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Order F11-34

## MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE

Jay Fedorak, Adjudicator

December 7, 2011

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**Summary:** A journalist requested copies of the electronic calendar of the Minister of Transportation for two years. The Ministry provided copies of printouts of the calendars for the two MLAs who were Ministers during that period, but withheld portions under ss. 17 (economic harm) and 22 (personal privacy) of FIPPA. It also withheld entries relating to MLA activities as being outside the scope of FIPPA. The journalist challenged the decision with respect to the entries relating to MLA activities. The Ministry argued that each electronic entry in the calendar was a separate record and the entries relating to MLA activities were not in the custody or under the control of the Ministry. The adjudicator found that each entry was not a separate record: the calendars the Ministry produced were two records (one for each Minister) that were in the custody and under the control of the Ministry. These Ministry records happened to contain information about MLA activities. The Ministry also argued that some entries were records created by or for an officer of the legislature and were outside the scope of FIPPA in accordance with s. 3(1)(c). The records were not created by or for the Ombudsperson. The adjudicator ordered the Ministry to complete the processing of the request with respect to the information it had incorrectly withheld as outside the scope of FIPPA.

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

**Authorities Considered: B.C.:** Order F07-07, [2007] B.C.I.P.C.D. No. 9; Order No. 297-1999, [1999] B.C.I.P.C.D. No. 10; Order 01-43 [2001] B.C.I.P.C.D. No. 45; Order 02-30, B.C.I.P.C.D. No. 30.

**Cases Considered:** *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25; *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2008 FC 766.

## INTRODUCTION

[1] A journalist challenged a decision of the Ministry of Transportation and Infrastructure (“Ministry”) to withhold passages from the “day timer or calendar” of the Minister that it disclosed in response to his request.

[2] The disputed information is what the Ministry refers to as “constituency information”. The Ministry disclosed all of the passages regarding meetings relating to Ministry business, but considered constituency information to be outside the scope of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”). The Ministry’s reasons were that it only has custody and control over entries relating to Ministry business and not of entries relating to the Minister’s function as a Member of the Legislative Assembly (“MLA”). The Speaker of the Legislative Assembly was invited to participate in the inquiry as an appropriate person, and, in a one-line submission, he endorsed the Ministry’s position in this respect. The Ministry also relied on s. 3(1)(c) of FIPPA in withholding two entries relating to a meeting with the Ombudsperson.

## ISSUES

[3] The questions I must decide are:

1. Whether the information concerning the Ministers’ activities as MLAs are records that are in the custody or under the control of the Ministry.
2. Whether the information relating to meetings with the Ombudsperson is properly withheld under section 3(1)(c) of FIPPA.

## DISCUSSION

[4] **Background**—The journalist requested “the day timer or calendar of meetings of the BC Transportation Minister from January 1, 2002 to June 1, 2004”. There were two Ministers of Transportation and Infrastructure during this period: the Honourable Judith Reid and the Honourable Kevin Falcon.

[5] The Ministry responded by providing the journalist with a severed “copy of the Minister of Transportation calendars”. The Ministry explained that it had “severed third party personal information, constituency information and information that may harm the interests of the provincial government”, and marked the severed information s. 22, s. 17 or “out of scope”. The Ministry was unable to locate any responsive records for the period January 1, 2002 to January 1, 2003.

[6] When the journalist objected to the Ministry's "out of scope" severing, the Ministry issued an updated response clarifying its application of "out of scope":

Some information that was previously withheld as being "out of scope" is now being released and entries revealing meetings with the Ombudsman [sic] are now withheld under s. 3(1)(c), where previously they were withheld as "out of scope".

We wish also to convey to you that entries revealing constituency matters and/or MLA duties continue to be withheld because they are both "out of scope" of the Act and "not responsive" to your request. We have withheld this information as being outside the scope of the Act as an MLA is not a "public body" and the information relating to MLA duties is not under the control of the Ministry. The information is not responsive to your request as you requested the "Minister's" calendar, not the MLA's calendar.<sup>1</sup>

[7] The issues respecting ss. 22 (personal privacy) and 17 (harm to government interests) were resolved in mediation. The issues relating to the severed constituency information and the meetings with the Ombudsperson were not.

[8] During the course of my deliberations, the Supreme Court of Canada released its decision in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*.<sup>2</sup> That decision concerned the issue of control of records in the Office of the Prime Minister ("PMO") and federal ministerial offices, in accordance with the federal *Access to Information Act* ("AIA"). The Court found that the PMO and the relevant ministerial officers are not part of the government institutions, for which they are responsible, for the purposes of the AIA. As a result, copies of the agendas of the Prime Minister and other ministers in the custody of the PMO or ministerial offices are not accessible under the AIA. I invited the parties to make any further submissions in view of this decision. As the decision also raised a number of specific issues relevant to this inquiry, I asked the Ministry to address a series of questions about administrative practices and the relationships between employees and the Ministry to assist my deliberations.

[9] **Records in Dispute**—The records in dispute are paper copies of the electronic calendars of two ministers: the Honourable Judith Reid from January 14, 2003, to January 13, 2004 and the Honourable Kevin Falcon from January 1 to June 1, 2004. For Minister Reid, the pages of the calendar cover approximately one page for each day, with several entries for each day, for

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<sup>1</sup> The former Office of the Ombudsman is now the Office of the Ombudsperson.

<sup>2</sup> 2011 SCC 25. This case was an appeal of a Federal Court of Appeal Decision partially affirming the decision of Kelen J. in *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2008 FC 766.

a total of 125 pages. For Minister Falcon, each page (there are 24 total) contains numerous entries and covers all meetings for a given week. I estimate the total number of individual calendar entries at more than 1,200 for Minister Reid and 900 for Minister Falcon.

[10] The severed information represents less than five percent of the total calendar entries. It consists of appointments relating to constituency or party caucus activities (which I will refer to as “MLA appointments”) or appointments with the Ombudsperson. This is the information in issue.

[11] Given the issues in question here, a more detailed description of the nature of the electronic records is warranted.

[12] Government computers are equipped with Microsoft Office software, including Microsoft Outlook. Outlook includes a variety of functions, but the most frequently used are email and electronic calendars. Information entered into Outlook using government Outlook accounts, such as the content of email messages and calendar entries, is stored on government servers.<sup>3</sup> Individual records within Outlook are referred to in Outlook as “items”. Each email message is an “item”, as is each calendar entry. Each “item” can be opened individually on the computer screen, printed as a hard copy document or forwarded as an email attachment.

[13] In an Outlook calendar, it is possible to view a full day, week or month on the computer screen, depending on the setting selected by the user. If a person has multiple meetings or appointments in a given day (or week or month, as the case may be), multiple items will be shown on the screen, although only limited information about each item is shown (subject and location, if one is entered, and, in the case of a meeting, the meeting organizer). Double-clicking on a particular item will open it and show any additional information that has been entered.

[14] Similarly, Outlook calendar entries can be printed on a daily, weekly or monthly basis. In addition, using what the Ministry refers to as a “Calendar Details Style”, the calendar can be printed with all the details of each entry on a continuous series of pages in chronological order.

[15] The government provides MLAs with electronic calendars on a system it manages exclusively for the Legislative Assembly. This system has an email address ending “leg.bc.ca”. It also provides Ministers with a Microsoft Outlook account on the government’s system, with an email address ending in “gov.bc.ca”. While Ministers can maintain two separate calendars—one for MLA appointments on the Legislative Assembly’s Outlook system and one for Ministerial (government-related) appointments and meetings on the

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<sup>3</sup> Ministry’s initial submission, Smith affidavit, para. 27.

government's Outlook system—the general practice is for Ministers to integrate MLA appointments into their government-related Outlook calendars.

[16] The Ministry acknowledges that the Senior Executive Assistant to the Deputy Minister and the Manager of Executive Operations, Deputy Minister's Office, have ongoing read-only access to the Minister's electronic calendar, as well as the ability to print copies of the calendar. In addition, there is a weekly meeting of Senior Ministry Executive, during which members view copies of the Minister's calendar for the purpose of determining what assistance the Ministry can provide in supporting the Minister at upcoming meetings.<sup>4</sup>

[17] **Custody and Control**—The Ministry characterizes the issue as being whether “electronic calendar entries relating to Cabinet ministers' functions as Members of the Legislative Assembly are in the custody or control of a public body”. The Ministry acknowledges that the disputed information is stored on government servers and is physically located in the Ministry (not the Minister's) offices, but says this storage constitutes “mere possession” of the records and not custody or control. It cites Order 02-30, where former Commissioner Loukidelis found that the records of the University of Victoria Foundation were not subject to FIPPA, even though they were in the possession of the University of Victoria, in part because the University did not have the right to deal with the records as it wished and had no responsibility for the records.<sup>5</sup> The Ministry reasons that, because MLAs are expressly excluded from the definition of “public body” in Schedule 1 to FIPPA, the MLA appointment calendar entries are not under its control, as it was not given authority by the Ministers to use those entries as it wished.

[18] I pause here to note that the “public body” definition includes “a ministry of the government of British Columbia” but excludes “the office of a person who is a member or officer of the Legislative Assembly”. The Ministry goes on to say this public body definition makes it “clear that the Act was not intended to apply to the records of MLAs in circumstances where the records do not relate to the mandate and functions of a public body”.

[19] This conclusion is not obvious to me. The provision that excludes the office of an MLA from the definition of “public body” does not differentiate between the office of an MLA, who is not a Minister, and the office of a Minister. The question of whether, by virtue of this provision, records physically located in a Minister's office are not accessible under FIPPA, regardless of whether they relate to ministerial or MLA functions, is not one that I need address in this inquiry. Here the information at issue is not physically located in the Minister's office, but rather resides in Ministry servers and is regularly accessed by senior government officials for work-related purposes.

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<sup>4</sup> Ministry inquiry letter, June 16, 2011 letter, p. 5.

<sup>5</sup> [2003] B.C.I.P.C.D. No. 30, para. 24.

[20] The Ministry seeks to buttress its argument by relying on the fact that MLA “records” are not regulated by the *Document Disposal Act*. It says that “[w]hile the government has the authority to regulate the use of the server where the ministers’ electronic calendar entries reside, the government does not purport to regulate the use or retention of electronic records on the server that relate to MLA business and not ministerial functions”.<sup>6</sup> I do not find this line of argument to be compelling. My conclusions in this respect are only reinforced by the Court’s findings in the *Minister of Defence* case. There, the Court said that the word “control” in federal information access legislation should be given a broad and liberal interpretation and that, had “Parliament intended to restrict the notion of control to the power to dispose or to get rid of the documents in question, it could have done so”.<sup>7</sup>

[21] The Ministry also says it “has long been the practice of FOI staff in government to remove calendar entries relating to a minister’s functions as an MLA (and not relating to his or her functions as a minister) from printouts of calendar entries before they are provided to applicants who have filed access requests for ministers’ calendars”.<sup>8</sup> I do not find this line of argument compelling either. The fact that this has long been the practice does not mean it is one that complies with FIPPA.

[22] In any event, the Ministry’s position with respect to MLA appointments rests on its characterization of the responsive records. On this point, it maintains that each calendar entry constitutes a separate record, because the government server saves each calendar entry in Microsoft Outlook as a separate item. While it is possible to print out electronic calendar entries as individual records, the Ministry says it did not do so, because it would be “very time-consuming and inconvenient”. Instead, the Ministry produced two integrated paper records. Notwithstanding this integrated format, the Ministry says it only “controls” the government-related entries contained in the responsive paper records. It takes the position that it has no “custody of”, or “control over”, the parts of the records containing MLA-related appointment information.

[23] In this respect, the journalist maintains the Ministry is confusing the concept of “records” with that of “information”. He argues that each calendar is a single record, making the point that, if the original records were paper day-timers or calendars, there would be no question about this. The journalist also says that, if it is possible for the government to arbitrarily categorize parts of a requested record as individual records, then this could be done in almost any case where electronic records are involved.

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<sup>6</sup> Ministry’s initial submission, Smith affidavit, para. 37.

<sup>7</sup> At para. 48.

<sup>8</sup> Ministry’s initial submission, Smith affidavit, para. 39.

[24] As for the Supreme Court of Canada's decision in the *Minister of Defence* case, the Ministry maintains this case "makes it clear" that the information relating to MLA activities, as described in the Ministers' electronic calendars, is not in the Ministry's custody and control. In this respect, it cites as support the following passages from that case:

[54] Further, the Commissioner's argument on the deficiency of the control test crafted by the courts below presupposes that the two part distillation of the test, particularly as articulated by the Federal Court of Appeal, is not intended to fully capture the principles upon which the test was crafted. I do not read the judgments below as having that effect. As Kelen, J. made clear, the notion of control must be given a broad and liberal meaning in order to create a meaningful right of access to government information. While physical control over a document will obviously play a leading role in any case, it is not determinative of the issue of control. Thus, if the record requested is located in a Minister's office, this does not end the inquiry. The Minister's office does not become a "black hole" as contended. Rather, this is the point at which the two-step inquiry commences. Where the documents requested are not in the physical possession of the government institution, the inquiry proceeds as follows.

[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. The Commissioner agrees that the *Access to Information Act* is not intended to capture non-departmental matters in the possession of Ministers of the Crown. 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 on request. These factors include the substantive content of the record, the circumstances under which it was created, and the legal relationship between the government and the record holder. The Commissioner is correct in saying that any expectation to obtain a copy of the record cannot be based on "past practices and prevalent expectations" that bear no relationship on the nature and contents of the record, on the actual legal relationship between the government institution and the record holder, or on practices intended to avoid the application of the Access to Information Act (A.F., at para. 169). 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.<sup>9</sup>

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<sup>9</sup> Ministry inquiry letter, June 16, 2011, p. 2. Emphasis in italics in original; underlined emphasis added by Ministry.

[25] The Ministry acknowledges that the two-step test was developed in the context of records physically located in the Office of the Prime Minister or in a Minister's office, but it argues that the same control test should apply in cases where the public body has physical possession of records that are unrelated to departmental (ministry-related) matters. The Ministry goes on:

The British Columbia Commissioner has previously held that even where a public body has possession of a record, one still must determine whether it has "control" over the requested record. The test applied by the Commissioner in those cases has been the same "control" test that the Commissioner has applied in cases where the public body did not have possession of the records (see Order 02-29, paragraph 49, and Order 02-30, para. 21). As such the Ministry submits that there is no reasonable basis upon which to conclude that the "control" test articulated by the Supreme Court of Canada in the above mentioned case should not apply to cases where a public body has possession of the requested records. As mentioned, though, the Ministry is not taking a position on the issue of whether the Minister's Office is part of the Ministry for purposes of the Act.<sup>10</sup>

[26] Given my conclusions below, it is not necessary for me to address this aspect of the Ministry's submissions. I would, however, point out that the Court was clear in its reasons that the two-step test it articulated was to be applied "[w]here the documents requested are not in the physical possession of the government institution".

### **Analysis**

[27] I do not accept the Ministry's characterization of individual calendar entries as each constituting a separate record. While it is an interesting idea as a theoretical concept, it is not one that strikes me as reflecting a common-sense, practical characterization of the two records that the Ministry actually produced. In this respect, I agree with the journalist that each calendar is a single record (it was generated by the Ministry as such) and that, if the original records were paper day-timers or calendars instead of electronic calendars, there would be no dispute about this.

[28] The evidence before me is that the Ministers made a deliberate decision to integrate MLA appointment information into their Ministry-related calendars on the government's Microsoft Outlook system, rather than maintain a separate calendar in the Legislative Assembly's system. In my view, having done so, that information is contained in, and forms part of, two Ministry records that are in its custody and under its control and are subject to FIPPA. Put somewhat differently, the two severed calendars responsive to the journalist's access request are two government records that just happen to contain information

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<sup>10</sup> Ministry inquiry letter, June 16, 2011, p. 3.



relating to non-Ministry business. Once this type of information is integrated into Ministry records or systems, it can only be severed from those records, if it falls into a category of excepted records under FIPPA.

[29] I observe that government records are no doubt replete with information received from, or concerning, entities or individuals that are not covered by FIPPA. This fact alone is not the basis for severing that information from those records. Here the journalist did not seek production of the calendars from a source not covered by FIPPA, and it was the Ministry which possessed and produced the calendars, as being responsive to the journalist's request.

[30] I would also note that, s. 4(1) of the federal AIA at issue in the *National Defence* case, differs from its equivalent in s. 3(1) of FIPPA in a material way. Section 4(1) provides for a right of access to "any record under the control of a government institution". In contrast, s. 3(1) provides for a right of access to "all records in the custody or under the control of a public body". Notably, some of the requested records in the *National Defence* case (copies of the Prime Minister's daily agendas) were located in government institutions (e.g., the offices of the RCMP), not the Prime Minister's office. The evidence was that the RCMP (for a period of time) routinely received copies of these records. The RCMP did not argue that those records were outside the control of a government institution (that argument was restricted to the records located in the Prime Minister's and Minister's offices). Rather, the RCMP denied access to them relying on ss. 17 and 19 of the federal legislation, provisions that are similar to FIPPA's s. 15 (security) and s. 22 (personal information) provisions.

[31] This highlights a point the journalist makes that the type of information in the responsive records relating to MLA appointments might be severable under one of the exceptions of FIPPA. The Ministry did not rely on any specific FIPPA exemptions, as an alternative to reliance on its "out of scope" and custody or control submissions. As s. 22 is a mandatory exemption, the Ministry must have the opportunity to consider whether it applies. There may also be other exemptions that form a proper basis for withholding some of this information.

[32] The Ministry must therefore make a decision under FIPPA as to whether the journalist is entitled to have access to this withheld information. I make the appropriate order below.

[33] **Exclusion from FIPPA's Scope: Records of the Ombudsperson**—FIPPA excludes records created by, or for, an officer of the Legislature that relate to the officer's functions under an Act. This exclusion appears in s. 3(1)(c) of FIPPA. FIPPA defines "officer of the Legislature" as including the "Ombudsperson".

[34] Order F07-07<sup>11</sup> considered the application of s. 3(1)(c) to records created by the Chief Electoral Officer. That order explained what a public body needs to do to establish that this provision applies:

The first question in such cases is whether the responsive records were created by or for, or were in the custody or under the control of, an officer of the Legislature and, second, whether they related to “the exercise of that officer’s functions under an Act”.<sup>12</sup>

[35] I take the same approach here.

[36] The Ministry submits that the withheld calendar entries in question “were created for the purposes of a meeting between the Minister and the Ombudsman”.<sup>13</sup> The Ministry said nothing more about the issue.

[37] The journalist did not address this point in either of his submissions.

### **Analysis**

[38] It is clear that the Minister’s calendar was not created by the Ombudsperson; employees in the Minister’s Office created it. Further, it was not created for the Ombudsperson; it was created for the Minister. Moreover, the record is not in the custody or under the control of the Ombudsperson.

[39] Previous orders have interpreted exclusion of records of officers of the Legislature to apply to all records within a public body that come into existence as part of an investigation by an officer of the Legislature.<sup>14</sup> In this case, the Ministry has not provided any explicit indication that the meeting between the Minister and the Ombudsperson related to a particular investigation. Having examined the two entries, I note that they do not even refer to the subject matter of the meetings.

[40] I find that the information at issue was not created by or for, or in the custody or under the control of, an officer of the Legislature and does not relate to the exercise of the Ombudsperson’s functions under the *Ombudsperson Act*. Therefore, the Ministry must make a decision under FIPPA as to whether the journalist is entitled to have access to this information as well. I make the appropriate order below.

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<sup>11</sup> [2007] B.C.I.P.C.D. No. 9.

<sup>12</sup> Order F07-07, para. 11.

<sup>13</sup> Ministry’s reply submission, pp. 1-2.

<sup>14</sup> See for example, Order No. 297-1999, [1999] B.C.I.P.C.D. No. 10; Order 01-43 [2001] B.C.I.P.C.D. No. 45.

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**CONCLUSION**

[41] For the reasons given above, under s. 58 of FIPPA, I make the following order:

1. I find that the Ministry has custody and control of the records, including information relating to MLA appointments.
2. I find that s. 3(1)(c) of FIPPA does not apply to the records, including information relating to appointments with the Ombudsperson.
3. I require the Ministry to complete the processing of the request with respect to the information in paras. 1 and 2 and provide a response to the journalist.
4. I require the Ministry to respond to the journalist within 30 days of the date of this order, as FIPPA defines “day”, that is, on or before January 19, 2012 and, concurrently, to copy me on its cover letter to the journalist.

December 7, 2011

**ORIGINAL SIGNED BY**

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Jay Fedorak  
Adjudicator

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