



Order F20-11

ELECTIONS BC

Laylí Antinuk
Adjudicator

April 20, 2020

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Summary: Elections BC requested that the OIPC decline to conduct an inquiry into Elections BC’s decision to refuse an applicant access to certain requested records. The records relate to an investigation conducted by Elections BC under the *Election Act*. The adjudicator found it plain and obvious that the requested records fell outside the scope of FIPPA pursuant to s. 3(1)(c) because Elections BC had created or received them as part of its statutorily mandated functions. Therefore, under s. 56, the adjudicator decided that the OIPC will not conduct an inquiry into this matter.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(c), 56(1) and Schedule 1; *Election Act*, s. 10(1), 12(2)(e), 18, 22 and 276(1)(c).

INTRODUCTION

[1] An access applicant requested records related to an investigation conducted by Elections BC.¹ Elections BC refused access to the records, asserting that they fall outside the scope of the *Freedom of Information and Protection of Privacy Act* (FIPPA) pursuant to s. 3(1)(c). The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review Elections BC’s decision. Elections BC then made an application to the OIPC, asking the commissioner to exercise his discretion under s. 56 not to conduct an inquiry.²

[2] Under s. 56, the OIPC can decide whether or not to conduct an inquiry. Elections BC has requested that the OIPC decline to conduct an inquiry in this case because it is plain and obvious that the requested records fall outside the

¹ Under FIPPA, Elections BC is a public body, the head of which is the Chief Electoral Officer (see Schedule 2). For convenience and consistency with past OIPC orders, I will use the terms “Chief Electoral Officer” and “Elections BC” interchangeably throughout this order.

² Whenever I refer to section numbers in this order, I am referring to sections of FIPPA unless otherwise stated.

scope of FIPPA. Both parties provided submissions about whether the OIPC should conduct an inquiry. This order addresses Elections BC's s. 56 application.

ISSUE

[3] In this order, I will decide whether the OIPC should exercise its discretion under s. 56 to decline the access applicant's request for an inquiry because it is plain and obvious that s. 3(1)(c) applies to the records in dispute.

[4] When it comes to the burden of proof for applications under s. 56, the party asking the OIPC not to conduct an inquiry must establish why the OIPC should grant that request.³ The other party – in this case, the access applicant – does not have a burden to show why the inquiry should proceed. However, if it appears obvious from past decisions that an inquiry will confirm that the public body properly applied FIPPA, the access applicant must provide “some cogent basis for arguing the contrary.”⁴

DISCUSSION

Background

[5] In October 2019, Elections BC released a public statement regarding an investigation (the investigation) it had conducted under the *Election Act* (the Act).⁵ The access applicant then wrote to Elections BC requesting access to records related to the investigation. Elections BC responded by saying that all records related to investigations performed under the authority of the Act are operational records of the Chief Electoral Officer, who is an officer of the Legislature. As such, the records fall outside the scope of FIPPA pursuant to s. 3(1)(c). The access applicant asked Elections BC to reconsider. Elections BC continued to withhold the records, citing s. 3(1)(c).

Records in dispute

[6] The records in dispute consist of a complaint letter, nine emails and an investigative report, all of which relate to the investigation.⁶ Elections BC received the complaint letter from a Member of the Legislative Assembly (the MLA) and began the investigation as a result. The nine emails were sent between Elections BC and the MLA. The investigative report totals four pages and outlines the steps taken in the investigation, the information and evidence obtained, and contains an analysis and conclusion about the complaint.

³ Order F16-37, 2016 BCIPC 41 at para. 10. See also Decision F08-11, 2008 CanLII 65714 (BC IPC) at para. 8.

⁴ Decision F08-11, 2008 CanLII 65714 (BC IPC) at paras. 8 and 11. See also Decision F07-04, 2007 CanLII 67284 (BC IPC) at paras. 17-18.

⁵ The information in this paragraph comes from Elections BC's initial submission at paras. 1-6.

⁶ The information in this paragraph comes from the Director's Affidavit at paras. 9-10.

[7] Elections BC did not provide a copy of the records for my review. Instead, it provided affidavit evidence from its Director of Investigations (Director) who conducted the investigation and wrote the investigative report. I consider this evidence sufficient for present purposes.

Discretion to conduct an inquiry – section 56

[8] Section 56(1) states:

If the matter is not referred to a mediator or is not settled under section 55, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry. [emphasis added]

As highlighted above, s. 56 uses the word “may” which gives the OIPC the discretion to decide whether or not to conduct an inquiry. The OIPC has exercised its discretion in favour of not conducting an inquiry for a variety of reasons in the past. For example, the OIPC has declined to conduct inquiries in situations where the records at issue plainly and obviously fall outside the scope of FIPPA, or where the legal principles of mootness, *res judicata* or issue estoppel clearly apply.⁷ In each instance, it must be clear that there is no arguable case that merits adjudication in an inquiry.⁸

[9] In this case, Elections BC argues that the requested records plainly and obviously fall outside the scope of FIPPA under s. 3(1)(c), so the OIPC should decline to conduct an inquiry.⁹ Elections BC submits that there is clearly no arguable case that merits adjudication.¹⁰ The access applicant contends that s. 3(1)(c) does not preclude Elections BC from providing the records – which he argues are of public interest – and says transparency and openness foster public trust in democracy.¹¹

Exclusion from FIPPA’s scope – section 3(1)(c)

[10] Section 3(1)(c) serves to facilitate and prevent interference with the exercise of an officer of the Legislature’s functions under an enactment.¹² It 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:

...

⁷ Decision F08-11, 2008 CanLII 65714 (BC IPC) at para. 8. See also Decision F07-04, 2007 CanLII 67284 (BC IPC) at para. 16.

⁸ *Ibid.*

⁹ Elections BC’s initial submission at paras. 8, 23 and 25.

¹⁰ *Ibid* at paras. 25-26.

¹¹ Access applicant’s response submission at paras. 2-4, 6, and 14.

¹² Order 01-43, 2001 CanLII 21597 (BC IPC) at para. 25; Order F16-07, 2016 BCIPC 9 at para. 9.

(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;¹³

[11] For s. 3(1)(c) to apply, three criteria must be met:¹⁴

1. An officer of the Legislature (officer) must be involved;
2. The records must either:
 - a. have been created by or for the officer; or
 - b. be in the custody or control of the officer; and
3. The records must relate to the exercise of the officer's statutory functions.

[12] Beginning with the first criterion, FIPPA defines "officer of the Legislature" as including the Chief Electoral Officer (CEO).¹⁵ The *Act* also states that the CEO is an officer of the Legislature.¹⁶ For the purposes of s. 3(1)(c), an officer's functions under an enactment extend to duties, powers and functions that the officer can delegate to others, including staff or consultants.¹⁷ Under the *Act*, the CEO can appoint the individuals necessary to enable the CEO to perform his or her duties of office and can delegate his or her statutory powers to those appointees.¹⁸ Taking all this into account, I find it abundantly clear that the CEO and his or her delegates – i.e. Elections BC – meet the first requirement under s. 3(1)(c). The access applicant does not dispute this.

[13] I find it equally clear that Elections BC created or received the records and has them in its custody and control. The access applicant does not dispute this either.

[14] The final criterion requires that the records relate to the exercise of Elections BC's functions under an enactment. In discussing this criterion, previous decisions of the OIPC and the BC Supreme Court have drawn a distinction between the administrative and operational records of an officer.¹⁹

¹³ Subsection (3) is not relevant here, so I have not included it. Subsection (3) relates to an officer of the Legislature's obligations regarding the collection, protection and retention of personal information.

¹⁴ Order 01-43, 2001 CanLII 21597 (BC IPC) at para. 9.

¹⁵ Schedule 1 of FIPPA contains its definitions.

¹⁶ Section 4(2) of the *Election Act*.

¹⁷ Adjudication Order No. 1 at para. 20. This decision is available on the OIPC website at <https://www.oipc.bc.ca/adjudications/1164>. See also Order F07-07, 2007 CanLII 10862 (BC IPC) at para. 13.

¹⁸ Sections 10(1), 12(2)(e), 18 and 22(1) of the *Election Act*.

¹⁹ Order 01-43, 2001 CanLII 21597 (BC IPC) at paras. 28-30.

Operational records relate to the exercise of an officer's statutory functions and fall outside the scope of FIPPA per s. 3(1)(c); whereas, administrative records do not.²⁰

[15] Operational records include case-specific records received or created during the course of opening, processing, investigating, mediating, settling, inquiring into, considering taking action on or deciding a case.²¹ For example, previous orders have found that records relating to the investigation and disposition of complaints by the Ombudsperson under the *Ombudsperson Act* are operational records that fall outside the scope of FIPPA under s. 3(1)(c).²² Similarly, past orders have held that records related to Elections BC's statutorily mandated functions of planning electoral processes and administering campaign financing provisions under the *Local Elections Campaign Financing Act* are operational records that FIPPA does not apply to, as are records related to Elections BC's prosecutorial functions under the *Act*.²³

[16] In contrast, administrative records do not relate to specific case files, but instead include things like personnel, competition and office management files and records related to the management of facilities, property, finances, or information systems.²⁴ For instance, a previous OIPC order found that job descriptions for jobs with Elections BC were administrative records to which FIPPA applied.²⁵

[17] In this case, Elections BC submits that the requested records are case-specific records related to its investigative powers under the *Act*. Therefore, Elections BC says the records undoubtedly qualify as the operational records of an officer, so s. 3(1)(c) plainly applies.²⁶ For the reasons that follow, I agree.

[18] The *Act* gives Elections BC the authority to conduct investigations into any matter that might constitute a contravention of the *Act*.²⁷ According to the uncontested evidence, in the investigation at issue, the Director (a delegate of the CEO) investigated whether contraventions of two specific provisions of the *Act* had occurred.²⁸ The investigation began when Elections BC received the

²⁰ Adjudication Order No.17 at paras. 19-20. This decision is available on the OIPC website at <https://www.oipc.bc.ca/adjudications/1180>. See also Order F07-07, 2007 CanLII 10862 (BC IPC) at para.14.

²¹ Adjudication Order No.17, *ibid* at para. 22.

²² Order F14-12, 2014 BCIPC 15 at paras. 10-11; Order 01-42, 2001 CanLII 21596 (BC IPC) at paras. 13 and 17; and Order 02-12, 2002 CanLII 42437 (BC IPC) at para. 33.

²³ Order F16-07, 2016 BCIPC 9 at paras. 25-26.

²⁴ Adjudication Order No. 6 at paras. 14-15. This decision is available on the OIPC website at <https://www.oipc.bc.ca/adjudications/1169>. See also Adjudication Order No. 10 at para. 14, available online at <https://www.oipc.bc.ca/adjudications/1173>.

²⁵ Order F16-07, 2016 BCIPC 9 at para. 22.

²⁶ Elections BC's initial submission at paras. 20, 23 and 25.

²⁷ Section 276(1)(c) of the *Election Act*.

²⁸ The information in this paragraph comes from the Director's Affidavit at paras. 4 and 7-9.

complaint letter from the MLA. During the course of the investigation, the Director interviewed individuals, collected and analysed evidence and prepared the investigative report. As described above, the responsive records comprise the MLA's complaint letter, emails sent between the MLA and Elections BC, and the investigative report.

[19] I have no hesitation whatsoever in concluding that s. 3(1)(c) plainly and obviously applies to the records, placing them squarely outside FIPPA's scope. Section 3(1)(c) clearly applies to the records because a delegate of an officer of the Legislature created or received them in performing the officer's statutorily mandated investigatory function under the *Act*. Numerous past decisions have found that s. 3(1)(c) excludes precisely these types of records from the scope of FIPPA.²⁹ Therefore, I find that an inquiry would simply confirm Elections BC's decision to withhold the records from the access applicant. Elections BC has discharged its burden to show why the OIPC should exercise its discretion to decline to conduct an inquiry into this matter.

[20] In my view, the access applicant has not provided a cogent basis for arguing that the outcome of an inquiry would do anything other than confirm Elections BC's decision to withhold the records. In his submission, the access applicant says Elections BC "is conveniently hiding behind Section 3 and its status as an Office of the Legislature, yet it forgets that Section 3 does not preclude Elections BC from disclosing the record."³⁰ From this statement, I understand the access applicant to concede that the responsive records fall outside the scope of FIPPA.

[21] The access applicant also refers to the public's right to know and highlights the importance of transparency and openness to the public's trust in democracy. He encourages the OIPC to balance the public interest in transparency with the cost of secrecy. However, making a decision about whether or not s. 3(1)(c) applies does not require weighing competing interests as the access applicant suggests. The Legislature has already done this and made the public policy decision about which interests will prevail. As mentioned previously, the Legislature enacted s. 3(1)(c) in order to facilitate and prevent interference with the vital, statutorily mandated work performed by officers. To this end, the Legislature ensured that FIPPA would not apply to the operational records of officers.

²⁹ For examples, see Order F14-12, 2014 BCIPC 15 at paras. 10-11; Order 01-42, 2001 CanLII 21596 (BC IPC) at paras. 13 and 17; Order 02-12, 2002 CanLII 42437 (BC IPC) at para. 33; Order F16-07, 2016 BCIPC 9 at paras. 25-26; Decision F06-06, 2006 CanLII 32975 (BC IPC) at para. 14; Order 01-43, 2001 CanLII 21597 (BC IPC) at paras. 38-42.

³⁰ The information summarized from the access applicant's arguments in this paragraph and the next comes from his response submission at paras. 2, 4-7, 9-13, and 15-20.

[22] Again, I find it abundantly clear that s. 3(1)(c) applies, so the disputed records fall outside the scope of FIPPA. I note that the applicant does not, in fact, contest this. He has not provided any cogent basis for conducting an inquiry in this case.

[23] In conclusion, I find it plain and obvious that s. 3(1)(c) applies to the requested records. In my view, there is no arguable case that merits adjudication in an inquiry. Therefore, the OIPC will not conduct an inquiry into this matter.

CONCLUSION

[24] For the reasons given above, I have decided that this matter will not proceed to inquiry under Part 5 of FIPPA.

April 20, 2020

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

OIPC File No.: F19-81322