



Decision F06-08

## LEGISLATIVE ASSEMBLY & OFFICE OF THE CLERK OF COMMITTEES

David Loukidelis, Information and Privacy Commissioner  
September 1, 2006

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**Summary:** The applicant made an access to information request to the Office of the Clerk of Committees of the Legislative Assembly for records and correspondence submitted to a Special Committee of the Legislative Assembly. The Office correctly responded that the *Freedom of Information and Protection of Privacy Act* does not apply to that Office, Members of the Legislative Assembly or the Special Committee.

**Key Words:** jurisdiction—public body—officer of the Legislative Assembly—public interest.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 3, 4, 5, 25; Schedule 1 (“public body”).

**Authorities Considered:** **B.C.:** Order 00-29, [2002] B.C.I.P.C.D. No. 32; Adjudication Order No. 3.

**Cases Considered:** *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30; *Macdonell v. Quebec (Commission d'accès à l'information)* (2002), 219 D.L.R. (4<sup>th</sup>) 193.

### 1.0 INTRODUCTION

[1] In this decision, I conclude that an inquiry under Part 5 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) cannot be held in relation to the applicant’s access to information request because FIPPA does not apply to records in the custody or under the control of the Legislative Assembly, Members of the Legislative Assembly or committees of Members of the Legislative Assembly.

[2] On March 15, 2006, the applicant made an access to information request, under FIPPA, to the Office of the Clerk of Committees (“Clerk of Committees”) of the Legislative Assembly of British Columbia. The request sought the following material:

Any and all submissions, tabled documents, and other relevant documentation and correspondence received by, or submitted to, The Special Committee to Review the Police Complaint Process<sup>1</sup> from:

Don Morrison, Former Police Complaints Commissioner; appeared in front of the Committee Monday, November 5, 2001 and Thursday, May 16, 2002.

Kevin Begg, the Director of the police services branch at the Ministry of Public Safety and Solicitor General; appeared in front of the Committee Monday, March 11, 2002.

Matthew Adie, former Deputy Police Complaint Commissioner; appeared in front of the Committee Friday, April 5, 2002.

Dana Urban, senior legal adviser to the Police Complaint Commissioner; appeared in front of the Committee Monday, April 15, 2002.

Steve Kelliher, former counsel for the Police Complaint Commission; appeared in front of the Committee Monday, April 15, 2002 and Wednesday, May 1, 2002.

Bill MacDonald, Special investigator for the Police Complaint Commission; appeared in front of the Committee Wednesday, April 17, 2002.

Rob Rothwell, Internal Investigation Section of the VPD; appeared in front of the Committee Friday, May 10, 2002.

[3] On March 21, 2006, the Clerk of Committees declined to respond, saying this:

As part of the Legislative Assembly, the Office of the Clerk of Committees and the former Committee are both exempt from the *Freedom of Information and Protection of Privacy (FOIPP) Act*, pursuant to Schedule 1 of the Act, which defines application of the Act to a “public body”. ...

Since this office and the [Special] Committee are specifically exempted under the FOIPP Act, we are therefore prevented from receiving or processing your submission of March 21, 2006 as a request under the Act.

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<sup>1</sup> I refer throughout to this committee as the “Special Committee”.

[4] On April 10, 2006, the applicant asked for a review of this response and, mediation by this Office having failed, the applicant asked for an inquiry under Part 5 of FIPPA.

[5] By a letter dated July 24, 2006, this Office invited representations from the applicant and from the Legislative Assembly on whether this Office has jurisdiction to hold an inquiry under Part 5 of FIPPA. Both made submissions.

## 2.0 DISCUSSION

[6] Citing the *Constitution Act*, the Legislative Assembly relies heavily on parliamentary privilege to support its contention that I have no jurisdiction to proceed with an inquiry under FIPPA. It refers to the inherent privileges of Parliament and Legislatures, which have been described as part of the fundamental and thus constitutional law of Canada. It cites case law holding that an express provision of a statute is needed to abrogate a parliamentary privilege. It says nothing in FIPPA “waives” the privilege which attaches to the work of legislative committees, and that FIPPA expressly does not apply to the Legislative Assembly.

[7] The applicant argues that it would be an error for me to ignore “the issue of ‘public interest’” and not hold an inquiry. He also says I “should be guided by” the “ruling of the Supreme Court” and refers to *Macdonnell v. Québec (Commission d'accès à l'information)*. He adds that, while the Special Committee “does not appear on the list of public bodies” [under FIPPA], “nor is it specifically excluded.” He then says, “Your decision must be guided by a ‘purposeful’ approach under which I feel that the documents requested are well within your jurisdiction.”

[8] The applicant advances a second reason why, he believes, FIPPA applies to the records he seeks, such that the records are “within your jurisdiction”. He argues that s. 25(1) of FIPPA, which is often called the “public interest override”, “allows access to the documents requested” if they “fall within the sphere of public interest.” In saying this, the applicant notes that s. 25(2) provides that s. 25(1) “applies despite any other provision of” FIPPA.

[9] The central issue is whether or not the Legislative Assembly, its Members or committees of its Members are public bodies to which FIPPA applies. Parliamentary privilege does not in my view advance the analysis. As the Supreme Court of Canada clearly indicated last year, it is open to a Legislature to enact a law— such as a human rights code—that, on coming into force, applies to the Legislature.<sup>2</sup> The question here is whether the Legislature has, through

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<sup>2</sup> *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30.

FIPPA, subjected the Legislative Assembly, its Members or committees of Members to the access to information provisions of FIPPA. For the reasons that follow, I conclude that this is not the case and this ends the matter.

[10] I will now describe the relevant provisions of FIPPA.

[11] Section 3(1) of FIPPA stipulates that FIPPA applies only to records in the custody or under the control of a “public body”. Section 4(1) provides that a person who makes an access request under s. 5 has a right of access to any record in the custody or under the control of a “public body”. Other provisions of Part 2 of FIPPA impose duties on the head of a “public body” in relation to access requests. It follows that a person, agency, office or other entity must be a “public body” in order to be subject to FIPPA.

[12] Section 52(1) of FIPPA provides that a person who has made a request for access to records “to the head of a public body” may ask for a review of any decision, act or failure to act of the head in relation to the request. If a request for review is not referred to mediation or settled in mediation, the Information and Privacy Commissioner is authorized to conduct an inquiry and make a decision respecting the matter.

[13] Schedule 1 to FIPPA defines “public body” as follows:

“**public body**” means

- (a) a ministry of the government of British Columbia,
- (b) an agency, board, commission, corporation, office or other body designated in, or added by regulation to, Schedule 2, or
- (c) a local public body<sup>3</sup>

but does not include

- (d) the office of a person who is a member or officer of the Legislative Assembly, or
- (e) the Court of Appeal, Supreme Court or Provincial Court;

[14] This definition does not name offices of Members of the Legislative Assembly, committees of the Legislative Assembly or officers of the Legislative Assembly as public bodies. Nor does Schedule 2 to FIPPA, operating through paragraph (b) of the definition of “public body”, designate any of them as public

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<sup>3</sup> The term “local public body” is defined in Schedule 1 to FIPPA. It does not include the Legislative Assembly or any “officer of the Legislative Assembly”.

bodies covered by FIPPA.<sup>4</sup> It follows on this basis alone that the right of access to records under FIPPA does not apply to records in the custody or under the control of offices of Members of the Legislative Assembly, committees of the Legislative Assembly or officers of the Legislative Assembly, including the Clerk of Committees.

[15] Further, paragraph (d) of the definition of “public body” goes on to expressly stipulate that the class of public bodies does not include “the office of a person who is a member or officer of the Legislative Assembly”. This plainly excludes offices of individual Members of the Legislative Assembly from the range of public bodies to which FIPPA applies.<sup>5</sup> I also conclude that paragraph (d) excludes committees comprised of Members of the Legislative Assembly from the class of public bodies covered by FIPPA. If individual Members are not public bodies under FIPPA, how could a number of them, acting together, be public bodies if FIPPA does not say so?<sup>6</sup> It follows that the right of access to records under FIPPA does not apply to records in the custody or under the control of committees of Members of the Legislative Assembly.

[16] The reference in paragraph (d) to an “officer of the Legislative Assembly” excludes the Clerk of Committees from the class of public bodies to which FIPPA applies. The term “officer of the Legislative Assembly” is not defined in FIPPA.<sup>7</sup> In Order 00-29,<sup>8</sup> I dealt with a claim by the Members’ Conflict of Interest Commissioner that his office was not a “public body” under FIPPA, even though the Commissioner is included in FIPPA’s definition of “officer of the Legislature”. In interpreting the term “officer of the Legislative Assembly”, I distinguished

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<sup>4</sup> By virtue of paragraph (b) of the definition, FIPPA applies to those officers of the Legislature designated by name as public bodies under Schedule 2. This list includes, as examples, the Offices of the Members’ Conflict of Interest Commissioner, Information and Privacy Commissioner, Ombudsman, Auditor General and Police Complaint Commissioner.

<sup>5</sup> It cannot sensibly be argued that FIPPA applies to individual Members of the Legislative Assembly, as opposed to their offices, on the basis that paragraph (d) mentions only their offices. Among other things, Members are not covered by the definition of public body in the first place.

<sup>6</sup> In reaching this view, I have, among other things, considered the decision of the Supreme Court of Canada in *Macdonell v. Quebec (Commission d’accès à l’information)* (2002), 219 D.L.R. (4<sup>th</sup>) 193. I should note that the applicant refers to the “ruling of the Supreme Court in *Macdonell v. Quebec (Commission d’accès à l’information)*.” Unlike FIPPA, Quebec’s access to information law explicitly specifies that the National Assembly is a public body. The Supreme Court of Canada held by a majority that, although the National Assembly of Quebec is a public body, individual Members of the National Assembly are not public bodies. *Macdonell* does not assist the applicant, since in the end, the Court ruled that Quebec’s access law did not apply to the requested records of expenses and payroll for individual Members’ offices.

<sup>7</sup> By contrast, the term “officer of the Legislature” is defined in FIPPA. It names certain officers of the Legislature, as opposed to “officers of the Legislative Assembly” referred to in FIPPA’s definition of “public body”. The officers of the Legislature named in FIPPA do not include the Clerk of Committees or any other Legislative Assembly officers.

<sup>8</sup> [2000] B.C.I.P.C.D. No. 32. <http://www.oipc.bc.ca/orders/2000/Order00-29.html>.

between permanent and traditional officers of the Legislative Assembly, on the one hand—including those referred to in s. 39 of the *Constitution Act*—and, on the other, the Commissioner appointed under the *Members' Conflict of Interest Act*.

[17] Consistent with my analysis in Order 00-29<sup>9</sup> and the authority on legislative procedure in British Columbia,<sup>10</sup> I conclude that the Clerk of Committees is an “officer of the Legislative Assembly” within the meaning of paragraph (d) of the definition of “public body”. The Clerk of Committees and his or her office are therefore not, on this basis as well as that expressed earlier, “public bodies” to which FIPPA applies.

[18] I will now address the applicant’s arguments around s. 25 of FIPPA.

[19] Section 25 reads as follows:

**Information must be disclosed if in the public interest**

- 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
- (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
  - (b) the disclosure of which is, for any other reason, clearly in the public interest.
- (2) Subsection (1) applies despite any other provision of this Act.
- (3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify
- (a) any third party to whom the information relates, and
  - (b) the commissioner.

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<sup>9</sup> Order 00-29, at p. 12.

<sup>10</sup> The authority on parliamentary procedure in British Columbia describes the Clerk of the Legislative Assembly as the “chief permanent officer of the House”. It goes on to note that the Clerk is “assisted in the performance of his or her duties by three Clerks Assistant (one of whom acts as Law Clerk and another as Chief Committee Clerk....the third Clerk Assistant acts as Clerk of Committees and has one or more committee clerks to assist with the duties of that office.” See E. George MacMinn, *Parliamentary Practice in British Columbia*, 3<sup>rd</sup> ed. (Victoria: Legislative Assembly of British Columbia, 1997), at pp. 179-180. I note in passing that Standing Order 92 of the Legislative Assembly provides that the Clerk of the Legislative Assembly “has the direction and control over all the officers and clerks employed in the offices, subject to such orders as he or she may from time to time receive from the Speaker or the House.” See MacMinn, above, at p. 179.

- (4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form
  - (a) to the last known address of the third party, and
  - (b) to the commissioner.

[20] As I understand the applicant's argument, s. 25(2) means that, if the public interest disclosure test is met—as he says it is in this case—the information has to be disclosed even if FIPPA otherwise would not apply or require it.<sup>11</sup>

[21] In Adjudication Order No. 3,<sup>12</sup> Levine J. (now J.A.) decided that, because of the override in s. 25(2), s. 25(1) could require public interest disclosure of records otherwise excluded from FIPPA's scope by s. 3(1)(c). In that case, an individual had made an access request to this Office for its records relating to an earlier file. Access was denied on the basis that FIPPA did not apply because, as provided by s. 3(1)(c), they were records created by or in the custody of an officer of the Legislature that related to the exercise of that officer's functions under an Act. Levine J. agreed, but said that, if either of the public interest tests in s. 25(1) was met, disclosure would be required. The fact that the records otherwise were excluded from FIPPA under s. 3(1)(c) did not dictate the outcome.

[22] There is no question that this Office is a “public body” under FIPPA to which access to information requests can be made and Adjudication Order No. 3 clearly proceeded on that basis. This case is quite different. The s. 25(1) duty to disclose information in the public interest is expressly directed at the “head of a public body”, but, for the reasons above, the applicant's request was not made to a “public body” to which FIPPA applies. In this light, it does not matter that s. 25(2) gives s. 25(1) precedence over other provisions of FIPPA, since by its terms s. 25(1) only applies to a public body, specifically to the “head” of a “public body”.

### 3.0 CONCLUSION

[23] Because the applicant's access request was not a request for records in the custody or under the control of a “public body” covered by FIPPA, I have no jurisdiction to proceed with an inquiry under Part 5 of FIPPA. Accordingly, no inquiry will be held.

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<sup>11</sup> A good deal of the applicant's argument about s. 25 has to do with his contention that the records he seeks contain information the disclosure of which is clearly in the public interest. These are arguments on the merits of an inquiry that I have decided cannot be held, since neither s. 25 nor the rest of FIPPA applies.

<sup>12</sup> <http://www.oipc.bc.ca/orders/adjudications/Adj3a.html>.

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[24] As indicated earlier, the applicant's extensive submissions in large measure lay out his arguments as to why disclosure of information relating to the death of an aboriginal person in police custody is in the public interest. My decision does not suggest that the applicant's arguments are persuasive or not. The inescapable fact is that I have no jurisdiction respecting disclosure of information in this matter. I have to stay within the bounds of the authority given to me and cannot arrogate to myself the right to step outside them.

September 1, 2006

**ORIGINAL SIGNED BY**

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David Loukidelis  
Information and Privacy Commissioner  
for British Columbia

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