



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

Protecting privacy. Promoting transparency.

Order F16-07

ELECTIONS BC

Elizabeth Barker
Senior Adjudicator

February 22, 2016

CanLII Cite: 2016 BCIPC 9
Quicklaw Cite: [2016] B.C.I.P.C.D. No. 9

Summary: The applicant requested records related to the delegation of the Chief Electoral Officer's powers and duties under the *Local Elections Campaign Financing Act*. He also requested all memorandums of understanding between the Chief Electoral Officer or Elections BC and any other organization, agency or body. Elections BC refused to disclose the requested records under s. 3(1)(c) of FIPPA (records outside the scope of Act). The adjudicator determined that s. 3(1)(c) applied to an event plan and three memoranda of understanding, but not to job descriptions and a delegation matrix. Elections BC was ordered to respond to the applicant's request under Part 2 of FIPPA with respect to the job descriptions and the delegation matrix.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.B.C., 1996, c. 165, ss. 2(1), 3(1)(c) and Schedule 1 (definition of "officer of the legislature"); *Election Act*, R.S.B.C., 1996, c. 106, ss.10, 12, 18(1), 18(9), 252; *Local Elections Campaign Financing Act*, S.B.C. 2014, c. 18, ss. 45, 75, 81, 88; *Interpretation Act*, R.S.B.C., 1996, c. 238, s. 12.

Authorities Considered: B.C.: Order No. 170-1997, 1997 CanLII 1485 (BCIPC); Order 01-43, 2001 CanLII 21597 (BCIPC); Order 03-06, 2003 CanLII 49170 (BC IPC); Order 03-14, 2003 CanLII 49183 (BC IPC); Decision F06-06, 2006 CanLII 32975; Order F07-07, 2007 CanLII 10862 (BCIPC); Order F13-23, 2013 BCIPC 30 (CanLII); Order F14-12, 2014 BCIPC 15; Order F15-49, 2015 BCIPC 52; Adjudication Orders No. 3, 6, 7, 10, 17.

INTRODUCTION

[1] The applicant made two requests for records to Elections BC. The first was for records related to the delegation of the Chief Electoral Officer's powers and duties under the *Local Elections Campaign Financing Act* ("LECFA") to Elections BC employees. The second request was for all memorandums of understanding between the Chief Electoral Officer or Elections BC and any other organization, agency or body.

[2] Elections BC refused to disclose the requested records on the basis that they are outside the scope of FIPPA pursuant to s. 3(1)(c) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The applicant requested a review of this decision by the Office of the Information and Privacy Commissioner ("OIPC"). Mediation did not resolve the issues in dispute, and the applicant requested that they proceed to an inquiry.

ISSUE

[3] The issue in this inquiry is whether the records fall outside the scope of FIPPA pursuant to s. 3(1)(c) of FIPPA. Although s. 57 is silent regarding the burden of proof in cases involving s. 3(1) of FIPPA, I agree with previous orders that have said that the public body bears the burden of establishing that the records are excluded from the scope of FIPPA.¹

DISCUSSION

[4] **Background** - Elections BC is responsible for administering electoral processes in B.C. in accordance with the *Election Act*, LECFA, the *Recall and Initiative Act*, and the *Referendum Act*. The powers, duties and functions of the Chief Electoral Officer are set out in those enactments. They include planning and administering electoral processes (i.e., general elections, by-elections, referendums, initiative petitions and recall campaigns), maintaining and controlling access to the provincial voters list, and administering electoral finance and advertising laws. Section 12(2)(c) of the *Election Act* and s. 88(2) of LECFA authorize the Chief Electoral Officer to delegate, in writing, the authority to exercise any power and perform any duty assigned to the Chief Electoral Officer other than the power to make regulations.

[5] In 2014 the applicant made a complaint to Elections BC about an alleged contravention of s. 45 of LECFA (restrictions on general voting day advertising). The applicant is dissatisfied with how Elections BC carried out its responsibilities

¹ For example: Order 03-06, 2003 CanLII 49170 (BC IPC) at para. 6. Order No. 170-1997, 1997 CanLII 1485 (BCIPC); Order 03-14, 2003 CanLII 49183 (BC IPC); Order F13-23, 2013 BCIPC 30 (CanLII); Order F15-49, 2015 BCIPC 52. See also Adjudication Order No. 7 at para 12.

under s. 75 of LECFA (complaints regarding contraventions of LECFA). He explains that his two access requests are based, in part, on his desire to know if Elections BC lacks adequate and competent resources to enforce compliance with the provisions of LECFA.

[6] **Information in Dispute-** The records in dispute comprise:

1. Job descriptions for the following positions: Deputy Chief Electoral Officer (Funding and Disclosure), Local Elections Campaign Financing Manager, Senior Compliance Specialist, Compliance Officer, and Administrative Assistant.²
2. “CEO Delegated Authorities Matrix”³ setting out which of the Chief Electoral Officer’s functions has been delegated to which senior management team position (“delegation matrix”).
3. “2014 General Local Elections Event Plan” (“event plan”).
4. Three “Memorandum of Understanding” (“MOU”) between the Chief Electoral Officer and, respectively, the Assistant Deputy Attorney General of BC, the RCMP, and the BC Association of Municipal Chiefs of Police. There are also two letters that accompanied the MOUs when Elections BC sent them to the police bodies.

[7] There are also several records that are no longer in dispute because the applicant says in his response submission that he does not object to Elections BC’s decision to withhold them.⁴ Therefore, I did not consider them or Elections BC’s decision to withhold them.

Scope of FIPPA - s. 3(1)(c)

[8] Elections BC is withholding the records under s. 3(1)(c), which states:

- 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:

...

- (c) subject to subsection (3), a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;⁵

² Only the Deputy Chief Electoral Officer (Funding and Disclosure) position also appears in the delegation matrix.

³ Elections BC has disclosed the titles of the records.

⁴ Records 12-31 (as numbered by Elections BC).

⁵ Subsection (3) is not relevant here.

[9] Previous OIPC orders have said that the purpose of s. 3(1)(c) is to facilitate, and prevent interference with, the exercise of an officer of the Legislature's functions under an enactment.⁶ They have also said that in order for s. 3(1)(c) to apply, the following three criteria must be met:⁷

1. An "officer of the Legislature" is involved;
2. The record must have been created by or for an officer of the Legislature, or be in the custody or control of an officer of the Legislature; and
3. In all cases, the record must relate to the exercise of the officer's functions under an Act.

[10] I will apply the above three criteria to the facts of this case.

Is the Chief Electoral Officer an Officer of the Legislature?

[11] The definition of "officer of the legislature" in Schedule 1 of FIPPA includes the Chief Electoral Officer. In addition, s. 4(2) of the *Election Act* states that the Chief Electoral Officer is an officer of the Legislature. I find that the Chief Electoral Officer is clearly an "officer of the legislature" for the purposes of s. 3(1)(c) of FIPPA.

Were the records created by or for the Chief Electoral Officer, or are they in the custody or control of the Chief Electoral Officer?

[12] There is no dispute that the responsive records were created by or for, or are in the custody or control of, the Chief Electoral Officer. This is self-evident from the records themselves.

Do the records relate to the exercise of the Chief Electoral Officer's functions under an Act?

[13] Previous OIPC orders and adjudication decisions of the British Columbia Supreme Court have consistently drawn a distinction between the administrative and operational records of an officer of the Legislature, and said that s. 3(1)(c) applies only to operational records.⁸ Operational records include records specific to a case file, such as case management or tracking sheets and lists, notes, working papers (including draft documents) of a commissioner or staff, and other case-specific records received or created during the course of opening,

⁶ See Order 01-43, 2001 CanLII 21597 (BCIPC) at para 25.

⁷ See Order 01-43, *ibid*; Decision F06-06, 2006 CanLII 32975; Order F14-12, 2014 BCIPC 15.

⁸ Order 01-43, *ibid*, at para. 28; Order F07-07, 2007 CanLII 10862 (BCIPC) at para 14.

Adjudications under Division 2, Part 5 of FIPPA: Adjudication Order No. 3 at para 19; Adjudication Order No. 6 at para 15; Adjudication Order No. 17 at paras. 18-24.

processing, investigating, mediating, settling, inquiring into, considering taking action on or deciding a case.⁹ Administrative records include personnel, competition and office management files and “records related to the management of facilities, property, material, finances, personnel or information systems”.¹⁰

[14] Elections BC argues that all the records at issue are the operational records of the Chief Electoral Officer, so they are excluded from FIPPA pursuant to s. 3(1)(c). Specifically, it submits that some of the records are instruments of delegation, and that such records are operational records because the authority to delegate is in itself an express authority under s. 88 of LECFA.¹¹ In his affidavit evidence, the Chief Electoral Officer says that he delegated authority for all electoral finance matters to the Deputy Chief Electoral Officer (Funding and Disclosure) by way of that position’s job description, the delegation matrix and the event plan. He also says that he delegated powers and duties related to the administration of LECFA to permanent and temporary staff through their job descriptions and the event plan. As for the three MOU, the Chief Electoral Officer says that they relate to the exercise of his statutory responsibility to investigate and approve prosecutions of contraventions of the *Election Act* and LECFA, and that they detail the protocol and process by which he will refer a matter to these other parties.

[15] The applicant submits that delegation is an administrative function, and he disputes that records relating to the delegation of duties are operational records. He submits that the language of the headnote to s. 88 of LECFA, the provision that authorizes delegation under LECFA, supports his view that the legislature considered written delegations to be administrative records. The headnote to s. 88 states: “Part 8 - Administration and Other Matters, Division 1 - Responsibilities and Authorities, Administrative matters”. Further, the applicant submits that the MOU are also records by which the Chief Electoral Officer delegated or transferred his statutory functions to another body, so they are administrative records, not operational records.

[16] First, in my view, the language of the headnote to s. 88 does not assist me in determining whether records related to delegation are operational or administrative for the purposes of s. 3(1)(c) of FIPPA. This is because s. 11 of the *Interpretation Act* states that a headnote to a provision is not part of the enactment, and must be considered to have been added editorially for convenience of reference only.

⁹ Adjudication Order No.17 at para. 22.

¹⁰ Adjudication Order No. 6 at para. 14; Adjudication Order No. 10 at para. 14.

¹¹ Elections BC reply, para. 18.

[17] The issue of Elections BC's operational versus administrative records was previously addressed in Order F07-07.¹² In that case, the applicant was a former deputy district electoral officer whose appointment had been rescinded by the Chief Elections Officer under s. 18(9) of the *Election Act*. The records at issue in that case documented complaints and concerns about the deputy district electoral officer. The former Commissioner found that s. 3(1)(c) applied to the records and they were excluded from the scope of FIPPA. Specifically, he said that the records were "operational" records that formed the basis of the Chief Electoral Officer's decision to rescind the appointment pursuant to s. 18(9) of the *Election Act*. He considered it to be important that the deputy district electoral officer is an "election official" as defined by the *Election Act*, and that the Chief Electoral Officer is required by s. 18(1) to appoint deputy district electoral officers and empowered by s. 18(9) to rescind such appointments. He also noted that the *Election Act* gave the Chief Electoral Officer specific oversight responsibilities in relation to election officials, and he said that this is "an express statutory function which is both essential and unique to the election process and constitutes a critical and core responsibility of the CEO."¹³

[18] Elections BC submits that the records in Order F07-07 were the actual records rescinding the delegation in that instance, and that Order F07-07 states that instruments of delegation are operational records that are excluded from FIPPA pursuant to s. 3(1)(c).¹⁴ The applicant disputes this and submits that the records in Order F07-07 were not instruments of delegation like the records at issue here.

[19] In my view, the records at issue in this case differ significantly from those in Order F07-07. The records at issue in Order F07-07 were the records that documented the complaints and concerns about the deputy district electoral officer's performance. Those complaints and concerns informed the Chief Electoral Officer's decision under s. 18(9) to rescind the appointment. Nothing indicates that the records in Order F07-07 were the actual instrument(s) that rescinded the appointment or any delegation.¹⁵ Therefore, I am not persuaded that Order F07-07 is directly applicable in this case, or that it states that instruments of delegation are operational records.

[20] I will now address whether the specific records at issue in this case are operational or administrative records.

¹² Order F07-07, 2007 CanLII 10862 (BCIPC).

¹³ *Ibid*, at para. 20-24.

¹⁴ Elections BC initial submissions, para. 21 and 25.

¹⁵ Presumably the applicant in that case had already received the actual record that rescinded her appointment, hence her desire to seek more information by way of an access request.

[21] Job descriptions – There are five job descriptions at issue here, which Elections BC submits are operational records because they are instruments of delegation.

[22] The job descriptions in this case are records that clearly relate to personnel management, and their format is no different than other BC public service job descriptions. In my view, administrative records include those related to staffing and clarifying work expectations and roles, with job descriptions falling into this category. Issuing job descriptions and assigning responsibilities to staff are the ordinary administrative and personnel management tasks of all employers, and they are not unique functions related to the statutory mandate of the officers of the Legislature. I find that the job descriptions are administrative records, so s. 3(1)(c) does not apply to them and they are within the scope of FIPPA.

[23] Delegation matrix - Elections BC also submits that the delegation matrix is an operational record. It is a table that lists work “functions” in the left hand column and nine senior management team job titles along the top row. There is a tick mark indicating which function has been delegated to which job position. It is signed by the Chief Electoral Officer.

[24] The *Election Act* and the LEFCA confer a number of duties expressly on the Chief Electoral Officer, along with the powers to carry them out. They also give the Chief Electoral Officer the ability to delegate his powers and duties. This ability to delegate acknowledges the inability of one individual to carry out all of the statutorily imposed duties as well as the administrative exigencies of planning and administering electoral processes, maintaining the provincial voters list, and administering electoral finance and advertising laws. In my view, the delegation matrix is an administrative record of who the Chief Electoral Officer has chosen to assist with his various functions. Therefore, I find that s. 3(1)(c) does not apply, and the delegation matrix is within the scope of FIPPA.

[25] Event plan - I have reviewed this record and it clearly relates to the Chief Electoral Officer's operational functions of planning electoral processes and administering campaign financing provisions under LECFA. I find that this record relates to the exercise of the Chief Electoral Officer's functions under an Act and that s. 3(1)(c) applies to it. Therefore, FIPPA does not apply to this record.

[26] MOU – Two of the MOU detail the protocol for referring alleged contraventions of the *Election Act* to the police for investigation. The third MOU sets out the protocol for referring alleged contraventions of the *Election Act* to the Criminal Justice Branch for prosecution.¹⁶ There are also two letters that accompanied the MOU that were sent to the police bodies. In my view, the MOU and the two letters clearly relate to the exercise of the Chief Electoral Officer's

¹⁶ Elections BC's submissions disclose this information about the content of the three MOU.

functions under s. 252 of the *Election Act* (prosecution of offences) and s. 81 of the LECFA (BC chief electoral officer authority in relation to prosecutions). I find that they are operational records for the purposes of s. 3(1)(c), and FIPPA does not apply to them.

[27] *Summary* - In summary, the Chief Electoral Officer is an officer of the Legislature and the records at issue were created by or for him, or are in his custody and control. I find that the event plan, the MOU, and the two accompanying letters are operational records that relate to the exercise of the Chief Electoral Officer's functions under the *Election Act* and LECFA, so they meet the requirements of s. 3(1)(c). Therefore, they are excluded from the scope of FIPPA. However, I find that the job descriptions and the delegation matrix are administrative records, so they do not meet the requirements of s. 3(1)(c), and FIPPA applies to them.

CONCLUSION

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

1. I confirm Elections BC's decision that the event plan and the three MOU and their two accompanying letters are excluded from FIPPA pursuant to s. 3(1)(c).
2. I require Elections BC to respond to the applicant's request with respect to the job descriptions and the delegation matrix in compliance with Part 2 of FIPPA.
3. I require Elections BC to comply with this order by April 6, 2016. Elections BC must concurrently copy the Registrar of Inquiries on its letter to the applicant regarding its decision.

February 22, 2016

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

OIPC File No.: F14-60055