



October 20, 2011

Honourable Dr. Margaret MacDiarmid
Minister of Labour, Citizens' Services
and Open Government
PO Box 9067 Stn Prov Govt
Victoria BC V8W 9E2

Dear Minister MacDiarmid:

**Amendment to the *Freedom of Information and Protection of Privacy Act*—
OIPC File No. F07-30736**

I write to request that the Ministry draft amendments to the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to ensure that FIPPA covers subsidiary corporations of local public bodies. I make this request as a result of a recent British Columbia Supreme Court decision, *Simon Fraser University v. British Columbia (Information and Privacy Commissioner)*, [2009] BCSC 1481. This decision held that Simon Fraser University did not exercise control, for the purposes of FIPPA, of the records of its wholly owned subsidiary corporations because the relationship between it and the corporations did not meet the common law civil liability test for "piercing the corporate veil". The Court also found that it was not appropriate for the records of a corporation to be subject to two legislative regimes with respect to privacy. As a result, the Court found that the requested records were not subject to FIPPA. This decision was binding on my office with respect to Order F11-31, released today, concerning a request for records of subsidiary companies of the University of British Columbia.

My office has consistently interpreted the term "control" in a liberal and purposive manner that promotes the objectives of British Columbia's access and privacy legislation. This has ensured that the public has access to the information necessary to hold public bodies accountable, especially with the expenditure of public funds. It has, until recently, been an approach applied by the Courts.

Where a public body, such as a university, creates a subsidiary company to provide services to it, or to others on its behalf, a liberal and purposive interpretation of control ensures that the public body can be held accountable for its use of public resources. Nevertheless, the recent Court decision noted above rejected this approach with respect to a post-secondary institution's control of its

wholly owned subsidiaries. Instead it applied a strict common law test for “piercing the corporate veil” that has evolved in the body of case law regarding financial liability in a civil context.

This ruling effectively exempts from accountability under FIPPA, public bodies like universities, which conduct some of the public’s business through wholly owned and publicly funded subsidiary operations.

As to a possible solution, I note that FIPPA addresses this concern with respect to the subsidiary companies of local government bodies. It includes in the definition of a “local government body”:

- (n) any board, committee, commission, panel, agency or corporation that is created or owned by a body referred to in paragraphs (a) to (m) and all the members or officers of which are appointed or chosen by or under the authority of that body,

The Ministry could address the accountability gap with respect to educational bodies and all other local public bodies by incorporating parallel provisions in the definitions of all types of local public bodies. By covering these subsidiary companies as public bodies in their own right, such an amendment would also address the Court’s concern that some of their records should not be subject to FIPPA, if others are subject to the *Personal Information Protection Act*.

I recognize that the Ministry might be able to formulate other legislative options for achieving the same end. My office is prepared to provide any assistance to the Ministry in finding an expeditious resolution that will enable FIPPA to achieve its stated purposes.

It is vital for open and accountable government that, whatever the form of the entity, if it is carrying on public business, it should be subject to FIPPA.

Sincerely,

ORIGINAL SIGNED BY

Elizabeth Denham
Information and Privacy Commissioner
for British Columbia