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When Public Bodies Create Companies, Public Can't Peer In

Recent court ruling against freedom of info rights is a blow to accountability.
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Without access to records, the media are unable to do their job of getting the public the facts they may have an urgent need to know.

Yet in the past two decades, a serious problem has cropped up that is growing worse. Public bodies have been creating wholly-owned puppet companies to perform many of their functions, and manage billions of dollars in taxpayers' money, while voicing the fiction that these companies are not covered by freedom-of-information (FOI) laws because they are "private and independent."

If a recent court ruling is allowed to stand, and the B.C. FOI law is not amended, then public bodies across Canada will have a green light to shield the records of similar "private" entities, or what the British call "quangos." This would be a disaster for accountability and the public interest.
The obvious and overdue solution is now to shift the topic from the legal to the political arena. In the legislature last fall, the minister of open government "appreciated the spirit" of this needed reform, and pledged to discuss it with the information commissioner. This might appear to be a hopeful sign, but we have heard it all before: Five years ago, the education minister sent out a press release pledging to add the Vancouver School Board's private companies to the Freedom of Information and Protection of Privacy (FOIPP) Act's coverage, but this was never done. (Yet B.C. local municipalities' subsidiaries are covered by the act.)

Shielding UBC's wholly-owned corporate entities

The problem was highlighted in 2006 when I filed a request to the University of British Columbia under the FOI law. I asked for meeting minutes, annual reports and salary records of three of UBC's wholly-owned corporate entities.

The first was UBC Properties Investments Ltd., whose self-described mission is to "acquire, develop and manage real estate assets for the benefit of the University." It has a near-monopoly on all development that happens on campus, manages private rental housing for non-students and is the landlord for most of the commercial space.

The university's 100 hectares of real estate was once managed by a committee of the UBC Board of Governors, then devolved to the new private company (then called UBC Real Estate Corp.) in 1988. Ever since then, students and staff have bitterly complained about its secrecy, in regards to the new mini-city arising on site, the mass cutting of trees to make way for it and UBC's building of high-priced condos for sale instead of student rental housing.

The second company, UBC Investment Management Trust (IMANT), acts as investment manager of UBC's huge endowment fund and its staff pension assets, making decisions worth billions of dollars of UBC's money. The third, UBC Research Enterprises Inc., takes research developed at UBC and creates spinoff companies in the hopes that the companies' profits will flow back to UBC.

The university denied my FOI request, claiming that the entities are all "independent," and so not under the "control" of UBC as required by the act. I appealed to the Office of the Information and Privacy Commissioner, the OIPC. (Over many years, the Alma Mater Society (AMS), The Ubyssey and the CUPE staff union had also made unsuccessful FOI requests to the UBC properties branch.)

UBC and its entities then hired a phalanx of lawyers at the public's expense to quash the public's right to know. Yet in April 2009, OIPC adjudicator Michael McEvoy ruled in my favour, writing, "UBC is found to have control of the requested records.... All three bodies were entities created and owned 100 per cent by UBC and accountable to it."

The case was won after I quoted from a dozen of UBC's own official websites, which in fact boasted that UBC had a high degree of control over its entities and appointed their boards. Students celebrated the outcome.

'The corporate veil'

But it was too good to last. UBC appealed the McEvoy ruling to judicial review. Then, in a separate ruling later that year, B.C. Supreme Court Justice Peter Leask stated that various Simon Fraser University (SFU) entities were not covered by the FOIPP Act because one must not "pierce the corporate veil."

UBC argued that the same principle for SFU should apply to it too. Mainly because the applicant in the SFU case, David Noble, had died, all parties agreed to submit this dispute to a second OIPC inquiry. UBC's lawyers argued that the OIPC is "an inferior court," and so the Justice Leask ruling became "the law of the province."

The second OIPC order came down last October. The new adjudicator, Jay Fedorak, sided with UBC because the SFU ruling was binding on the OIPC and he essentially had no choice. To resolve this dilemma, on the same day, the commissioner sent an urgent letter to Margaret MacDiarmid -- minister of labour, citizens' services and open government -- pleading that the law be amended to cover such entities:

"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.... 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."

Five days later in the legislature, NDP MLA Doug Routley tried to amend the FOI law to fix the problem, saying: "I would like to move to add the words 'or its subsidiaries' after the words 'under the control of the public body,' and I have an amendment here that would do that."

MacDiarmid replied that, although appreciative of "the spirit of the amendment," she opposed it, because it would not accomplish its goal. "What we would need to do is look at the entire act. Just putting this into this section would not actually have any meaning, because there are other areas of the act that would have to be amended before the subsidiaries could be included." His amendment was rejected.

Walled fortresses

The outcome is that public bodies today can still "veil" their records in the vaults of these fortresses, while the secrecy creates potential breeding grounds for waste, corruption and risks to public health and safety. FOI-exempt companies of B.C. Crown corporations were related to two major scandals of the 1990s: "Hydrogate," by which BC Hydro formed a subsidiary, IPC International Power Corp., to invest in a Pakistani power project, and BC Ferries' $500 million fast ferries loss through its subsidiary Catamaran Ferries International.

Today, BC Hydro claims that two of its companies, Powertech and Powerex, are FOI-exempt. After BC Ferries itself was privatized in 2003, its FOI coverage was dropped (but after years of hard campaigning the coverage was restored).

I stress that I am not arguing against the decision to privatize some public services -- a choice that might work well or not -- only the harmful loss of public transparency that too often accompanies that decision, but should not. Such privatization has occurred in other countries also, but the global FOI standard is to include them under the laws.

Past and possible future litigation on this dispute has already been wasteful enough. To date, SFU has spent $157,144 in legal fees fighting the case (while UBC refuses to reveal its legal costs) -- money that would be far better spent aiding students. The UBC lawyers report to the university's vice president of legal affairs, Stephen

Owen, who ironically was a vocal FOI advocate while a federal MP. Meanwhile, UBC president Stephen Toope and the Board of Governors could end the obstructionism today if they chose to, but they have not spoken publicly about it.

No accountability without transparency

The main argument a public body might raise is that its companies must be exempt from FOI laws to shield them from business competitors' scrutiny. Yet this claim is indefensible because the FOIPP Act already contains ample protections (Sections 17 and 21, which are over-applied in practice) to withhold records that could bring competitive harm. If this public body claim was accepted, then no federal or B.C. Crown corporation would be covered by any FOI law, and yet they all are. Indeed, even Stephen Harper, the most secretive prime minister in memory, amended the federal Access to Information Act to cover all Crown corporations and their subsidiaries.

The B.C. government is well aware of the FOI quango problem. Last year, the all-party legislative review of the act urged that the law be amended to "expand the definition of 'public body' in Schedule 1 to include any corporation that is created or owned by a public body, including an educational body." Nothing happened. In an interview last December, MacDiarmid said: "It seems reasonable to me that they would be covered. So we're certainly looking at it, but we need to do a consultation, because we have to watch for unintended consequences." Commissioner Denham reiterated the needed law reform on Vaughn Palmer's cable TV show *The Voice of B.C.* this month.

One of the main goals of the passage of the FOIPP Act was to render government more accountable, and there can be no real accountability without transparency. The quango exclusion is also contrary to the basic purpose of the law's Section 25, the Public Interest Override. Premier Christy Clark based her leadership campaign on open government and transparency. Now is her chance to demonstrate it.