reaffirmed by the Supreme Court of Canada in *H.J. Heinz Co. of Canada v. Canada (Attorney General)*.<sup>10</sup>

[17] This approach has been restated in many orders of this Office<sup>11</sup> and is entirely consistent with s. 8 of the *Interpretation Act*, which states that:

Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[18] It is necessary therefore to consider the meaning of control in ss. 3(1) and 4(1) within its statutory context and in a way which best ensures its construction is aligned with FIPPA's purposes. Those purposes are set out in s. 2 of the statute and read in relevant part:

***Purposes of this Act***

2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

(a) giving the public a right of access to records,

[19] This aspect of the purpose of freedom of information legislation was given fulsome consideration in *Dagg v. Canada (Minister of Finance)*<sup>12</sup> by La Forest J., dissenting on a different point:

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,

<sup>10</sup> [2006] 1 S.C.R. at para. 21.

<sup>11</sup> See for example the Commissioner's comments in Order F05-26, [2005] B.C.I.P.C.D. No. 35.

<sup>12</sup> [1997] 2 S.C.R. 403.

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

[20] The Ontario Court of Appeal recently considered the purpose of freedom of information legislation in interpreting Ontario's *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA").<sup>13</sup> The Court assessed whether an entity, incorporated by the City of Toronto ("City") for the purpose of carrying out an element of the City's economic development policy, was covered by MFIPPA. The City itself was covered by the legislation. However the entity it created, the City of Toronto Economic Development Corporation ("TEDCO"), argued it was not.

[21] The Court had to determine whether TEDCO was covered by a provision of s. 2(3) of MFIPPA, which reads in relevant part

Every agency, board, commission, corporation or other body...is deemed to be part of the municipality for the purposes of [MFIPPA] if all of its members or officers are appointed or chosen under the authority of the council of the municipality.

[22] TEDCO argued that its officers were not appointed by the City but rather by TEDCO's directors. The Court rejected this technical interpretation of MFIPPA:

[A] formal and technical interpretation of s. 2(3) runs contrary to the purpose of the Act. We are dealing with a corporation whose sole shareholder is the City of Toronto, whose sole purpose is to advance the economic development of the City, and whose board of directors -- at the time of the proceedings before the adjudicator -- was populated by persons directly appointed by City Council, including the Mayor of Toronto (or his/her designate), the Chair of the City's Economic Development and Parks Committee, two City Councillors, and the Commissioner of Economic Development, Culture and Tourism (or his/her designate). 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

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<sup>13</sup> *City of Toronto Economic Development Corp. v. Ontario (Information and Privacy Commissioner)*, [2008] O.J. No. 1799.

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.

[23] As Adjudicator Francis said in Order 04-19:<sup>14</sup>

Control is to be given a liberal and purposive meaning that promotes the objectives of British Columbia's access and privacy legislation. The nature of requested records and all aspects of their generation and use must be assessed in relation to the public body's mandate and functions. Records that are created or acquired by or for a public body as part of its mandate and functions will be under the public body's control. The duty to provide access to records under the Act is not defined by the willingness of the public body or its staff, contractors or agents.

[24] In interpreting "control" and applying that interpretation to this case, I have considered Order 04-19, other orders and court decisions on the control question, notably the British Columbia court decisions referred to in Order 04-19.<sup>15</sup>

[25] I completely reject UBC's argument that control should be interpreted "in the sense of its literal meaning." UBC's assertion is entirely inconsistent with the modern approach to statutory interpretation. It is also inconsistent with numerous court decisions and the orders of this Office.

[26] In applying the contemporary approach to interpretation of FIPPA, I will determine whether some, all or none of the requested records are under the "control" of UBC. In doing so, I will consider control of the records as it relates to each of the entities cited by the applicant.

[27] **3.3 UBC Properties Investment Ltd. and UBC Properties Trust**—The applicant seeks records relating to UBC Properties Investment Ltd. ("UBC Properties Investment") and UBC Properties Trust ("UBC Trust").

[28] UBC Properties Investment was incorporated in 1999.<sup>16</sup> UBC owns 100% of UBC Properties Investment's shares and elects its eleven person board of

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<sup>14</sup> [2004] B.C.I.P.C.D. No. 19, para. 46.

<sup>15</sup> Among the many cases cited there which I have considered are *Neilson v. British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1640 and *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.) in addition to: *Canada Post Corp. v. Canada (Minister of Public Works)* [1995] 2 F.C. 110, [1995] F.C.J. No 241 (C.A.); *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Ontario (Criminal Code Review Board) v. Doe*, (1999), 180 D.L.R. (4<sup>th</sup>) 657, 47 O.R. (3d) 201, [1999] O.J. No. 4072 (C.A.); *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)*, [2003] 1 F.C. 219 (C.A.).

<sup>16</sup> Affidavit of Hubert Lai, para. 2.

directors.<sup>17</sup> Three of the directors are employed by UBC. Other directors include the chair of UBC's board along with one other governor.<sup>18</sup>

[29] UBC Properties Investment is the trustee of a trust arrangement in which UBC and the UBC Foundation are beneficiaries.<sup>19</sup> UBC Properties Investment owns, administers and manages the assets of the trust arrangement.<sup>20</sup>

[30] UBC contends that UBC Properties Investment is not a public body<sup>21</sup> and its separate corporate existence cannot be ignored, in order to find that UBC has "control" of records, because a public body may adopt alternative methods to provide services to the public.<sup>22</sup>

[31] UBC submits that UBC Properties Investment "voluntarily" provides it with a document entitled "Year in Review" which UBC describes as being akin to an annual report. UBC concedes that it has custody and control of this document although it does not state whether it has disclosed it to the applicant. UBC also states that, pursuant to the *Financial Information Act*, UBC is obligated to report salary and expense figures for employees of its subsidiaries and that information has now been disclosed in UBC's own Consolidated Financial Statements Booklet for 2005-2006.

[32] The remaining records in issue are UBC Properties Investment's minutes. Those minutes are stored on UBC property by UBC Treasury Associate Vice-President Byron Braley. Braley is also a director of UBC Properties Investment and serves as its assistant secretary treasurer.<sup>23</sup> UBC argues, however, that these records are kept separate from UBC's at all times.<sup>24</sup> UBC argues that no contract exists that gives UBC the right to possess, inspect, review or copy the requested records<sup>25</sup> and therefore UBC does not have custody or control of the records.<sup>26</sup>

[33] Finally, UBC submits that the other entity the applicant referred to, the UBC Trust, does not have any connection with the records he seeks because

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<sup>17</sup> Affidavit of Hubert Lai, paras. 3 and 4.

<sup>18</sup> This according to the "UBC Properties Trust" website, [www.ubcproperties.com](http://www.ubcproperties.com), cited to me by the applicant.

<sup>19</sup> UBC's initial submission, para. 9. The UBC Foundation is described in detail below. It is sufficient to say here that it is a body which was enacted by statute mainly for the purpose of financially supporting UBC.

<sup>20</sup> UBC's initial submission, paras. 12 and 22.

<sup>21</sup> UBC initial submission, para. 98.

<sup>22</sup> UBC's initial submission, para. 139. It cites Order 02-29, [2002] B.C.I.P.C.D. No. 29, in support.

<sup>23</sup> Affidavit of Byron Braley, preamble and para. 1.

<sup>24</sup> Affidavit of Byron Braley, para. 7.

<sup>25</sup> UBC's initial submission, para. 18 and para. 135, wherein it cites Order 02-29, [2002] B.C.I.P.C.D. No. 29 as support for this proposition.

<sup>26</sup> UBC's initial submission, paras. 103 and 104.

UBC Trust is only an “arrangement” rather than a legal entity capable of having custody or control of records.<sup>27</sup>

[34] The applicant argues UBC Properties Investment cannot be truly independent of the ultimate control of UBC because UBC holds 100% of its shares. The applicant submits that UBC Properties Investment is a creation of UBC which holds lands in the public trust and for the public good and therefore should be subject to FIPPA.<sup>28</sup> The applicant submits that adopting UBC’s approach would amount to giving public bodies the unlimited ability to exempt themselves from FIPPA by establishing subsidiaries which are entirely under their control but have a separate legal personality. He contends that this would require Schedule 2 of FIPPA to set out every possible subsidiary, no matter how closely tied to the public body, or FIPPA would not apply. He argues that this approach would be unworkable, undesirable and at odds with the intention of the legislature, considering the entire scheme of FIPPA. The applicant makes no submission with respect to UBC Trust.

#### ***Analysis regarding UBC Trust***

[35] It is my view that the records the applicant seeks have no relationship to UBC Trust. I conclude that UBC Trust is merely a shorthand term for the trust agreement between the parties and it is not a legal entity capable of holding records. Therefore, the focus of this analysis is solely on the requested records as they relate to UBC Properties Investment.

#### ***Analysis regarding UBC Properties Investment***

[36] As noted above, the remaining records in issue are the minutes that, based on the material before me, I conclude were prepared to document UBC Properties Investment’s official business. As indicated in Order 04-19, one consideration in determining custody or control under FIPPA is the nature and use of the records in question as they relate to the public body’s mandate and functions.

[37] UBC’s functions and duties are set out at s. 47 of the *Universities Act*. Those duties include providing “instruction in all branches of knowledge” and to “establish facilities for the pursuit of original research in all branches of knowledge”. In order to meet this mandate, the board of governors of the University is empowered to undertake the “management, administration and control of the property, revenue, business and affairs of the university”.<sup>29</sup>

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<sup>27</sup> UBC’s initial submission, para. 23.

<sup>28</sup> Applicant’s initial submission, p. 2.

<sup>29</sup> *University Act*, s. 27(1).

[38] Neither UBC nor UBC Properties Investment makes any attempt to explain the nature of the trust arrangement or UBC Properties Investment's mandate or role as trustee. UBC does concede, somewhat opaquely, that UBC Properties Investment has "some relation to UBC's mandate",<sup>30</sup> but contends the requested records do not fall within UBC's "core mandate".<sup>31</sup> UBC does not offer any clarification of the distinction its argument implicitly raises between a "core mandate" for UBC and a non-core mandate, whatever these might be. Nor does it say why such a distinction is relevant or important to this case. UBC also does not explain what it means by asserting the records have "some" relation to the supposed "core mandate".

[39] The genesis and role of UBC Properties Investment are, however, described within a UBC website the applicant provided me:<sup>32</sup>

In 1988, the University created a property management subsidiary, now known as UBC Properties [Investment],<sup>33</sup> dedicated to managing UBC's real estate assets for the benefit of the University endowment. UBC Properties [Investment] reflects the best practices of managing endowed land assets. Its reputation for community building, innovation, and generating endowment wealth for the benefit of learning and research is widely acknowledged throughout the North American university community. The Trust is structured to ensure:

- UBC uses the best project management talent in British Columbia
- Land leases are predicated on commercial standards, with each leaseholder paying property taxes equivalent to those paid by residents in surrounding municipalities
- The University confines its project management to UBC lands

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<sup>30</sup> UBC initial submission, para. 148.

<sup>31</sup> UBC initial submission, para. 141.

<sup>32</sup> Applicant's initial submission p. 6 ([www.universitytown.ubc.ca](http://www.universitytown.ubc.ca)). The specific and up to date reference cited here is at [/endowment9.php](#) of the website. I note here that UBC did not deny, rebut or attempt to address website references the applicant made. UBC did, however, argue that the applicant's assertions in general were not accompanied by any sworn affidavit, whereas its own submissions were. UBC acknowledged that, when conducting a written inquiry, the Commissioner is not required to accept "only those facts that have been sworn in an affidavit" (UBC reply submission para. 10). However, UBC argued that where a conflict exists between the two submissions, greater weight should be given to its sworn affidavit material. What is relevant, in my view, is that much, if not all of the material in question which is cited by the applicant, is derived from UBC's own websites, a point UBC does not deny. Further, other than the matter addressed below in para. 41, there are no "conflicts" as described by UBC because UBC has chosen not to directly address the matters raised in relation to those websites.

<sup>33</sup> I have substituted UBC Properties Investment for "UBC Properties Trust" here to avoid confusion. Although the terms appear to be used interchangeably in the materials before me, UBC Properties Investment is the appropriate identifier because, as UBC properly points out, UBC Properties Trust *per se* is not a corporate entity nor has it any legal personality or capacity capable of controlling records.

The CEO of UBC Properties [Investment] reports directly to UBC's Vice-President of Finance and Administration.

[40] Managing real estate to build its endowment is within UBC's mandate, particularly under s. 27 of the *University Act*, and it is apparent that UBC has entrusted execution of this mandate to UBC Properties Investment.<sup>34</sup> UBC Properties Investment's work, and the records associated with it are directly related to, indeed closely identified with, UBC's mandate.

[41] UBC argues that, in any event, UBC Properties Investment's relationship to the mandate of UBC is only one factor to be considered in determining whether UBC's controls the requested records. It argues that this factor should generally not weigh as heavily as others.

[42] UBC's last point is based on Order 02-29. However, that Order must be viewed within its factual context. The applicant in that case asked the public body, the Workers' Compensation Board ("WCB"), for records which the WCB said were controlled by another entity, the Industrial Musculoskeletal Injury Reduction Program Society ("Society"). Commissioner Loukidelis noted that, although there was some connection between the requested records and WCB's mandate, it was "not as direct" and "far from sufficient" on its own to lead to a finding that WCB controlled the Society's records.<sup>35</sup> Here, as noted above, UBC Properties Investment is carrying out a UBC mandate by managing its real estate assets and I have therefore found that the requested records have a direct relationship to UBC's mandate. This is in clear contrast to the situation in Order 02-29, where the facts established a less than direct connection, which was not sufficient on its own, as the Commissioner noted, to establish control.

[43] The nexus between UBC Properties Investment and UBC's mandate is not the only factor that supports the conclusion that the requested records are under UBC's control within the meaning of FIPPA.<sup>36</sup> The corporate relationship between UBC and UBC Investment Properties is another factor. Specifically, I am satisfied that UBC has complete dominion over UBC Properties Investment's governance.<sup>37</sup> UBC created UBC Properties Investment, owns 100% of its shares and appoints all of its directors. These facts are also in contrast to Order 02-29, where the Society was not exclusively created by the

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<sup>34</sup> The UBC Properties Investment website, to which the applicant referred in his initial submission, until very recently referred to UBC Properties Investment as "UBC's property management [sic] arm" (the former link being <http://www.ubcproperties.com/documents/Full-TimeFamily.pdf>). The webpage is no longer accessible.

<sup>35</sup> Para. 45.

<sup>36</sup> Previous orders have identified various indicators of control including whether the content of the records relates to the public body's mandate.<sup>36</sup> As Order F06-01, [2006] B.C.I.P.C.D. No. 2, and other orders have noted, while a listing of indicators may be helpful, none is exhaustive and a factor that is significant in one context may not be in another context. An example of a non-exhaustive list of such factors can be found at para. 81 of Order F06-01.

<sup>37</sup> This is also noted as a relevant factor to consider in Order 02-29, at para. 52.

WCB, the WCB was not a member of the Society and the WCB had no right to appoint directors to its board.

[44] Although UBC denied this in its submissions,<sup>38</sup> statements on UBC Properties Investment's own website, which the applicant quoted,<sup>39</sup> say UBC Properties Investment's is directly accountable to UBC to carry out the mission UBC has prescribed for it.

[UBC Properties Investment] reports to the UBC Board of Governors through UBC's Vice President, Administration & Finance, who also administers contractual development duties and tasks.

[45] UBC argues there is no explicit contract between it and UBC Properties Investment allowing UBC disposition, control or use of records. However, the lack of a "contract" between the parties addressing control of records does little to advance UBC's submission. Indeed, one would hardly expect an explicit contract of this nature to exist, given UBC's overarching control of UBC Properties Investment's governance structure and its accountability to UBC through ongoing reporting mechanisms.

[46] UBC also submits that the requested records cannot be in the control of both a public body and a "private sector" entity at the same time, and this is especially, UBC says, for records created by a private entity that do not relate to the mandate of a public body.<sup>40</sup> It is not clear what UBC means by a "private entity", but in any case the orders UBC cited in support do not assist it. In Orders P05-02 and P05-03, Commissioner Loukidelis had to decide whether records were controlled by a public body in order to determine whether the *Personal Information Protection Act* ("PIPA") or FIPPA applied. This is because s. 3(2)(d) of PIPA provides that PIPA does not apply to "personal information" if FIPPA "applies to the personal information". The Commissioner made no finding on whether both or only one of a public body and a private sector organization controlled records. Moreover, UBC's argument fails to acknowledge that previous rulings of this Office have established that two entities can simultaneously control the same record.<sup>41</sup>

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<sup>38</sup> UBC's initial submission, para. 143.

<sup>39</sup> Applicant's initial submission, p. 4. This reference was online at the time of the applicant's submission (<http://www.ubcproperties.com/team-board.html>). However a recent attempt to link to this website indicates that this particular page no longer exists. However a similar reference to UBC Property Investment's accountability to UBC can still be found at another UBC website referenced by the applicant. I have noted this reference in para. 36 above.

<sup>40</sup> UBC initial submission, para. 155.

<sup>41</sup> See for example the preliminary ruling respecting Order 03-19, [2003] B.C.I.P.C.D. No. 19 found at [http://www.oipc.bc.ca/orders/other\\_decisions/14385prelimNov19.pdf](http://www.oipc.bc.ca/orders/other_decisions/14385prelimNov19.pdf), and Order 04-19, [2004] B.C.I.P.C.D. No. 19.

[47] UBC makes two other arguments concerning UBC Properties Investment's corporate status. First, it contends that the legislative intent of FIPPA is to generally exclude from the statute corporations owned by public bodies because they are not specifically "designated" under the legislation.<sup>42</sup> However, the issue here is not whether FIPPA applies to corporations owned by public bodies but which are not themselves designated as public bodies. The question is whether, as contemplated by s. 3(1), the requested records are in the custody or "under the control" of UBC, which is a public body. If an entity is not itself a "public body" covered by designation as such under FIPPA, the question may still arise of whether records are covered because they are in the custody or under the control of an entity that is a public body.

[48] Second, UBC argues that finding a public body to be in control of records held by its subsidiary is akin to "lifting" the subsidiary's "corporate veil" and treating it and the public body as one. UBC submits that this approach is inconsistent with the doctrine articulated in two corporate law cases, *Kosmopoulos v. Constitution Insurance Co.*,<sup>43</sup> a 1987 decision of the Supreme Court of Canada, and *Salomon v. Salomon & Co.*,<sup>44</sup> an 1897 decision of the House of Lords. These cases held that, subject to certain exceptions, business corporations have a separate legal existence from their shareholders. UBC contends the adjudicator in Order F08-01<sup>45</sup> lifted the corporate veil—legal jargon for ignoring the separate legal existence of a corporation—of a company owned by SFU in making her decision, which it says was wrongly decided for this reason. UBC argues that the separate legal existence of a corporation owned by another can only be disregarded if the corporation was created for a fraudulent or otherwise improper purpose. UBC contends that UBC Properties Investment was not created for a fraudulent or otherwise improper purpose, including to avoid responsibilities under FIPPA.

[49] UBC is asking me to strictly apply corporate common law principles in determining, under FIPPA, whether a public body controls records. This approach is not tenable.

[50] First, the common law principle itself is far more nuanced than UBC suggests. As the Court in *Kosmopoulos*, for example, acknowledged:

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<sup>42</sup> UBC's initial submission, para. 100. UBC relies here on Order 04-08, [2004] B.C.I.P.C.D. No. 8. What the Commissioner actually said in Order 04-08 is that under the definition of "public body" in Schedule 1 of FIPPA, the Legislature chose not to designate, as a class of public bodies themselves directly covered by FIPPA, corporations owned or controlled by the provincial government. This does not mean that records held by a corporation owned or controlled by the provincial government cannot be subject to FIPPA. If such records are, in a given case, "under the control" of the provincial government, they will be amenable to access requests made to the government. Nor does the *City of Toronto* assist UBC here, as it contends.

<sup>43</sup> [1987] 1 S.C.R. 2.

<sup>44</sup> [1897] A.C. 22 (H.L.).

<sup>45</sup> [2008] B.C.I.P.C.D. No. 1.

The law on when a court may disregard this principle by “lifting the corporate veil” and regarding the company as a mere “agent” or “puppet” of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the “separate entities” principle is not enforced when it would yield a result “too flagrantly opposed to justice, convenience or the interests of the Revenue...”<sup>46</sup>

[51] Second, the doctrine has not been applied in other rulings assessing the relationship between shareholder and corporation where production of records was in issue. For example, in *Lacker v. Lacker*,<sup>47</sup> a matrimonial dispute, the BC Supreme Court decided that a husband had to produce the records of a company of which he was the sole shareholder. The Court had to determine whether the husband had “control” and “possession” of the records under the *Rules of Court*. The Court ultimately drew no distinction between the husband and the company in finding that the husband possessed and controlled the corporate records for production purposes. Huddart J. (as she then was) quoting from a passage in the case of *B. v. B.*,<sup>48</sup> said this:

In cases of a one man company, where the director owns all or substantially all the shares and any minority shareholders are not adverse to him, then the inference may be drawn that the company, although a separate legal entity, does not control him but he controls the company in such manner as to make it his other person or alter ego. In such a case, where the director controls the company and nominates the other directors, all the documents of the company are within his power in the sense that in truth and in fact he is able to obtain control of them.

[52] The *Lacker* case demonstrates that a common law principle cannot be applied blindly and without regard to the statutory framework in which the case arises. Accepting UBC’s argument would require me to adopt corporate common law principles developed for other purposes—particularly for the purpose of determining civil rights as between private actors—without any regard for the meaning of “control” within the context of FIPPA and its explicit legislative purposes.

[53] The Legislature created UBC for certain purposes and gave it authority to undertake certain actions to advance those purposes. The Legislature has also ensured that UBC is to be held publicly accountable through the right of access to records found in FIPPA. UBC established UBC Properties Investment to manage the development of UBC’s lands. Having considered the various factors for determining control, as set out in decisions of this Office and otherwise, I have reached the conclusion that UBC Properties Investments’ minutes requested by

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<sup>46</sup> It should also be remembered that ultimately the Court still found in favour of Mr. Kosmopoulos by finding that he had an insurable interest in the company’s assets capable of supporting the insurance policy under which he made his claim and he was therefore entitled to recover under it.

<sup>47</sup> *Lacker v. Lacker*, [1982] 42 B.C.L.R. 188.

<sup>48</sup> [1979] 1 All E.R. 801 at p. 807.

the applicant and held by UBC's self-described real estate asset management vehicle, are "under the control" of UBC for the purposes of FIPPA.

[54] UBC must therefore respond to the applicant's access request as it relates to the UBC Properties Investments minutes and the "Year in Review" document, which UBC has now conceded is under its control.

[55] **3.4 Discovery Parks Inc.**—Discovery Parks Inc. ("Discovery Parks") was incorporated by the provincial government in 1978 to promote and support the province's high technology research and development industry.<sup>49</sup> Profits generated by the company are distributed to BC's post-secondary educational institutions.

[56] Discovery Park's board of directors is made up of senior representatives from the private sector as well as the vice-presidents of research from BCIT, University of Victoria, Simon Fraser University and UBC. John Hepburn, UBC's vice-president of research, who sits on Discovery Park's board, says he does so as a volunteer in his own personal capacity and not as a representative or agent of UBC.<sup>50</sup> UBC argues it has no ownership in Discovery Parks and is not entitled to appoint any members to its board.<sup>51</sup> UBC also submits that Discovery Parks leases property from a variety of landowners including but not limited to UBC.<sup>52</sup>

[57] UBC submits that Discovery Parks is a separate legal entity that is in no way related to UBC. UBC also argues that Discovery Parks does not provide it with the records the applicant requested and no contractual relationships exist that would obligate Discovery Parks to turn over such records to UBC.<sup>53</sup>

[58] The applicant submits that UBC and a number of other post-secondary institutions in BC are members of the Discovery Foundation, which in turn owns Discovery Parks. The applicant cites notes to UBC's financial statements from 1997 as evidence of the nexus between UBC and Discovery Parks. The applicant submits that those notes indicate approximately \$350,000 was transferred to UBC as a result of Discovery Parks' "activity" at UBC.<sup>54</sup>

[59] UBC replies that any monies transferred to UBC from Discovery Parks were in recognition of leases that UBC granted to Discovery Parks. UBC also replies that while it is a member of the Discovery Foundation, along with a number of organizations, such membership does not give it any ownership of Discovery Parks.<sup>55</sup>

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<sup>49</sup> Affidavit of John Hepburn, para. 5.

<sup>50</sup> Affidavit of John Hepburn, para. 3.

<sup>51</sup> UBC's initial submission, para. 28.

<sup>52</sup> UBC's initial submission, para. 27.

<sup>53</sup> UBC's initial submission, paras. 25, 26, 27 and 28.

<sup>54</sup> Applicant's initial submission, p. 6.

<sup>55</sup> UBC's reply, para. 27.

### **Analysis**

[60] I conclude that the records the applicant seeks relating to Discovery Parks are not under UBC's control.

[61] There is no evidence that UBC had any hand in creating or otherwise establishing Discovery Parks. UBC does not control the appointment of directors to Discovery Parks. While a UBC Vice-President is also a director on the board of Discovery Parks, it is not clear from the evidence exactly how he was appointed. The only evidence before me is that he was not nominated by UBC to that position.

[62] There is in fact little evidence before me concerning Discovery Parks, let alone any facts detailing its relationship with UBC. The applicant submits that UBC has been granted a membership in the Discovery Foundation which apparently owns Discovery Parks. I was given no further information about Discovery Foundation and there is no evidence that UBC's membership in the Discovery Foundation gives UBC ownership or say in the operations of Discovery Parks.

[63] The monies which UBC received and accounted for from Discovery Parks in 1996-97 were, I conclude based on the evidence, payments pertaining to a lease arrangement with Discovery Parks. UBC, along with other post-secondary educational institutions, also appears to be the recipient of grant monies from Discovery Parks. In my view, neither of these facts, without any other evidence, supports the applicant's claim that the records of Discovery Parks are under the control of UBC.

[64] **University of British Columbia Foundation**—The University of British Columbia Foundation ("UBC Foundation") was created pursuant to the *University Foundations Act* ("UFA"). The UFA provides that the UBC Foundation will consist of five members appointed by UBC's board of governors. It also provides that the UBC Foundation is for all purposes the agent of the provincial government and has as its purposes, among other things, encouragement of activities that indirectly or directly increase the financial support of UBC.<sup>56</sup>

[65] UBC submits that the only records the UBC Foundation holds that are responsive to the applicant's request are minutes from its board of directors meetings.<sup>57</sup> UBC contends the UBC Foundation does not provide it with those minutes. UBC argues that the UBC Foundation is a separate entity, created under legislative authority with a separate mandate from UBC, a position the Foundation reiterates. UBC relies on Order 02-30<sup>58</sup> in support of its submission.

<sup>56</sup> UBC's initial submission, para.34 and 35.

<sup>57</sup> UBC's initial submission, para. 107.

<sup>58</sup> [2002] B.C.I.P.C.D. No. 30.

[66] The gist of the applicant's submission is that most of the UBC Foundation's officers, directors and members are UBC officials and therefore the UBC Foundation should be considered a UBC entity for the purposes of FIPPA.<sup>59</sup>

### **Analysis**

[67] While the UBC Foundation clearly benefits UBC, it is a body created by the Legislature and not by UBC. The Foundation was created under the UFA, the same statute giving rise to the University of Victoria Foundation, which was the subject of Order 02-30. In that case the Commissioner assessed whether the University of Victoria had control over the requested records relating to the University of Victoria Foundation. He held it did not. The Commissioner's reasoning was primarily based on the fact that because the University of Victoria Foundation was a body created by statute<sup>60</sup>

...the decision to subject the Foundation's activities to public scrutiny and accountability under [FIPPA] does not rest with me. Only the government can decide, under s. 76.1 of [FIPPA], to designate the Foundation as a public body covered by the Act.

[68] Given that the factual matrix concerning the two Foundations is similar, including the fact that both were established under the same legislative authority, I conclude that the reasoning in Order 02-30 is applicable to this case and that the records requested related to the UBC Foundation are not under the control of UBC. It may be that the UBC Foundation, with its goals being closely tied to that of UBC's, should be subject to FIPPA, but the Legislature has not seen fit to make it so. I therefore find that the requested records concerning the UBC Foundation are not within the control of UBC and thus are not subject to FIPPA.

[69] **3.6 University Golf Club and University Golf Course**—The applicant listed these entities in his initial request for records and they were identified in the Notice of Inquiry. However the applicant made no reference to them in his initial or reply submissions. UBC argued that the applicant should be taken as having abandoned his request. At the very least, however, I conclude that no evidence has been adduced that UBC controls the requested records.

[70] **3.7 UBC Research Enterprises Inc.**—UBC Research Enterprises Inc. ("UBC Research") is a corporation wholly-owned by UBC. All of its directors are UBC employees who are appointed by UBC.<sup>61</sup> It has as its purpose the encouragement, promotion and assembling of resources for the commercialization of inventions.<sup>62</sup>

<sup>59</sup> Applicant's initial submission, p.6.

<sup>60</sup> [2002] B.C.I.P.C.D. No. 30, para. 28.

<sup>61</sup> UBC initial submission, para. 54 and 55.

<sup>62</sup> UBC's initial submission, para. 53.

[71] The President of UBC Research is Angus Livingstone. In addition to his role with UBC Research, Livingstone serves as Managing Director of UBC's University-Industry Liaison Office ("UILO"). UILO's mission and mandate include a commitment to connect its own research and innovation with that of its affiliated hospitals, outside industry and the community. Besides having common management, UBC Research and UILO are shown to be connected with one another on an organizational chart contained in a report that the applicant referred me to. The chart also shows both entities falling under, and being accountable to, UBC's vice-president of Research.<sup>63</sup> In addition, the business of UBC Research is described in the report as part of an overall review of UILO's operations.<sup>64</sup>

[72] According to the evidence of Angus Livingstone, UBC signed a consent resolution dispensing with the requirement that UBC Research hold an annual general meeting ("AGM") and for that reason there are no minutes of the kind requested by the applicant. The only record which UBC says UBC Research possesses is an annual report.<sup>65</sup> UBC says that UBC Research does not release that report to UBC and that no relationship, contractual or otherwise, exists between UBC and UBC Research which gives UBC control or disposition of the requested records.<sup>66</sup> UBC also argues that all of its employees that serve as directors of UBC Research do so as unpaid volunteers in their personal capacity.<sup>67</sup>

[73] Besides noting that UBC Research is wholly-owned by UBC, the applicant argues that other linkages between the two entities, including the fact that the chair of the UBC Research board was also once UBC's vice-president of Research, point to control over UBC Research by UBC.

### **Analysis**

[74] I conclude that the records the applicant requested relating to UBC Research are in the control of UBC. UBC created UBC Research and retains 100% ownership. The entire board of directors of UBC Research is composed of UBC employees. The mandate of UBC Research is closely related to that of UILO and its operations are administratively integrated with UILO. Evidence of this latter point is found in the organizational chart referred to above along with the fact that UBC Research is directly accountable to UBC's vice-president of Research who himself is a director of UBC Research.<sup>68</sup> The fact that UBC

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<sup>63</sup> [http://www.uilo.ubc.ca/pdf/UILOReviewProgressReport\\_2001.pdf](http://www.uilo.ubc.ca/pdf/UILOReviewProgressReport_2001.pdf), p. 2.

<sup>64</sup> Applicant's initial submission, p. 7 and also found at:  
[http://www.uilo.ubc.ca/pdf/UILOReviewProgressReport\\_2001.pdf](http://www.uilo.ubc.ca/pdf/UILOReviewProgressReport_2001.pdf), p. 7.

<sup>65</sup> Affidavit of Angus Livingstone, para. 4, 5 and 6.

<sup>66</sup> UBC initial submission, para. 41.

<sup>67</sup> UBC's initial submission, para. 55.

<sup>68</sup> Affidavit of Hubert Lai, para. 39.

dispensed with the need for UBC Research to hold an AGM, thereby relieving it of the obligation to produce company minutes, is also a clear indication of UBC's *de facto* control over the affairs of UBC Research, including matters relating at least incidentally to the creation of UBC Research records.

[75] Having considered the factors respecting control, I conclude that the UBC Research annual report, the record requested by the applicant, is in the control of UBC for the purposes of ss. 3(1) and 4(1) of FIPPA.

[76] **BC Research Inc.**—BC Research Inc. was incorporated in 1993. Neither UBC nor BC Research Inc. describes what the business of the company is. UBC contends it does not have ownership of BC Research and does not have the right to appoint members to its board.<sup>69</sup> UBC submits the only relationship it has with BC Research Inc. is a commercial one resulting from UBC leasing property to BC Research Inc.<sup>70</sup>

[77] BC Research Inc. says it used to conduct its operations through its subsidiary Vizon Scitec Inc., but that it sold that company and no longer carries on an active business. Although BC Research Inc. does not say so explicitly, I take this to mean that Vizon Scitec Inc. also had no connections with UBC. The applicant does not dispute this claim.

[78] The applicant submits that BC Research Inc. is a company with a facility at the south end of the UBC campus. He contends that there is a close connection between BC Research Inc. and UBC and, in support, cites a 2004 article from 'The Toronto Star' newspaper. The article describes BC Research Inc. as an "incubator company formed with private investment money out of UBC to turn new technologies cobbled together by academics and engineers into viable products and businesses."<sup>71</sup>

### **Analysis**

[79] No cogent evidence has been adduced demonstrating a connection between BC Research Inc. and UBC sufficient to establish UBC's "control" of records or otherwise establishing control of records by UBC. The phrase "formed with private investment money out of UBC" is only one consideration and I note that it refers to "private" money, which may well refer to money not coming from UBC or another "public" source. Rather, it appears the only relationship between BC Research Inc. and UBC is that the former leased property from the latter. This is by no means enough of a basis upon which to conclude that the requested records are under UBC's control.

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<sup>69</sup> UBC's initial submission, paras. 43 and 44.

<sup>70</sup> UBC's initial submission, para. 47.

<sup>71</sup> Applicant's initial submission, p. 8.

[80] **3.9 UBC Investment Management Trust**—UBC Investment Management Trust (“UBC IMANT”) is a wholly-owned subsidiary of UBC and acts as investment manager of UBC’s endowment fund and its staff pension assets.<sup>72</sup> UBC IMANT has eight directors on its board and all are appointed by UBC. Two members are employees of UBC and the others are drawn from the investment, corporate and development community. Of those latter members, one “also happens to be a member of the UBC board of governors and chair of the UBC finance committee.”<sup>73</sup>

[81] UBC IMANT submits that it does not produce an annual report and that the salary and expense information requested is already publicly available.<sup>74</sup> UBC IMANT argues that, while it possesses the requested minutes, it does not provide them to UBC and UBC does not have a right to their possession. In addition UBC IMANT submits that the content of the minutes does not relate to UBC’s mandate but rather to the governance of UBC IMANT.<sup>75</sup>

[82] UBC contends that its employees on the board of UBC IMANT are there as unpaid volunteers and they are not permitted to allow their interests in UBC to interfere with them acting in the best interests of UBC IMANT.<sup>76</sup>

[83] The applicant points to the “UBC Treasury” website as evidence that UBC IMANT is not truly an independent entity from UBC. A website excerpt explains that UBC IMANT assumed responsibility for managing UBC’s endowment and staff pension funds in 2004 and that UBC IMANT now “acts as UBC’s investment manager, with ownership of the assets at all stages resting with UBC and current custodial relationships unchanged”.<sup>77</sup>

### ***Analysis***

[84] UBC argues, and the applicant did not dispute, that UBC IMANT does not possess the annual report requested and that the salary information is publicly available. Therefore, the only requested record in issue is IMANT’s minutes.

[85] I have considered the purposes of FIPPA, the meaning of control therein and relevant factors identified in previous decisions and conclude that these minutes are under the control of UBC for three reasons.

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<sup>72</sup> UBC’s initial submission, paras. 72 and 73.

<sup>73</sup> UBC IMANT’s initial submission, para. 10.

<sup>74</sup> The fact that particular records or information may or may not be publicly available through other means is not relevant to the question of whether records are under the control of a public body for the purposes of FIPPA.

<sup>75</sup> UBC IMANT’s initial submission, paras. 24 and 25.

<sup>76</sup> UBC’s initial submission, para. 76.

<sup>77</sup> Applicant’s initial submission, p. 9.

[86] First, the meeting minutes of UBC IMANT, which I find, based on the material before me, concern UBC IMANT's role as a pension and asset administrator, directly relate to UBC's mandate. I reach this conclusion because UBC's mandate includes, among other matters, the management and administration of its property, revenue and business affairs. Indeed, until 2004, for example, the task of managing and administering staff pensions was performed directly by a committee of UBC's board of governors.<sup>78</sup> UBC IMANT now manages both the endowment and pension funds as UBC's self-described "investment manager". There is a direct relationship between UBC's mandate and the records of UBC IMANT.<sup>79</sup>

[87] Second, UBC incorporated and is the sole shareholder of UBC IMANT.

[88] Third, in addition to UBC's sole ownership of UBC IMANT and its control over board appointments, UBC has structured its ongoing relationship with UBC IMANT to ensure UBC IMANT's direct accountability to UBC. This fact is highlighted in a document the applicant referred to as "The UBC endowment making greatness possible."<sup>80</sup>

UBC IMANT through its Board of Directors, comprised principally of appointees from the business community, is accountable to the University's Board of Governors; indeed the UBC IMANT Board is considered a committee of the UBC Board of Governors as contemplated by the *University Act*. As sole shareholder, [UBC] stays informed of [UBC] IMANT's activities through representation by senior UBC staff on [UBC] IMANT's Board and with regular reporting to the UBC Board of Governors. The company also works very closely on the operational level with UBC Treasury.

[89] In the face of this public assertion of UBC's dominance of UBC IMANT through the UBC board of governors—considering UBC IMANT to be committee of the board—UBC's claims respecting control are hardly persuasive. I find UBC IMANT's minutes to be under UBC's control for the purposes of FIPPA.

[90] **3.10 Custody of the Records**—It is not necessary for me to consider "custody" of the requested records in respect of UBC Properties Investment, UBC Research and UBC IMANT given my findings on control in relation to each of them.

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<sup>78</sup> Applicant's initial submission, p. 9.

<sup>79</sup> UBC acknowledges that it has "some relation" to UBC IMANT's mandate but does not elaborate.

<sup>80</sup> Properly speaking the name of the document would appear to be "The UBC Endowment: A Foundation for Excellence". The applicant appears to have derived the title, cited above, from a message from the UBC President contained within the document. In any event, the document can be accessed at the UBC Treasury website referred to by the applicant; specifically, <http://www.treasury.ubc.ca/assets/pdf/endowment07s.pdf>. at p. 18.

[91] I also find that the applicant has adduced no evidence to support a finding that UBC has custody of the requested records relating to the University Golf Club, University Golf Course and BC Research Inc.

[92] With regard to the UBC Foundation, UBC's uncontested evidence<sup>81</sup> is that the requested records, possessed by four UBC employees who are also officers of UBC Foundation, were kept separate from, and not intermingled with, UBC records. This is essentially the same factual matrix that presented itself in Order 02-30. The Commissioner found in that case that the University of Victoria did not have custody or control of the records in the possession of the University of Victoria Foundation. Given that the Foundations are under the same legislation and the factual circumstances of each case are similar, I apply the reasoning of Order 02-30 to the circumstances here. I therefore find that UBC does not have custody of the records which relate to the UBC Foundation.

[93] Finally, as concerns Discovery Parks, I conclude that UBC does not have custody of the records relating to that entity. The evidence is that a UBC employee keeps Discovery Park's minutes at his place of work. However, there is no evidence that the employee was appointed by UBC to Discovery Parks or that he is in any way accountable to UBC for his Discovery Park involvement. The employee states that he keeps these minutes separate from his UBC files.<sup>82</sup> More than bare possession of a record, by someone who happens to be an employee of the public body but is not acting in that capacity in relation to the records, is required to making a finding that the record is in the "custody" of the public body. On the basis of the above, I find that the records requested in relation to Discovery Parks are not in the custody of UBC for the purposes of FIPPA.

#### **4.0 CONCLUSION**

[94] For the reasons given above, under s. 58 of the Act, I make the following orders:

1. The records identified at paragraphs 36, 75 and 89 that the applicant requested with respect to UBC Properties Investment Ltd., UBC Research Enterprises Inc. and UBC Investment Management Trust are under the control of UBC within the meaning of ss. 3(1) and 4(1) of FIPPA.

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<sup>81</sup> Affidavit of Hubert Lai, para. 21.

<sup>82</sup> Affidavit of John Hepburn, para. 9.

2. I require UBC to comply with FIPPA by processing the applicant's request under s. 4(1) of FIPPA for access to the records identified in paragraph 1.

April 21, 2009

**ORIGINAL SIGNED BY**

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Michael McEvoy  
Adjudicator

OIPC File: F07-30736