



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
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Order F15-65

**CITY OF VANCOUVER,
RESORT MUNICIPALITY OF WHISTLER
AND THE MINISTRY OF FINANCE**

Celia Francis,
Adjudicator

December 3, 2015

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Summary: A journalist requested access to minutes, agendas and correspondence of four directors of the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (“VANOC”). The adjudicator found that the requested records are not in the custody or under the control of the public bodies.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1), 4(1).

Authorities Considered: **B.C.:** Order F11-31, 2011 BCIPC No. 37 (CanLII); Order 02-29, 2002 CanLII 42462 (BC IPC); Order 02-30, 2002 CanLII 42463 (BC IPC); Order F13-23, 2013 BCIPC No. 30 (CanLII); Order No. 308-1999, 1999 CanLII 2976 (BC IPC); Decision F10-01, 2010 BCIPC 5 (CanLII). **Ontario:** Order P-239, [1991] O.I.P.C. No. 33.

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25; *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCCA 522; *Neilson v. British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1640; *Minister of Small Business, Tourism and Culture et al. v. The Information and Privacy Commissioner of the Province of British Columbia et al.*, 2000 BCSC 929; *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611; [1997] O.J. No. 2485 (C.A.).

INTRODUCTION

[1] This case arises out of requests under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) to the City of Vancouver (“Vancouver”), the Resort Municipality of Whistler (“Whistler”) and the Ministry of Finance (“Ministry”) for records of four directors of the Board of the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (“VANOC”), for the period January 1 to October 10, 2013. Vancouver and Whistler told the journalist that they did not have custody or control of the requested records for the purposes of ss. 3(1) and 4(1) of FIPPA. The Ministry said that it had not been able to locate any responsive records.

[2] The journalist requested a review of the public bodies’ responses by the Office of the Information and Privacy Commissioner (“OIPC”), arguing that the public bodies had control of the requested records. Mediation by the OIPC did not resolve the issues and all three matters proceeded to inquiry.

[3] After the OIPC had issued the Notices of Inquiry, the Canadian Olympic Committee (“COC”) asked for the opportunity to make submissions in the inquiries, saying it had an interest in the records. The COC, which is not a public body, said that it owns the requested records (“VANOC Archival Materials”) and that they are currently stored in the City of Vancouver Archives under an Archival Agreement between Vancouver and the COC.¹ The OIPC agreed to the COC’s request. Accordingly, the OIPC received submissions from the journalist, the three public bodies and the COC.

[4] Three different public bodies received the requests and the inquiries took place separately. However, the records are similar and the issues are the same in all three cases. I have therefore dealt with all three inquiries in this order.

ISSUES

[5] The issues before me are whether the requested records are in the custody or under the control of the three public bodies, for the purposes of ss. 3(1) and 4(1) of FIPPA.

DISCUSSION

Background

[6] After Vancouver was awarded the 2010 Olympic and Paralympic Winter Games (“2010 Games”) in 2003, VANOC was incorporated as a not-for-profit corporation under the *Canada Corporations Act* to plan, organize, finance and stage the 2010 Games. The Government of Canada and the Province of

¹ COC letter of May 21, 2015.

British Columbia (the “Province”) each appointed three directors to VANOC’s Board, Vancouver and Whistler each appointed two, the COC appointed seven, the Canadian Paralympic Committee (“CPC”) appointed one and the Squamish and Lil’wat First Nations appointed one.

[7] In 2013, the VANOC Board of Directors agreed to reduce its number to four: Ken Dobell (nominated by the Province); Penny Ballem, City Manager for Vancouver, (nominated by Vancouver); Sharon Fugman, Manager of Legal Services and Special Projects for Whistler, (nominated by Whistler); and Christopher Overholt (nominated by the COC). The purpose of the smaller Board was to facilitate the winding up of VANOC.

[8] In June 2014, the VANOC Board of Directors held its final meeting. In July 2014, it released its final financial and operations report and, in November 2014, VANOC formally dissolved.²

Records in Dispute

[9] The records in dispute are agendas, minutes and reports regarding VANOC and correspondence among the four individuals named in the requests. These individuals were all directors of the Board of VANOC for the period in question, January 1 to October 10, 2013.

Custody or Control

[10] FIPPA applies, and provides a right of access, to records in the custody or under the control of a public body, subject to limited exceptions.³ FIPPA does not define “control” or “custody”. A number of previous orders and court cases have considered the interpretation of these two terms, the indicators for which overlap to some extent. I discuss them below.

Custody

[11] In Order 02-30,⁴ former Commissioner Loukidelis considered whether records of the University of Victoria Foundation (the “Foundation”) were in the custody of the University of Victoria (“UVic”). The evidence in that case showed that the Foundation’s records were kept in separate files within UVic’s offices, they were not integrated with UVic’s files in any other way and UVic employees only had access to Foundation records located on campus for the purpose of

² City’s initial submission, paras. 5-12; Ballem affidavit, paras. 4-11; Whistler’s initial submission, paras. 3-7; Godfrey affidavit, paras. 2-3; Ministry’s initial submission, paras. 4.01-4.10; Foster affidavit, paras. 15, 22, 36, 38; Shoop affidavit, para. 5; paras. 4-13, COC’s initial submission; Byrne affidavit, para. 5.

³ Sections 3(1) and 4(1).

⁴ 2002 CanLII 42463 (BC IPC).

providing services to the Foundation (under a contractual arrangement, including storage of records) and in their capacities as members of the Foundation's board or as officers of the Foundation. The Commissioner found that UVic's rights and responsibilities respecting the records were limited to its performance of services, as the evidence showed that UVic had no right to the records that would allow it to deal with them as it wished and no responsibility for the records, including respecting their use, disclosure or destruction. Commissioner Loukidelis concluded, in light of this evidence, that UVic did not have custody of the requested records.

[12] In arriving at his finding on "custody" in Order 02-30, the Commissioner referred to Ontario Order P-239,⁵ which said that possession of records is not enough to establish custody and that a public body will only have custody if it has "some right to deal with the records and some responsibility for their care and protection". The Commissioner also considered Order No. 308 -1999⁶ in which former Commissioner Flaherty accepted that physical possession of a record is not enough to establish custody for the purposes of FIPPA. On judicial review of Order No. 308-1999, the Court upheld Commissioner Flaherty's approach, although it found in that case that the public body did not have custody of the requested record.⁷

[13] More recently, in Order F13-23,⁸ Adjudicator Barker considered the meaning of "custody", with reference to Order 02-30 and Order No. 308-1999. She concluded that "custody" means more than simple physical possession of a record and that a public body must have some legal right or obligation to the information in its possession before it can be said to have "custody".

Parties' positions

[14] The journalist made a brief argument to the effect that the public bodies have the legal right to possession of the requested records, including under the Multiparty Agreement.⁹

[15] The Ministry said it found no responsive records in Ministry offices, so it does not have custody of the requested records.¹⁰ Vancouver said that Penny Ballem located responsive records in her office¹¹ but that it does not have

⁵ [1991] O.I.P.C. No. 33.

⁶ 1999 CanLII 2976 (BC IPC).

⁷ *Minister of Small Business, Tourism and Culture et al. v. The Information and Privacy Commissioner of the Province of British Columbia et al.*, 2000 BCSC 929.

⁸ 2013 BCIPC No. 30 (CanLII).

⁹ Paragraphs 66, 70, journalist's submission.

¹⁰ Paragraphs 4.16-4.17, Ministry's initial submission; Foster affidavit, paras. 5, 28-29.

¹¹ Paragraph 21, Ballem affidavit.

custody of them. Whistler and the COC argued that the public bodies do not have custody of any responsive records.¹²

Custody Analysis

[16] Having regard for the findings in previous orders, as noted above, I find, based on the evidence and reasoning set out below, that the public bodies never did, and still do not, have custody of the requested records for the purposes of ss. 3 and 4 of FIPPA:

- The evidence shows that, during the time VANOC retained its own offices, all of its records were stored and kept in VANOC's offices; VANOC's bylaws provided that records such as minutes of meetings, resolutions and reports were to be maintained at a place its board of directors determined and that such records were only available for inspection by a director on reasonable notice.¹³
- Regarding the responsive records that Penny Ballem found in her office, the evidence shows that: VANOC provided them to Penny Ballem in her capacity as a VANOC director; that her role as director was separate and distinct from her employment as City Manager; neither VANOC nor Penny Ballem provided the records to Vancouver; Penny Ballem did not co-mingle the records that VANOC had provided to her with any records of Vancouver. There is also no evidence that Vancouver has a legal right to the requested records.¹⁴
- Regarding Whistler, VANOC prepared the records for Sharon Fugman's use as director; neither she nor VANOC provided them to Whistler; and Sharon Fugman did not store or co-mingle any VANOC records with any records Whistler stored or maintained.¹⁵
- Regarding the VANOC Archival Materials in the Vancouver City Archives, the evidence of Heather Gordon, Vancouver City Archivist, shows that: Vancouver's role was and is restricted to preserving and maintaining the VANOC Archival Materials; Vancouver staff's access to the materials was, and is, restricted to performing these functions; when VANOC existed, it maintained ownership over, and restricted access to, the materials; and now

¹² Paragraphs 29-35, 39, COC's initial submission; Ballem affidavit, paras. 15-18, Terms of Reference and Ethics Policy, Exhibit F, Ballem affidavit.

¹³ Paragraphs 25-26, 29-31, Whistler's initial submission; Fugman affidavit, paras. 7-10; VANOC By-Law No. 1, Exhibit C, Fugman affidavit.

¹⁴ Paragraphs 49-53, City's initial submission; Ballem affidavit, paras. 16, 17, 19, 21.

¹⁵ Paragraphs 24-32, WHISTLER's initial submission; Fugman affidavit, para. 10; VANOC By-Law No. 1, Exhibit C, Fugman affidavit.

the COC or IOC owns these records and only they have “unfettered access” to the materials.¹⁶

Control

[17] In Order F11-31,¹⁷ Adjudicator Fedorak noted that previous orders and court cases had applied a broad contextual approach to determining “control” for the purposes of ss. 3(1) and 4(1), having regard to FIPPA’s purposes.¹⁸ The adjudicator noted that the Supreme Court of Canada endorsed this broad approach to determining “control” in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*¹⁹ (“*Minister of National Defence*”). The Court there made the following observations about “control” in relation to the federal *Access to Information Act*:

[48] As “control” is not a defined term in the Act, it should be given its ordinary and popular meaning. Further, in order to create a meaningful right of access to government information, it should be given a broad and liberal interpretation. Had Parliament intended to restrict the notion of control to the power to dispose or get rid of the documents in question, it could have done so. It has not. In reaching a finding of whether records are “under the control of a government institution”, courts have considered “ultimate” control as well as “immediate” control, “partial” as well as “full” control, “transient” as well as “lasting” control, and “*de jure*” as well as “*de facto*” control. While “control” is to be given its broadest possible meaning, it cannot be stretched beyond reason. Courts can determine the meaning of a word such as “control” with the aid of dictionaries. The *Canadian Oxford Dictionary* defines “control” as “the power of directing, command (under the control of)” (2001, at p. 307). In this case, “control” means that a senior official with the government institution (other than the Minister) has some power of direction or command over a document, even if it is only on a “partial” basis, a “transient” base, or a “*de facto*” basis. The contents of the records and the circumstances in which they came into being are relevant to determine whether they are under the control of a government institution for the purposes of disclosure under the Act (paras. 91–95).

[18] Previous orders and court cases list a series of indicators of control to be considered. These indicators include whether: the record was created by an officer or employee in the course of carrying out his or her duties; the public body has statutory or contractual control over the records; the public body has possession of the records; the public body has relied on the records; the records are integrated within the public body’s other records; the public body has the

¹⁶ Paragraphs 29-35, 39, COC’s initial submission; Ballem affidavit, paras. 15-18, Terms of Reference and Ethics Policy, Exhibit F, Ballem affidavit.

¹⁷ 2011 BCIPC No. 37 (CanLII).

¹⁸ At para. 19. The adjudicator also listed a number of relevant orders and court cases.

¹⁹ 2011 SCC 25.

authority to regulate the use and disposition of the records; the content of the record relates to the public body's mandate and functions; the contract allows the public body to inspect, review, possess or copy the records.²⁰ The list of indicators is not exhaustive and not all will apply in every case.²¹

[19] In *Minister of National Defence*, the Court introduced a two-step test for determining control over records that are not in the physical possession of the government institutions concerned:

- (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?²²

[20] The Court provided the following guidance on this two-step test:

[55] Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. ... If the record requested relates to a departmental matter, the inquiry into control continues.

[56] Under step two, *all* relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. ... The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably *should* be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word "could" is to be understood accordingly.²³ [emphasis in original]

Parties' Positions

[21] The journalist argued that the public bodies have control of the requested records.²⁴

[22] The Ministry said that it searched for responsive records and found none. It argued that it does not have control of the requested records that are not in its possession.²⁵

²⁰ See, for example, Order 02-29, 2002 CanLII 42462 (BC IPC), at para. 18.

²¹ See, for example, Decision F10-01, 2010 BCIPC 5 (CanLII), at para. 9.

²² 2011 SCC 25, at para. 50.

²³ 2011 SCC 25.

²⁴ Paragraph 73, journalist's submission.

²⁵ Paragraphs 4.17 & 4.19, Ministry's initial submission; para. 5, Foster affidavit.

[23] Vancouver said that Penny Ballem located responsive records in her office²⁶ but argued it does not have control of these records. Rather, it argued, VANOC owned and had control of these records while it existed and, since VANOC's dissolution, the COC or the IOC owns and has control of these records. Vancouver acknowledged that VANOC placed certain records in the City of Vancouver Archives but said they pre-date the requested records.²⁷

[24] Whistler argued that it does not have control of the requested records. Whistler's submissions neither confirm nor deny that it located any responsive records. However, Sharon Fugman's evidence suggests that she does not have any in her possession.²⁸

[25] The COC argued VANOC owned VANOC records while it existed and that, since VANOC's dissolution, "ownership of VANOC records vests either in the IOC or the COC. As such, the COC/IOC own all VANOC records".²⁹

Control Analysis

[26] I have considered below the relevant indicators of control, drawn from previous orders and court cases. I have also kept in mind the test in *Minister of National Defence* which, in my view, incorporates the same indicators. I have concluded, for reasons given below, that the requested records are not, and never were, in the control of the public bodies under ss. 3 and 4 of FIPPA.

Does the content of the record relate to the public body's mandate and functions?

[27] The public bodies and the COC argued that the contents of the requested records related only to VANOC's business and not to the mandate and functions of the respective public bodies.³⁰ They did not explain why they think this.

²⁶ Paragraph 21, Ballem affidavit.

²⁷ Paragraphs 21-22, 34, 48, City's initial submission; para. 18, COC's initial submission; para. 17, Byrne affidavit; Gordon affidavit, para 14.

²⁸ Sharon Fugman deposed that directors were told not to retain, store or otherwise use any documents VANOC had provided to them and that directors were to destroy or return such documents to VANOC. She further deposed that the common practice was for all VANOC records, including those provided to her as a VANOC director, to be placed in a storage room at the VANOC office; paras. 7-9, Fugman affidavit.

²⁹ Paragraph 18, COC's initial submission; para. 17, Byrne affidavit.

³⁰ Ministry's initial submission, paras. 4.16-4.17, 4.25, 4.28; paras. 29-32, Foster affidavit; Paragraph 76, City's initial submission; paras. 15-21, Ballem affidavit; Paragraphs 41-46, Whistler's initial submission; para. 1, Fugman affidavit; para. 10, Godfrey affidavit; para. 42, COC's submission, in the inquiry related to Vancouver.

[28] The journalist argued that the records relate to the public bodies' mandates because the 2010 Games were a project of the Government of Canada, the Province of British Columbia and the City of Vancouver.³¹

[29] The public bodies did not provide me with copies of any responsive records and did not describe them. I am, therefore, not able to determine the requested records' content first hand. Other sources do, however, provide some insight into the likely content of the records and whether their contents relate to the mandate and functions of the public bodies.

[30] The Olympic Charter, the Multiparty Agreement and the Host City contract set out the respective mandates and responsibilities of the IOC, VANOC and the other parties regarding the 2010 Games.³² They are solely concerned with the various aspects of organizing, funding and staging the 2010 Games. They demonstrate, in my view, that, in staging the 2010 Games, VANOC was staging an IOC event, an international, "once-in-a-lifetime"³³ sporting event of national interest and significance. There was no evidence that hosting and staging an Olympic games is a normal local public body or provincial activity. I acknowledge that the municipalities and the Province contributed, financially and otherwise, to the success of the 2010 Games³⁴ and may also have benefited from them in a number of ways. However, nothing in the material before me suggests that staging the 2010 Games was within the public bodies' respective mandates – quite the opposite in fact.

[31] I conclude that the subject matter of the requested records relates to VANOC's planning, organizing, staging and financing of the 2010 Games – not to the mandates and functions of the respective public bodies. Under the two-step test in *Minister of National Defence*, this finding technically ends the matter because the documents do not "relate to a departmental matter". For the sake of completeness and because the parties argued these points, however, I have considered the remaining indicators of control.

Does the public body have possession of the records?

[32] Neither Whistler nor the Ministry has physical possession of responsive records.

[33] Vancouver said that Penny Ballem "inadvertently retained possession" of some responsive records but said she did not retain them for the purpose of her duties as City Manager. Penny Ballem deposed that all other VANOC related

³¹ Paragraph 69, applicant's submission. He did not mention Whistler.

³² Exhibits A, B and C, Byrne affidavit.

³³ Page 5, "British Columbia's Investments in the 2010 Olympic and Paralympic Winter Games and Related Activities", Exhibit B, Foster affidavit.

³⁴ Paragraphs 17, 19, 24-26, Foster affidavit;

records previously in her possession have been destroyed. She added that she did not make any efforts to retain VANOC records as she understood that VANOC was placing copies of all relevant records in the City of Vancouver Archives.³⁵

[34] I accept the evidence on this issue. The fact that Vancouver, apparently unintentionally, physically possesses some responsive records does not, on its own, establish that Vancouver had or has control of the requested records.³⁶

Who controlled VANOC?

[35] The public bodies and the COC argued that VANOC was never under the public bodies' control but rather was under the control of the IOC. They also submitted that the records were "solely under the control of VANOC and after dissolution are now under the control of either the COC or the IOC".³⁷ The journalist did not address this issue directly.

[36] If VANOC was under the control of one or more of the public bodies involved in this inquiry, this would suggest that VANOC's records were also under their control. For reasons that follow, I find that VANOC was not under the control of one or more of the public bodies at the time the journalist submitted his requests:

- VANOC was a federally incorporated, not-for profit organization, formed for the purpose of planning, organizing, financing and staging the 2010 Games.³⁸ VANOC retained its own offices and stored and maintained its records there during its existence.³⁹
- Under the Olympic Charter, the Games are the "exclusive property" of the IOC and the IOC is the "authority of last resort on any question".⁴⁰ VANOC, as the organizing committee to which the IOC had entrusted the organization of the 2010 Games, reported to the IOC and received instructions from it.⁴¹

³⁵ Paragraph 75(e), City's initial submission; para. 21, Ballem affidavit.

³⁶ In this regard, see Order 02-29, at para. 49, where former Commissioner Loukidelis referred to cases, such as *Walmsley v. Ontario (Attorney General) (1997)*, 34 O.R. (3d) 611; [1997] O.J. No. 2485 (C.A.), in which possession of records on site by public body employees did not establish control over those records.

³⁷ See, for example, Vancouver's initial submission, para. 48.

³⁸ Paragraph 5, Ballem affidavit; VANOC's Letters Patent and Application for Incorporation, Exhibit B, Ballem affidavit, City's initial submission; para. 22, Foster affidavit, Ministry's initial submission; para. 9, Byrne affidavit, COC's initial submission.

³⁹ Paragraph 9, Fugman affidavit.

⁴⁰ Articles 1 and 11, Olympic Charter, Exhibit B, Byrne affidavit, COC initial submission.

⁴¹ Article 39, Olympic Charter, Exhibit B, Byrne affidavit, COC initial submission.

The IOC required that most agreements for staging the 2010 Games, for example, the Multiparty Agreement,⁴² be submitted to it for review.⁴³

- Under the Host City Contract,⁴⁴ the IOC had to approve all plans and financial and other agreements related to the 2010 Games, as well as arrangements for other aspects of the 2010 Games, such as the “look” of the Games, ticketing, marketing and media contracts. In addition, the Host City contract said that any disputes had to be dealt with in the Swiss legal system, as opposed to the Canadian system.⁴⁵
- The evidence shows that: the IOC consistently made it clear that VANOC was not an agent or subsidiary of any of the parties to the Multiparty Agreement; apart from reporting on matters related to joint financial contributions and obligations under the Multiparty Agreement and the Contribution Agreements, VANOC was not subject to any requirement to report to the public bodies; VANOC consistently made it clear that it owned its records; VANOC was a party to archival agreements with Vancouver and the COC and, under those agreements, after VANOC’s dissolution, the IOC or COC owns VANOC’s records.⁴⁶
- While in some cases, VANOC’s directors were public body employees, no single public body appointed a majority of the directors.⁴⁷ Under the Multiparty Agreement and Contribution Agreements, VANOC received funding from the public bodies and the Province, and the Province guaranteed that it would cover any shortfall.⁴⁸ However, the factors relating to funding and appointment of directors by public bodies do not, in my view, suffice to establish that VANOC was under the control of one or more of the public bodies.⁴⁹
- The submissions and affidavit evidence reveal that the VANOC directors understood that, when acting as directors, they were not acting as agents of

⁴² The parties to the 2012 Multiparty Agreement were the Government of Canada, the Province of British Columbia, Vancouver, Whistler, the COC, the CPC and the Vancouver 2010 Bid Corporation (“Bid Corp”). The Agreement set out the commitments and roles of each of the parties in staging the 2010 Games and their obligations to each other should Bid Corp’s bid to host the Games succeed.

⁴³ Paragraph 14, Byrne affidavit, COC initial submission.

⁴⁴ Between the IOC, Vancouver, the COC and later VANOC, under which the IOC entrusted to Vancouver and the COC the organization of the 2010 Games and set out their responsibilities.

⁴⁵ Exhibit D, Byrne affidavit, COC initial submission.

⁴⁶ Paragraph 13, Byrne affidavit, COC’s initial submission; para. 11, Shoop affidavit, Ministry’s initial submission; paras. 4, 8, Gordon affidavit; Article G, Archival Agreement, Exhibit C, Gordon affidavit, COC’s initial submission.

⁴⁷ Paragraph 9, Byrne affidavit, COC’s initial submission.

⁴⁸ Paragraph 17, Foster affidavit, Ministry’s initial submission; para. 7, Byrne affidavit, COC’s initial submission.

⁴⁹ See Order 02-29, at para. 53, and Order F11-31, at para. 40, for similar findings.

their respective nominating entities. In the case of directors who were public body employees, they understood that their role as director was distinct from their role as employee.⁵⁰

[37] In *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCCA 522, the BC Court of Appeal considered the issue of control in the context of whether the Olympic Games were a governmental activity and subject to the *Charter*. Although that case dealt with the *Charter*, I find it to be helpful to this analysis, as the Court found that the fact that the IOC controlled VANOC was undisputed and that no government had the legal power to control VANOC.⁵¹

Was the record created or received by an employee or consultant of the public body in the course of his or her duties for the public body?

[38] The journalist argued that the Vancouver and Whistler directors created the records in the course of their duties as public body employees and that the Province's director was a consultant to a public body.⁵²

[39] Penny Ballem deposed that VANOC created agendas, minutes and reports and provided them to her in her role as a VANOC director, not in her role as a City of Vancouver employee.⁵³ Whistler and the COC provided similar argument and evidence.⁵⁴ The Ministry said that the Province had appointed Ken Dobell as its nominee on the VANOC Board. However, it said, he was not a consultant or employee of the Province or the Ministry at the relevant time and was not required to report to the Ministry or Province or take instructions from them. The Ministry submitted that, therefore, if any records exist, Ken Dobell would have created them in his capacity as a VANOC director.⁵⁵

[40] I am satisfied from the evidence that the VANOC directors created or received any responsive records in their capacity as VANOC directors, not as employees or consultants to the respective public bodies.

⁵⁰ Paragraphs 10-23, Whistler's initial submission; paras. 3-6, Fugman affidavit; para. 6-9, Godfrey affidavit; paras. 37-48, City's initial submission; paras. 14-17, Ballem affidavit; VANOC's Letters Patent and Application for Incorporation, Exhibit B, Ballem affidavit; Terms of Reference for a Director and Ethics Policy, Exhibit F, Ballem affidavit; paras. 4-7, COC's initial submission; paras. 12-13, Byrne affidavit; Article 39, Olympic Charter, Exhibit C, Byrne affidavit; paras. 4.58-4.60, Ministry initial submission; paras. 22, 43, Foster affidavit.

⁵¹ At para. 45.

⁵² Paragraphs 64-65, journalist's submission.

⁵³ Paragraph 77, City's initial submission; paras. 18-20, Ballem affidavit.

⁵⁴ Paragraph 49, Whistler's initial submission; para. 1, Fugman affidavit; para. 44, COC's initial submission.

⁵⁵ Paragraph 4.32, Ministry's initial submission; paras. 29, 31-32, Foster affidavit; para. 9, Ministry's reply.

Does the public body have contractual authority to affect the contents of the record and regulate the record's use, disclosure and disposition?

[41] Penny Ballem deposed that she understood that Vancouver had no power to use or disclose the records.⁵⁶

[42] The COC argued that Vancouver had no general authority to regulate the records' use and disposition. It said that VANOC, as owner of the records it produced, imposed restrictions on the use of the records after the 2010 Games.⁵⁷

[43] Whistler said that it did not have any authority to regulate the use or disposition of the records. Sharon Fugman deposed that the directors did not have a general authority, outside of their duties as directors, to retain, store or otherwise use records provided to them in their capacities as directors, because these records were VANOC's property and directors were to either return them to VANOC or destroy them. Sharon Fugman also deposed to her understanding and belief that the common practice was that all VANOC records provided to her in her capacity as a director were to be placed in a storage room at the VANOC office and that, under the VANOC bylaws, directors were allowed to inspect minutes and records only on reasonable notice.⁵⁸

[44] The Ministry said it has no right to regulate the use or disposition of the requested records.⁵⁹

[45] I am satisfied from the evidence that VANOC maintained its records at its office and retained control over the use, disposition and disclosure of the records. It follows that I find that the public bodies had no such authority.

[46] The journalist argued that the public bodies had authority over the use and disposition of the records because the federal *Access to Information Act* ("ATIA") applied to VANOC's records.⁶⁰ However, the ATIA has no relevance to whether any of the public bodies had authority over the use and disposition of the records.

Has the public body relied on the record to a substantial extent?

[47] The public bodies all provided evidence that they did not rely on any of the requested records in any way.⁶¹ The applicant did not address this issue.

⁵⁶ Paragraph 20, Ballem affidavit.

⁵⁷ Paragraph 44, COC's initial submission; para. 17, Byrne affidavit.

⁵⁸ Paragraphs 45, 49, Whistler's initial submission; paras. 7-9, Fugman affidavit; para. 10, Godfrey affidavit.

⁵⁹ Paragraph 4.36, Ministry's initial submission.

⁶⁰ Paragraph 71, journalist's submission.

⁶¹ Paragraphs 49, 53, 76, City's initial submission; Ballem affidavit, para. 19; para. 44, COC's initial submission; para. 49, Whistler's initial submission; paras. 4.33-4.34, Ministry's initial submission.

[48] I accept the evidence of the public bodies on this point and find that they did not rely on the requested records.

Are the records closely integrated with other records held by the public body?

[49] Penny Ballem deposed that she kept all records she received from VANOC in a separate file in her office and did not co-mingle them with Vancouver's records. She said that all responsive records were destroyed before Vancouver received the request, except for records related to a single meeting which she "inadvertently retained". Penny Ballem also said she did not provide any of the requested records to the Vancouver City Council.⁶²

[50] Whistler said it has not integrated the correspondence among Sharon Fugman and the other former VANOC directors with its records. Sharon Fugman deposed that she did not integrate or co-mingle any VANOC records with any records that Whistler stored or maintained.⁶³

[51] The Ministry said that it has not integrated correspondence between Ken Dobell and the other former VANOC directors with Ministry records.⁶⁴

[52] The journalist did not address this issue.

[53] I accept the public bodies' evidence on this issue and find that the responsive records were not integrated into their own records.

Does the contract permit the public body to inspect, review, possess or copy the record produced, received or acquired by the contractor as a result of the contract?

[54] **Multiparty Agreement** – The journalist pointed to the Multiparty Agreement as indicating that the public bodies had "special access" to the records.⁶⁵ The public bodies and the COC disagree.⁶⁶

[55] Having regard for the overall purpose of the Multiparty Agreement and the placement of its access provisions within the financial reporting section of the Agreement, I am satisfied that any rights of access to records by the parties were for the purposes of financial accountability only and were not intended to capture

⁶² Paragraphs 19-22, City's initial submission; Ballem affidavit, paras. 19, 21.

⁶³ Paragraph 49, Whistler's initial submission; para. 10, Fugman affidavit.

⁶⁴ Paragraph 4.34, Ministry's initial submission.

⁶⁵ Paragraph 69, journalist's submission.

⁶⁶ Paragraphs 54-72, City's initial submission; Byrne affidavit, paras. 7, 14 15; Ballem affidavit, para. 4; paras. 22-24, 46-51, COC's initial submission; para. 7, Byrne affidavit; paras. 52-68, Whistler's initial submission; para. 4, Godfrey affidavit; paras. 4.38-4-75, Ministry's initial submission; paras. 37-51, Foster affidavit.

day-to-day materials. I find that this limited right of access to financial information under the Multiparty Agreement is not sufficient, on its own, to establish the public bodies' control of the requested records.⁶⁷

[56] **Archival agreements** – Vancouver acknowledged that VANOC had placed the VANOC Archival Materials in the Vancouver City Archives under the terms of temporary and, later, final agreements between Vancouver, the COC and VANOC but argued that, nevertheless, Vancouver has no control of these materials.⁶⁸ I note that the journalist appears to accept this, as he said the current (final) Archival Agreement “handcuffed” Vancouver from allowing access to VANOC meeting agendas and minutes until 2025.⁶⁹

[57] The issue of who has control of the VANOC Archival Materials in the Vancouver City Archives is to some extent moot, as the evidence of Vancouver's City Archivist indicates that the VANOC Archival Materials do not include any responsive records for the time period the journalist requested.⁷⁰ However, for the sake of completeness, and because the parties argued this point, I have considered this aspect of the control issue.

[58] Under the archival agreements, VANOC, and later the IOC and COC, confirmed ownership of, and imposed restrictions on access to, the VANOC Archival Materials. I am satisfied that Vancouver staff's access to the VANOC materials has always been for the limited purpose of carrying out storage, preservation, maintenance and custodial functions under the agreements. VANOC's and the COC's ability to set contractual terms of access and to restrict public access to VANOC Archival Materials, in some cases for 15 years, all support the conclusion that Vancouver has never had control of the VANOC Archival Material.⁷¹

Conclusion on control

[59] I found above that:

- VANOC was not under the control of any of the public bodies
- the requested records were not created by an employee or consultant in the course of carrying out his or her duties for a public body

⁶⁷ I note that former Commissioner Loukidelis made a similar finding in Order 02-29, 2002 CanLII 42462 (BC IPC), at para. 57.

⁶⁸ City's initial submission, paras. 22, 46-47; Gordon affidavit, paras. 5-10; COC's initial submission, paras. 16-21; Byrne affidavit, paras. 16-17.

⁶⁹ Paragraph 23, journalist's submission.

⁷⁰ Paragraphs 19-22, City's initial submission; Gordon affidavit, paras. 11, 14.

⁷¹ See Order 02-30, at para. 24, where former Commissioner Loukidelis found that limited access by University of Victoria staff to the requested records, for performance of contractual duties, did not establish control over them.

- the content of the records does not relate to the public bodies' mandate and functions
- the public bodies have no statutory or contractual authority to inspect, review, possess or copy the records, or to regulate their use and disposition
- the records are not integrated within the public bodies' other records and the public bodies have not relied on the records

[60] In addition, while Vancouver located some responsive records, I concluded that physical possession of these records does not suffice to establish that Vancouver has control over them. I also found that access by Vancouver's staff to VANOC Archival Materials in the City of Vancouver Archives is for the limited purpose of performing Vancouver's contractual duties.

[61] These findings all support the conclusion that the requested records are not, and never were, in the control of the public bodies.⁷² In conclusion, based on a consideration of all of the factors above and in light of relevant orders, I find that the requested records never were under the control of Vancouver, Whistler or the Ministry for the purposes of ss. 3 and 4 of FIPPA.

Section 3(1)(g) of FIPPA

[62] The COC and Vancouver argued that, even if there are responsive records among the VANOC Archival Materials in the Vancouver City Archives, they are excluded from the scope of FIPPA under s. 3(1)(g).⁷³ This provision says:

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

...

(g) material placed in the archives of a public body by or for a person or agency other than a public body;

[63] In light of my conclusions on custody and control, it is not necessary to consider whether the requested records are excluded from the scope of FIPPA under s. 3(1)(g) of FIPPA.

⁷² See Decision F10-01 and Order 02-29, which came to similar conclusions based on similar considerations.

⁷³ Paragraphs 21-22, 34, 48, City's initial submission; para. 18, COC's initial submission; para. 17, Byrne affidavit; Gordon affidavit, para. 14.

CONCLUSION

[64] For reasons given above, I find that the requested records were never in the custody or under the control of the public bodies for the purposes of ss. 3 and 4 of FIPPA. Given this finding, no order respecting the records is necessary.

December 3, 2015

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File Nos.: F13-55731, F13-55733,
F13-55742, F13-55743