

# Manitoba mbudsman

## REPORT UNDER

### *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

CASE 2014-0269

#### THE UNIVERSITY OF WINNIPEG

#### ACCESS COMPLAINT: REFUSAL OF ACCESS

**PROVISIONS CONSIDERED: 12(1)(c)(i)**

**REPORT ISSUED ON OCTOBER 24, 2014**

**SUMMARY:** The complainant requested access to board meeting minutes of the University of Winnipeg Community Renewal Corporation (UWCRC) from January to April of 2014. The University of Winnipeg (the university or the public body) advised that such records were not in the custody or under the control of the university, and refused access to the records under FIPPA. Our investigation determined that, while the decision making process of UWCRC is influenced by the university and the UWCRC operates to promote the interests of the university, there are sufficient divisions between the internal governance structures of the two entities that UWCRC records cannot be said to be under the control or in the custody of the public body. We also found that the university did not have custody of the records as they were not in its physical possession. The complaint was not supported.

#### THE COMPLAINT

On May 12, 2014 the University of Winnipeg (the university or the public body) received the complainant's request for access to the following records:

*A copy of any board meeting minutes from the University of Winnipeg's Community Renewal Corporation from January – April 2014.*

The university responded to the complainant's request by correspondence dated May 21, 2014 in which it advised the complainant that access was being refused under subclause 12(1)(c)(i) of *The Freedom of Information and Protection of Privacy Act* (FIPPA) as the records were not in the custody or under the control of the public body.

A complaint about the refusal of access was received by our office on June 2, 2014. Along with the complaint form received by our office, the complainant attached a brief cover letter in which he indicated that the university's financial statements list the University of Winnipeg Community Renewal Corporation (UWCRC) as being a controlled entity of the university. The complainant believed this was evidence that the university ought to have control of UWCRC records.

## **BACKGROUND**

UWCRC was created in 2005. According to its website, UWCRC is mandated to move beyond the traditional inward direction of the university to develop partnerships with community, private, and public sector organizations. In addition to property development, UWCRC manages business units, including housing and the university's bookstore. UWCRC partnered with a community economic development organization (SEED Winnipeg) to create a campus food service. UWCRC is also overseeing the development of a commercial property (the Merchant's Hotel) to repurpose the site for university purposes, as well as housing and commercial enterprises.

## **POSITION OF THE UNIVERSITY OF WINNIPEG**

The public body's response to the complainant advised that it did not have custody or control of the requested records, as they were maintained by UWCRC. The university explained that UWCRC is a not-for-profit charitable corporation pursuant to provincial law and is registered as a separate legal entity from the university.

Upon receipt of the complaint, our office contacted the university and requested that it provide further information in support of its reliance on subclause 12(1)(c)(i) of FIPPA. We also requested that the university explain how it could refer to UWCRC as a controlled entity in its financial statements while maintaining the position that it did not exercise control over UWCRC records.

In its reply, the university advised that UWCRC is not enumerated as a public body or any other body that would be subject to FIPPA. Further, the university advised that UWCRC is a separate legal entity, has a separate corporate existence, and has a separate mandate and governance structure from the university.

The university also advised that it did not have custody or control of the records because UWCRC maintains its own accounting system and records, including minutes of board meetings, which are not integrated with university records or files.

In its explanation of the applicability of subclause 12(1)(c)(i) of FIPPA the university stated that, since such records are under the custody and control of UWCRC, board minutes "cannot be located" within university records subject to the act. The university confirmed that it did not physically possess copies of UWCRC board meeting minutes. It further explained that, while it is the case that some UWCRC directors and officers are university employees, university members of the UWCRC board and officers receive copies of such documents in their capacity as UWCRC board members and not as employees of the university.

## ANALYSIS OF ISSUE AND FINDINGS

### Were the public body's reasons for refusing access in accordance with FIPPA?

When an applicant requests access to a record under FIPPA, the public body must respond in accordance with section 12 of FIPPA. Regarding this matter, subclause 12(1)(c)(i) of FIPPA is relevant:

***Contents of response***

***12(1) In a response under section 11, the head of the public body shall inform the applicant***

*(c) if access to the record or part of the record is refused,*

*(i) in the case of a record that does not exist or cannot be located, that the record does not exist or cannot be located*

*(ii) in the case of a record that exists and can be located, the reasons for the refusal and the specific provision of this Act on which the refusal is based*

A record is in the *custody* of a public body if the public body has physical possession of the record. A record is under the *control* of a public body when the public body has the authority to manage the record, including, among other things, restricting, regulating, and administering its use, disclosure, or disposition.

In determining whether a public body has custody or control of a record, it is necessary to consider all aspects of the creation, maintenance, or use of the record. The information and privacy commissioner of Ontario considered this question in its order P-120, which is frequently cited in this regard. The order sets out ten criteria as relevant considerations for determining whether the requirements of custody or control are met:

1. Was the record created by an officer or employee of the institution?
2. What use did the creator intend to make of the record?
3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator pursuant to a mandatory, statutory, or employment requirement?
4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of their duties as an officer or employee?
5. Does the institution have a right to possession of the record?
6. Does the content of the record relate to the institution's mandate and functions?
7. Does the institution have the authority to regulate the record's use?
8. To what extent has the record been relied upon by the institution?
9. How closely is the record integrated with other records held by the institution?
10. Does the institution have the authority to dispose of the record?

In considering the relationship between the university and UWCRC, our office identified the following scenarios in which the university could have custody and/or control of UWCRC records.

1. The university could have custody and/or control of copies of particular UWCRC records if UWCRC had provided copies of those records for the university's purposes.
2. The university could have control of particular UWCRC records if it was a requirement that UWCRC provide its records to the university under UWCRC's articles of incorporation, service agreements between the university and UWCRC, or in established practices such as an integrated record keeping system which maintained records from both entities.
3. The university could have control of UWCRC records if the university had such complete control of the motions of UWCRC that UWCRC had no independent functioning of its own, such that UWCRC records were all considered records of the university.<sup>1</sup>

Our office reviewed the consolidated financial statements available on the university's website which include financial statements from the UWCRC and refer to it as a controlled entity of the university. The UWCRC website makes reference to its board of directors and states that half of the 16 member board is drawn from the university community, including the president, who serves as chair.

Subsequent to receiving representations from the university, our office requested copies of any contracts or agreements between the university and UWCRC, a copy of UWCRC's articles of incorporation, as well as further explanation of why the university would not have control of UWCRC records despite referring to UWCRC as a controlled entity in the university's financial statements.

In its reply, the university advised that the reference to UWCRC in its financial statements was consistent with standard accounting practices and refers to the university having a right of representation on the board of UWCRC and its potential to influence or "control" decisions made by that entity. The university further explained that its year-end financial statements are prepared for the Office of the Auditor General Manitoba in accordance with the requirements of that office and the financial situation of UWCRC is reported as a "note" to the financial statements.

Additionally, the university provided our office with a number of records pertaining to UWCRC's legal status and the relationship between the two entities. Among these documents were independent contractor agreements between the university and UWCRC as well as the articles of incorporation for the UWCRC. Through our review of the agreements we received we found a close relationship existed between the two entities, however we did not find evidence to suggest that UWCRC is under such control by the university to the extent that it has no independent existence of its own.

We found that UWCRC has an internal governance structure which allows a certain degree of autonomy from the university. Although a significant number of individuals who make up the board of directors of UWCRC are drawn from the university community, there is also significant representation of business, neighbourhood, and community leaders on the board. The university has significant influence on the board, but does not exercise exclusive control of the UWCRC decision making process and UWCRC is able to undertake its own initiatives without requiring

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<sup>1</sup> See *Order F11-31* issued by the Office of the Information and Privacy Commissioner for British Columbia, October 2011. Available at <http://www.oipc.bc.ca/orders/2011/OrderF11-31.pdf>

approval from the university. As board meeting minutes would be records of the internal decision making process of UWCRC, it is reasonable to conclude that the university would not require a copy of these records for its own purposes.

It is clear on the evidence that UWCRC operates to promote the university's interests, however we found that these entities have internal governance structures that operate in a sufficiently independent manner. Board meeting minutes are records that document the internal decision-making process of UWCRC, which may or may not be dealing with matters related to the university. University members who are on the UWCRC board receive copies of such documents, but only in their capacity as board members and not as employees of the university.

The university is not in a position to reasonably expect to obtain a copy of UWCRC board meeting minutes upon request. While the university may require UWCRC to provide some records in relation to fulfilling duties and obligations outlined in the independent contractor agreements, this requirement is specific to the provision of services under these agreements and does not extend to board meeting minutes.

In consideration of the above, we find that the university was correct in refusing access under subclause 12(1)(c)(i) as the records did not exist within the university by virtue of the fact that they were not in the custody or under the control of the university.

## **CONCLUSION**

Based on our findings, the complaint is not supported.

In accordance with subsection 67(3) of *The Freedom of Information and Protection of Privacy Act*, the complainant may file an appeal of the University of Winnipeg's decision to refuse access to the Court of Queen's Bench within 30 days of receiving this report.

October 24, 2014  
Manitoba Ombudsman