

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 297-1999
March 3, 1999**

INQUIRY RE: Request for records in the custody of the Ministry of Forests that had been sent to the Ombudsman

**Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: <http://www.oipcbc.org>**

1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on November 27, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of the Ministry of Forests' (the Ministry) application of section 3(1)(c) of the Act to a request for records relating to information provided by the Ministry to the Office of the Ombudsman.

2. Documentation of the inquiry process

On January 26, 1998 the applicant requested "all records relating to the timber cruise computations as related to the information given to the Ombudsman. These calculations differ from any other information released previously."

The Ministry of Forests responded in a letter dated June 10, 1998 that the records requested were excluded on the basis of section 3(1)(c) of the Act. The Ministry added:

Notwithstanding the above, all information given to the Office of the Ombudsman has been released to you in the past with the exception of a covering letter and a report created by the ministry for that office.

On July 9, 1998 the applicant requested a review by my Office. The ninety-day period expired on October 7, 1998. On October 6, 1998 the applicant requested that the matter proceed to an inquiry before me. The applicant and the Ministry agreed to extend the period to October 30, 1998. The Notice of Inquiry was issued on October 21, 1998. The Office of the Ombudsman was notified under section 54 of the Act. On October 21, 1998 our Office notified the parties that the records in dispute could be characterized as a

February 19, 1997 letter from the Ministry of Forests to an Ombudsman Officer and forty-two pages of attachments.

The initial submissions were received on November 4, 1998. After the parties had provided their initial submissions, the Office of the Ombudsman notified this office of an apparent discrepancy between the records the Ministry identified as having sent to the Ombudsman and those records the Ombudsman identified as having received. The inquiry was extended to November 27, 1998 to permit the Ministry time to address the discrepancy. On November 24, 1998 it provided my office with copies of the records in dispute. On that day, our Office notified the parties of the new list of records in dispute. The parties provided their reply submissions on November 26, 1998.

3. Issue under review and the burden of proof

The issue under review in this inquiry concerns the Ministry's application of section 3(1)(c) of the Act to decide that records responsive to the applicant's request were outside the scope of the Act.

The relevant section of the Act has since been amended, but at the time the Ministry replied to the request for records, it read as follows:

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) a record that is created by or is in the custody of an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;

....

Section 57 of the Act, which deals with burdens of proof, is silent as to the burden of proof where a public body has relied on section 3(1)(c) of the Act. For reasons expressed in Order No. 170-1997, June 12, 1997, I find that the Ministry has the burden of proof. Accordingly, it is up to the Ministry to prove that the withheld records are not covered by the Act by the operation of section 3(1)(c).

4. The records in dispute

The records in dispute can be characterized as a series of four letters (one with attachments), a fax with attachments, and a handwritten note with attachments from the Ministry of Forests to the Office of the Ombudsman during the period of November 20, 1995 to August 21, 1997.

The following is a detailed list of the records in dispute as provided to the parties:

- a) an August 21, 1997 letter from the Ministry of Forests to an Ombudsman Officer (1 page);
- b) a February 19, 1997 letter from the Ministry of Forests to an Ombudsman Officer (3 pages), a list of enclosures (1 page), and 17 pages of attachments;
- c) a February 3, 1997 letter from the Ministry of Forests to an Ombudsman Officer (2 pages);
- d) a December 20, 1996 letter from the Ministry of Forests to an Ombudsman Officer (2 pages);
- e) a November 12, 1996 fax cover sheet letter from the Ministry of Forests to an Ombudsman Officer (1 page), and 3 pages of attachments; and
- f) a November 20, 1995 cover sheet from the Ministry of Forests to an Ombudsman Officer (1 page), and 13 pages of attachments.

5. The applicant's case

The applicant's view is that the records in dispute are wrongly characterized as Ombudsman's records, since they were created at a time when he was engaged in an ongoing dispute with the Ministry "regarding stumpage rebate owed to Western Forest Products." At that point he was involved in dispute resolution with both the Ministry and the Ombudsman. In the applicant's view, the "records in question were created as a result of negotiations initiated by the Ministry of Forests to substantiate the position taken by the Ministry of Forests in those negotiations."

The applicant's position is that the records in dispute were created by the Ministry and placed in the possession of the Ombudsman and "have neither a sole or a dominant purpose related to" the work of an Officer of the Legislature. The submission on his behalf states:

[The applicant] was instrumental in the investigation conducted by the Ombudsman in relation to which the records previously disclosed by the B.C. Ministry of Forests were made. It is [the applicant's] intent that provision of the requested records will enable [him] to assist in the investigation of particularly determination [*sic*] of the factual basis upon which the calculations provided by the B.C. Ministry of Forests to the Ombudsman were made.

6. The Ministry of Forests' case

The Ministry states that all of the records in dispute were "sent in response to a letter from an Ombudsman Officer requesting information as part of an investigation into a complaint made by the Applicant." (Submission of the Ministry, paragraph 4.01, and

the Reply Submission of the Ministry) The Ombudsman Officer was acting under authority delegated by the Ombudsman herself. Thus the Ministry submits “that the Record in Dispute is outside the scope of the Act and the Commissioner does not have the jurisdiction to order its disclosure.” (Submission of the Ministry, paragraph 5.04) See Order No. 188-1997, August 22, 1997; Order No. 197-1997, November 14, 1997; and Order No. 216-1998, February 27, 1998.

7. The Acting Ombudsman’s case

The Acting Ombudsman submits that the records in dispute pertain to an investigation undertaken by one of her officers, a process for which confidentiality is critical. Any disclosure of resulting records is solely at the discretion of the Ombudsman:

“...[i]t is the Ombudsman’s position that section 3(1)(c) of the *Freedom of Information and Protection of Privacy Act*, both as amended and in its previous wording, includes all records that come into existence as part of an investigation or that relate to her work or that of her delegates.”
(Submission of the Acting Ombudsman, paragraph 8)

The Ombudsman’s office refers in particular to Order No. 152-1997, March 4, 1997; Order No. 170-1997, June 12, 1997; Order No. 188-1997, August 22, 1997; Order No. 197-1997, November 14, 1997; and Order No. 216-1998, February 27, 1998.

8. Discussion

The request for information was made on January 26, 1998. The Ministry responded on June 10, 1998. Since the amendment of section 3(1)(c) of the Act was proclaimed in force on July 1, 1998, this inquiry must be determined on the basis of the former wording of section 3(1)(c).

It is clear from a letter submitted to me on an *in camera* basis that the Ministry created the records in dispute, or at least some of them, in response to a request from the Ombudsman Officer, who was investigating a complaint made by the person who is the applicant in this inquiry. The Ministry also clearly sent copies of previously existing records to the Ombudsman Officer conducting the investigation. In my view, these two types of records should be treated differently by the Ministry in response to an access request.

I have reviewed all records in dispute in this inquiry (see the description above). While all letters and fax cover sheets created by or in the custody of an Ombudsman Officer are clearly excluded by section 3(1)(c) of the Act, as are any attachments created pursuant to the Ombudsman’s investigation (items (a) through (d) in particular), I have serious reservations about the status of those attachments which are copies of records in existence at the Ministry before the Ombudsman’s investigation commenced (items (e) and (f), and eight pages of item (b)). An applicant has the right to request access to all

relevant records of a public body that were in existence prior to the launching of an investigation by an Officer of the Legislature.

In this connection, I do not accept the Acting Ombudsman's formulation:

While ...the Ministry could have theoretically, and may well have created some of the information at issue here in contexts other than an Ombudsman investigation, the assemblage, creation and production of it *in the form* sent to the Ombudsman's Office was in direct response to inquiries from an Ombudsman Officer in the course of an investigation. The attachments to correspondence to this Office are in fact part of unique responses to the investigative process, although some are copies of records that may have been created originally in non-investigative circumstances. (Reply Submission of the Acting Ombudsman, paragraph 3)

The Acting Ombudsman further submits that section 3(1)(c) "includes all records that come into existence as part of an investigation...." (Submission of the Acting Ombudsman, paragraph 8) I agree that this is clearly the case with respect to the new language of section 3(1)(c). I also agree that this is the case with respect to records created specifically for the purposes of an Ombudsman investigation under the former section 3(1)(c). (See Order No. 170-1997) However, I do not accept that the former section 3(1)(c) applies to records which existed prior to an Ombudsman's investigation and which do not owe their existence to such an investigation. The fact that a public body forwards such documents to the Ombudsman does not alter the underlying nature of those documents as being disclosable under the Act, subject to the applicable exceptions. In my view, the rationale for extending confidentiality to records created for the purposes of an investigation by an Officer of the Legislature does not apply to such documents.

The obvious difficulty with the approach of the Ombudsman is that the request for access to records was made to the Ministry and not to the Office of the Ombudsman. It seems to me that the prudent course of action for a public body notified of an Ombudsman's investigation would be to create a separate file for all correspondence with an Ombudsman Officer, including any necessary copies of previously existing records, so that an applicant's right of access to the public body's records would not be restricted. It would then be relatively easy for a public body to respond to an access request for records already in existence, even if some of them had been copied to the Ombudsman. A public body should not, of course, try to thwart an applicant's right of access by failing to keep copies of all such records.

For the purposes of as much clarity as possible, this decision stands for the following propositions with respect to the former language of section 3(1)(c) of the Act:

1. A record created by a public body for the purposes of an Ombudsman investigation is covered by section 3(1)(c) of the Act. In this case, that covers items (a) through (d) and the fax cover sheets for items (e) and (f) of the records

in dispute, except for certain portions of the attachments to item (b) which pre-date the investigation.

2. A previously existing record of a public body, in the custody of a public body, that is sent to the Ombudsman's office during the course of an investigation is not covered by section 3(1)(c). In this case, that covers the attachments to items (e) and (f), and certain portions of the attachments to item (b).
3. An applicant has a right of access to previously existing records from a public body that may also have been sent to the Ombudsman's office as part of an investigation by it. Thus, in this case, calculations of stumpage, or an equivalent record, made in earlier years by the Ministry with respect to the applicant's ongoing issues with the Ministry are disclosable to the applicant, even if also held by the Ombudsman. This refers to the attachments to items (e) and (f), and eight pages of the attachments to item (b), since the applicant asked for "all records relating to the timber cruise computations as related to the information given to the Ombudsman. These calculations differ from any other information released previously."

9. Order

I find that the Ministry of Forests has properly applied section 3(1)(c) of the Act to items (a) through (d) and the cover pages for items (e) and (f) of the records in dispute and is authorized to refuse access to certain records withheld under that section with the exception of certain pages in the attachments to item (b). Under section 58(2)(b), I confirm the decision of the Ministry of Forests to refuse access to items (a) through (d) and the cover pages for items (e) and (f) of the records in dispute, except for the pages that I have identified in the attachments to item (b).

I find that the Ministry of Forests has not properly applied section 3(1)(c) of the Act to the pages identified in the attachments to item (b), and the attachments to items (e) and (f) of the records in dispute, and was not authorized to refuse access to these records. Under section 58(2)(a) of the Act, I require the Ministry of Forests to give the applicant access to those records that I have identified for the Ministry, and under section 52(3)(a) of the Act, I require the Ministry to perform its duties under sections 4(2) and 8(1) of the Act with respect to those records.

David H. Flaherty
Commissioner

March 3, 1999