OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 00-29

INQUIRY REGARDING THE MEMBERS' CONFLICT OF INTEREST COMMISSIONER

David Loukidelis, Information and Privacy Commissioner
July 31, 2000

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Summary: Applicant sought access to information from the commissioner under the *Members' Conflict of Interest Act*, who declined to respond on the basis that he was not a public body under the *Freedom of Information and Protection of Privacy Act*. Although an "officer of the Legislative Assembly" under the *Members' Conflict of Interest Act*, the conflict commissioner is designated as a public body under paragraph (b) of the *Freedom of Information and Protection of Privacy Act*, Schedule 1 definition of "public body". He is not excluded by reference to "the office of a person who is a member or officer of the Legislative Assembly" in paragraph (d) of that definition. Conflict commissioner ordered to respond to applicant's access request.

Key Words: Public body – officer of the Legislative Assembly – officer of the Legislature.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3, 79, Schedule 1 definitions of "public body" and "officer of the "Legislature"; *Members' Conflict of Interest Act*, s. 14; *Constitution Act*, ss. 39, 50(1); *Interpretation Act*, s. 2(1), s. 29, definitions of "Legislative Assembly" and "Legislature".

Authorities Considered: B.C.: *Adjudication Order No. 3* (June 30, 1997, Levine J.); *Adjudication Order No. 1* (September 6, 1996, Esson C.J.); *Adjudication Order No. 5* (September 22, 1997, Levine J.); *Adjudication Order No. 6* (November 10, 1997, Bauman J.); *Adjudication Order No. 7* (January 5, 1998, D. Smith J.); *Adjudication Order No. 2* (October 2, 1996, Bauman J.).

Cases Considered: *New Brunswick Broadcasting Co.* v. *Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Harvey* v. *New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *Tafler* v. *British Columbia (Commissioner of Conflict of Interest)* (1998), 48 B.C.L.R. (3d) 328 (C.A.); *Cope & Taylor* v. *Scottish Union & National Insurance Company* (1897), 5 B.C.R. 329 (C.A.); *Mollwo March & Company* v. *Ct. of Wards*, L.R. 4 P.C. (J.C.P.C.)

1.0 INTRODUCTION

This inquiry concerns the question of whether the *Freedom of Information and Protection of Privacy Act* ("Act") applies to the office of the commissioner appointed under the *Members' Conflict of Interest Act* ("Conflict Commissioner").

On April 14, 2000, the applicant – the news editor for 'Monday Magazine' – made the following request for access to records to the Conflict Commissioner:

> This is to request under the Freedom of Information and Protection of Privacy Act the following records:
>
> (i) spending by your office to date on professional fees, including legal fees for the inquiry concerning MLA Glen Clark. I would like a breakdown of who was paid and how much.
>
> (ii) total spending by your office from August 1, 1997 till today on professional fees. Again, I would like a breakdown of names and amounts.
>
> I request that any fees be waived.

The Conflict Commissioner's response, dated April 17, 2000, said the following:

> I am not a public body, but an Officer of the Legislature, and neither I nor my office are subject to the Act.

In other words, the Conflict Commissioner declined to respond to the applicant's access request under the Act. (His submissions in this inquiry confirm that reference to the "Legislature" in his response to the applicant should be read as a reference to "Legislative Assembly".) This prompted the applicant to request a review, under s. 52 of the Act, of the Conflict Commissioner's decision.

2.0 ISSUE

The issue to be decided here is whether the Conflict Commissioner, or his office, is a "public body" within the meaning of the Act.

3.0 DISCUSSION

3.1 Statutory Framework – I will first set out statutory provisions that frame the issue in this inquiry.

Relevant Access Act Provisions

Section 3(1) of the Act provides that it applies to all records in the custody or under the control of a public body (other than the classes of records described in ss. 3(1)(a) to (i)).

Section 3(1) reads 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:
>
> (a) a record in a court file, a record of a judge of the Court of Appeal, Supreme Court or Provincial Court, a record of a master of the Supreme Court, a record of a justice of the peace, a judicial administration record or a record relating to support services provided to the judges of those courts;
>
> (b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity;
>
> (c) 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;
>
> (c.1) a record that is created by or for, or is in the custody or control of, the Children's Commission and that relates to the exercise of the commission's functions under the *Childrens' Commission Act*;
>
> (d) a record of a question that is to be used on an examination or test;
>
> (e) a record containing teaching materials or research information of employees of a post-secondary educational body;
>
> (f) material placed in the British Columbia Archives and Records Service by or for a person or agency other than a public body;
>
> (g) material placed in the archives of a public body by or for a person or agency other than the public body;
>
> (h) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;
>
> (i) a record of an elected official of a local public body that is not in the custody or control of the local public body.

The theme of records in the "custody or under the control" of a public body is continued in s. 4(1) of the Act. That section provides that anyone who makes a request under s. 5 of the Act has "a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant". It follows that a person, agency, office or other entity must be a "public body" in order to be subject to the Act.

The term "public body" is defined as follows in Schedule 1 to the Act:

> "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
>
> 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.

Schedule 2 to the Act contains a list of public bodies and their heads. (The "head" of a public body is the person or body primarily charged under the Act with discharging the public body's powers, duties and functions under the Act.) Schedule 2 lists as a public body the "Office of the Commissioner appointed under the *Members' Conflict of Interest Act*" and lists the "Commissioner" as the head.

Schedule 1 to the Act contains the following definition of the term "officer of the Legislature":

> "officer of the Legislature" means the Auditor General, the Child, Youth and Family Advocate, the Commissioner appointed under the *Members' Conflict of Interest Act*, the police complaint commissioner appointed under Part 9 of the *Police Act*, the Information and Privacy Commissioner, the Chief Electoral Officer or the Ombudsman;

The definition of "officer of the Legislature" expressly includes the Conflict Commissioner. This definition functions, under s. 3(1)(c), to exclude from the Act's application any 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".

Leaving aside, for the moment, any consideration of paragraph (d) of the Schedule 1 definition of "public body", the following conclusions can be drawn from the above-quoted provisions of the Act:

1. the Conflict Commissioner is an officer of the Legislature;

2. the office of the Conflict Commissioner is a public body;

3. the Conflict Commissioner is the head of that public body;

4. any record created by or for the Conflict Commissioner, or that is in the custody or control of the Conflict Commissioner, that relates to the exercise of his functions under the *Members' Conflict of Interest Act,* is excluded from the Act by s. 3(1)(c).

Members' Conflict of Interest Act Provisions

Section 14(1) of the *Members' Conflict of Interest Act* provides that there must be appointed "a commissioner who is an officer of the Legislative Assembly". This is the Conflict Commissioner.

In the Act, therefore, the Conflict Commissioner is listed as a "public body" and is defined as an "officer of the Legislature". However, in the *Members' Conflict of Interest Act* he is appointed as an "officer of the Legislative Assembly" and the Act contains an exclusion from the definition of "public body" for the offices of "officers of the Legislative Assembly".

Interpretation Act Definitions

Both the term "Legislature" and the term "Legislative Assembly" are defined in s. 29 of the *Interpretation Act* – for the purposes of all Acts and regulations – as follows:

> "Legislative Assembly" means the Legislative Assembly of British Columbia constituted under the *Constitution Act*;
>
> "Legislature" means the Lieutenant Governor acting by and with the advice of the Legislative Assembly.

3.2 The Parties' Arguments – It is convenient to summarize, in turn, the parties' arguments on the issue before me.

Conflict Commissioner's Initial Submission

The Conflict Commissioner says paragraph (b) of the Act's definition of "public body" includes the Conflict Commissioner as one of the public bodies set out in Schedule 2, but argues that the Conflict Commissioner is excluded under paragraph (d) of the definition because he is an "officer of the Legislative Assembly". This exclusion prevails, he says, over the immediately preceding inclusion in the definition of public body. The basis for this interpretation is that members and officers of the Legislative Assembly are cloaked with certain legislative privileges and subjecting them to access to information rights under the Act would derogate from those privileges. The nature of the Conflict Commissioner's work is such that any encroachment on legislative privilege as it extends to him would involve a derogation from the privileges of all of the members of the Legislative Assembly with whom he deals under the *Members' Conflict of Interest Act*.

The Conflict Commissioner relies on several cases in which the nature and scope of parliamentary privilege have been considered: *New Brunswick Broadcasting Co.* v. *Nova*

Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319, and *Harvey* v. *New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876. He also relies on *Tafler* v. *British Columbia (Commissioner of Conflict of Interest)* (1998), 48 B.C.L.R. (3d) 328 (C.A.). The Court of Appeal held in *Tafler* that the privileges of the Legislative Assembly extend to the Conflict Commissioner as its officer and that his decision to exclude the public from witness examinations conducted by him was an exercise of legislative privilege and not reviewable in the courts.

The Conflict Commissioner's initial submission in this inquiry includes the following argument, which merits quotation at length:

> 23. In *New Brunswick Broadcasting*, *supra*, the Court found that the decision of whether to exclude "strangers" from the Legislative Assembly was a matter of parliamentary privilege. In *Tafler*, *supra*, the British Columbia Supreme Court and Court of Appeal confirmed that the Commissioner was acting pursuant to privilege in denying access to his proceedings.
>
> 24. Here, the Commissioner has made a decision regarding public access to legal records related to his investigations and duties as an officer of the Assembly. It is submitted that such a decision is similarly cloaked with privilege. The privileges that flow to the Commissioner in carrying out his duties are absolute (and constitutional), and cannot be interfered with by the executive or the Courts.
>
> 25. The doctrine of the separation of powers makes it clear that the Crown (of which the Information and Privacy Commissioner, as an Officer of the Legislature, is a part) and the Courts cannot review the exercise of legislative privilege … .
>
> …
>
> 27. The exclusion of the members and officers of the Legislative Assembly from the scope of the *FOI Act* simply maintains this separation of powers and protects the privilege which is essential to the proper functioning of the legislature. To include the Commissioner within the scope of the Act would have the effect of abrogating or derogating from the privileges under which he operates. Indeed, given the nature of his work, the privileges of the members of the Assembly would also be eroded if the Commissioner was subject to the FOI Act. While the Legislature could achieve this, it would require the clearest and most express language to do so. However, it is clear from the exclusion set out in paragraph (d) of the definition of public body that the Legislature did not mean to trench upon matters of parliamentary privilege. Any ambiguity of the legislative scheme must be resolved in favour of preserving the constitutional privileges of the Conflict of Interest Commissioner and indirectly those of every member of the Legislative Assembly.

Applicant's Initial Submission

The applicant acknowledges that paragraph (d) of the definition of "public body" in Schedule 1 to the Act refers to officers of the "Legislative Assembly" and that under the *Members' Conflict of Interest Act* the Conflict Commissioner is appointed as an "officer of the Legislative Assembly". He argues, however, that the status of the Conflict Commissioner under the Act is specifically addressed by including him as a public body in Schedule 2 and by including him in the definition of "officer of the Legislature" in paragraph (b) of the Schedule 1 definition of "public body". In the applicant's view, these two specific references to the Conflict Commissioner in the Act prevail over the more general exclusion of officers of the Legislative Assembly in paragraph (d) of the definition of public body.

The applicant also submits that s. 14 of the *Members' Conflict of Interest Act* does not necessarily apply in relation to the Act. He also relies upon s. 79 of the Act, under which the provisions of the Act prevail in the event of an inconsistency or conflict between a provision of the Act and that of another statute. Section 79 reads as follows:

> 79. If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

On the question of giving the term "officer of the Legislative Assembly" meaning in the Act and in the *Members' Conflict of Interest Act*, the applicant says that paragraph (d) of the definition of "public body" in the Act refers to permanent officers of the Legislative Assembly, such as the Speaker of the House, the Clerk and the Sergeant-at-Arms. According to the applicant, the Conflict Commissioner is an officer of the Legislative Assembly under the *Members' Conflict of Interest Act*, but that term is used more restrictively in the definition of "public body" in the Act and does not include the Conflict Commissioner, who is dealt with specifically in Schedules 1 and 2.

The applicant also relies on recent work by the Special Committee to Review the *Freedom of Information and Protection of Privacy Act*. The applicant refers to the Special Committee's rejection of an attempt by the former Ombudsman to be removed from the scope of the Act and to the Special Committee's view that the Act's definition of "officer of the Legislature" should be expanded to include the Police Complaint Commissioner and the Child, Youth and Family Advocate. In the applicant's submission, the Special Committee obviously regarded the Conflict Commissioner as an officer of the Legislature and was comfortable with the application of the Act to officers of the Legislature.

The applicant also submits that, despite the definitions in the *Interpretation Act* distinguishing between "Legislature" and "Legislative Assembly", the terms "officer of the Legislature" and "officer of the Legislative Assembly" are frequently used

interchangeably, even in official publications of the Legislative Assembly. He offers examples of this.

Last, the applicant argues that the general thrust behind creation of the Act was to open up records of taxpayer-funded bodies and officers, including, at least, the administrative records of the Conflict Commissioner.

Conflict Commissioner's Reply Submission

In his reply submission, the Conflict Commissioner reiterates that his inclusion within the definition of "officer of the Legislature" in Schedule 1 to the Act does not bring him within the scope of the Act. He says the Act only applies to an officer of Legislature if that officer falls within the definition of "public body" and the Conflict Commissioner does not. Similarly, he argues that mention of the Conflict Commissioner in Schedule 2 to the Act has the effect of bringing him within the Act's scope, but the exclusion of officers of the Legislative Assembly later in the definition of "public body" has the effect of taking him back out of the Act. According to the Conflict Commissioner, the Act cannot change the nature of his office through a definition provision – *i.e.*, the definition of "officer of the Legislature" – that does not speak to his status as an officer of the Legislative Assembly.

The Conflict Commissioner makes several additional points in his reply. He says the proceedings or report of the Special Committee are irrelevant and inadmissible as evidence of legislative intent and, in any event, do not support the applicant's position. He also observes that examples of confusion in official publications, or on the part of members of the Legislative Assembly, between the terms "officer of the Legislature" and "officer of the Legislative Assembly" are not indicative of their correct meanings.

Applicant's Reply Submission

In his reply submission, the applicant says the Legislature specifically turned its mind to coverage of the Conflict Commissioner by explicit reference to him in Schedule 2 to the Act and this underscores the fact that reference to "officer of the Legislative Assembly" in paragraph (d) of the public body definition refers to permanent officers such as the Speaker of the Legislative Assembly. He also says s. 3(1)(c) affords the Conflict Commissioner – as it does other such officers – "a qualified exception" from the Act "in respect of some of their records".

As regards the Conflict Commissioner's reliance on *Tafler*, the applicant says this case "leaves open the question of whether other decisions of the [Conflict] Commissioner are subject to the same privilege". He submits that s. 3(1)(c) of the Act "provides the type of protection discussed by the Court" in *Tafler*. Taking "strong exception to the Conflict Commissioner's statement that the privileges that flow to his office are absolute", the applicant argues that "the Conflict Commissioner is in fact created by the Legislature and

subject to any legislation the Legislature may enact", in this case respecting access to "some of his records" under the Act.

3.3 Discussion – Before addressing the main issues before me, I agree with the Conflict Commissioner that the applicant's evidence of interchangeable use of the terms 'officer of the Legislature' and 'officer of the Legislative Assembly' in publications or by individuals is not persuasive on the matter before me. It shows that these terms are confusing or that people are confused about the terms. It may be both. It does not, however, resolve the question of whether the Conflict Commissioner is a public body subject to the Act. That is essentially a question of statutory interpretation.

I also agree with the Conflict Commissioner that the work of the Special Committee and any remarks by its individual members are not probative when it comes to determining the meaning of the Act. At the very least, that material is not directly on point, came into existence well after enactment of the Act in 1993 and does not necessarily reflect the will of the Legislature now or when the Act was enacted.

Conflict Between Statutes

In my view, this is not a case where provisions in two different statutes are in conflict. There would be a conflict if the Act provided that the Conflict Commissioner was not an officer of the Legislative Assembly for the purposes of the *Members' Conflict of Interest Act* and s. 14 of that statute said otherwise. This is not such a case. There would also be a conflict if the *Members' Conflict of Interest Act* provided that the Conflict Commissioner did not fall within the scope of the Act when the Act said otherwise. But that is not the case. The *Members' Conflict of Interest Act* is silent on the Act's application and it certainly contains no 'override' provision of the kind contemplated by s. 79 of the Act, which is quoted above. The only relevant provision of the *Members' Conflict of Interest Act* is s. 14, which says that the Conflict Commissioner is an "officer of the Legislative Assembly".

The issue of whether the Conflict Commissioner falls under the scope of the Act requires me to interpret various provisions of the Act and to determine their intended effect. This in turn requires me to take s. 14 of the *Members' Conflict of Interest Act* into account and to assess its relationship with the Act and, possibly, other relevant statutes as well.

Officer of the Legislative Assembly

The term "officer of the Legislative Assembly" appears once in the Act, in paragraph (d) of the Schedule 1 definition of "public body". As I see it, the Conflict Commissioner's assertion that he is an officer of the Legislative Assembly within the meaning of paragraph (d) is a linchpin in his argument that he does not come within the scope of the Act. If the Conflict Commissioner is *not* an officer of the Legislative Assembly within the meaning of paragraph (d), he is unquestionably a public body listed in Schedule 2 and as such is subject to the Act (albeit in only a limited way, because he is also defined as an "officer of the Legislature" and s. 3(1)(c) excludes from the scope of the Act any record

created by or for him, or in his custody or control, and that relates to his operational functions).

If, but only if, the Conflict Commissioner is an officer of the Legislative Assembly within the meaning of paragraph (d) of the "public body" definition, then there is an apparent internal inconsistency in the Act between his inclusion in the definition by paragraph (b) and his exclusion by paragraph (d). In that case, if the Conflict Commissioner's exclusion under paragraph (d) of the definition takes precedence over his inclusion in paragraph (b) as a public body listed in Schedule 2 and over his inclusion in the Schedule 1 definition of "officer of the Legislature", then those provisions in the Act which expressly address the Conflict Commissioner will be without meaning or effect.

The essence of the Conflict Commissioner's position is that because s. 14 of the *Members' Conflict of Interest Act* provides that he is an officer of the Legislative Assembly, this creates a status which stays with him under the Act unless it is explicitly removed. The definition of "officer of the Legislature" in Schedule 1 to the Act and the inclusion of the Conflict Commissioner in Schedule 2 do not have the effect of removing that status. The result, he says, is that the exclusion of officers of the Legislative Assembly from paragraph (d) of the definition of public body in Schedule 1 to the Act excludes the Conflict Commissioner, regardless of his explicit inclusion in the definition of officer of the Legislature in Schedule 1 and in the list of public bodies which constitutes Schedule 2 to the Act. The following passage comes from the Conflict Commissioner's reply submission:

> … our submission is that the Commissioner retains his status as an Officer of the Legislative Assembly, and is therefore exempt from the Act by virtue of subparagraph (d) in the definition of "public body". If the Commissioner is found to be within the scope of the Act, he would be subject to the whole Act, including the definition of "Officer of the Legislature".

The *Interpretation Act* definitions of the terms "Legislative Assembly" and "Legislature" apply to all enactments, including the Act, unless a contrary intention appears (see s. 2(1) of the *Interpretation Act*). A contrary intention may be said to exist in the Act to the extent that its definition of "officer of the Legislature" includes the Conflict Commissioner even though he is an officer of the Legislative Assembly for other purposes. However, neither the *Interpretation Act* nor the Act offers a definition of the expression "officer of the Legislative Assembly".

Clearly, given s. 14 of the *Members' Conflict of Interest Act*, the Conflict Commissioner is an officer of the Legislative Assembly for the purposes of his own statute. I do not find self-evident, however, the Conflict Commissioner's submission that s. 14 confers upon him a status which must flow through to other statutes, such as the Act. On the contrary, the validity of this proposition is a matter of statutory interpretation that must be examined and tested in the context of the *Members' Conflict Interest Act*, the Act and other statutes relevant to officers of the Legislative Assembly.

Constitution Act

The *Constitution Act* is of interest here. The *Constitution Act* provides for the appointment of officers of the Legislative Assembly. It does not define that term and does not refer to the Conflict Commissioner. Section 39 of the *Constitution Act* reads as follows:

> 39. (1) The appointment of all permanent officers of the Legislative Assembly must be made by resolution of the Legislative Assembly or, during the interval between 2 sessions, by the Lieutenant Governor in Council.
>
> (2) All appointments of permanent officers of the Legislative Assembly made during any interval between sessions must be ratified by the Legislative Assembly at its next session.
>
> (3) The appointment of all other officers and employees of the Legislative Assembly must be made
>
> (a) by the Speaker, or
>
> (b) by the Provincial Secretary, if there is no Speaker or the Speaker is absent or unable to act.
>
> (4) a person occupying the position of permanent officer of the Legislative Assembly is deemed to have occupied that position on and after the date of his or her appointment until the person dies, resigns or is removed from office.
>
> (5) if a person referred to in paragraph (4) dies while in office, the remuneration to which the person would have been entitled, had he or she lived until the end of the sixth month after the month in which he or she died, must be paid to the person's estate.

Section 14 of the *Members' Conflict of Interest Act* reads as follows:

> 14. (1) There must be appointed a commissioner who is an officer of the Legislative Assembly.
>
> (2) On the motion of the Premier in the Legislative Assembly and on the recommendation of 2/3 of the members present, the Lieutenant Governor in Council must appoint the person so recommended to the office of commissioner.
>
> (3) The commissioner holds office for a term of 5 years and may be reappointed for a further term or terms.
>
> (4) The commissioner may be removed or suspended before the end of the term of office by the Lieutenant Governor in Council for cause on the recommendation of the Legislative Assembly.
>
> (5) The commissioner must be paid compensation as may be set by the Lieutenant Governor in Council.

(6) If

(a) the commissioner is removed or suspended or the office of the commissioner becomes vacant when the Legislature is sitting but no recommendation under this Act is made by the Legislative Assembly before the end of that session, or

(b) the commissioner is suspended or the office of the commissioner is or becomes vacant when the Legislature is not sitting, the Lieutenant Governor in Council may appoint an acting commissioner.

(7) The appointment of the acting commissioner under this section terminates

(a) on the appointment of a new commissioner under paragraph (2),

(b) at the end of the period of suspension of the commissioner, or

(c) immediately after the expiry of 20 sitting days after the day on which he or she was appointed, whichever the case may be and which ever occurs first.

(8) The commissioner may employ or retain persons that the commissioner considers necessary and may

(a) specify their duties and responsibilities, and

(b) establish their remuneration and other terms and conditions of employment, or retainer.

(9) The *Labour Relations Code* and the *Public Service Labour Relations* Act do not apply to a person employed or retained under paragraph (8).

The provision for appointment of officers of the Legislative Assembly in s. 39 of the *Constitution Act* is separate and distinct from the appointment provision for the Conflict Commissioner in the *Members' Conflict of Interest Act*. This is, in my view, because the term "officer of the Legislative Assembly" has a meaning under the *Constitution Act* which does not include the Conflict Commissioner. The permanent officers of the Legislative Assembly referred to in s. 39 of the *Constitution Act* are the Clerk of the House, the Law Clerk and the Sergeant-at-Arms. See *Standing Orders of the Province of British Columbia Legislative Assembly*, Chapter XIII – Officers of the House. In some cases, this list also includes deputy and assistant officers. See E.G. MacMinn, *Parliamentary Practice in British Columbia*, 2nd ed., 1987, at p. 139. The "other officers" referred to in s. 39(3) must be other than the "permanent officers", but they are clearly not the Conflict Commissioner, as they are appointed by quite a different means than that by which the Conflict Commissioner is appointed under s. 14 of the *Members' Conflict of Interest Act*. There is no indication that any of the officers provided for in s. 39 of the *Constitution Act* have any of the Conflict Commissioner's functions under the *Members' Conflict of Interest Act*.

It is clear to me that s. 39 of the *Constitution Act* refers to officers who have historically served the Legislative Assembly, while s. 14 of the *Members' Conflict of Interest Act* – which was enacted after what is now s. 39 of the *Constitution Act* – creates a new statutory officer of the Legislative Assembly. Section 39 of the *Constitution Act* is not, in my view, intended to apply to the Conflict Commissioner and s. 14 of the *Members' Conflict of Interest Act* is not intended to apply to the officers of the Legislative Assembly referred to in s. 39 of the *Constitution Act*.

In my view, s. 39 of the *Constitution Act* undercuts the force of the Conflict Commissioner's argument to me that, because s. 14 of the *Members' Conflict of Interest Act* designates him as an officer of the Legislative Assembly, this designation confers a status on him that necessarily extends to use of that term in other statutes. Since this is not so for the *Constitution Act*, why must it be so for the Act (especially if there are other factors which suggest otherwise)?

I reject an approach which is based on the notion that the Conflict Commissioner's status as an "officer of the Legislative Assembly" under the *Members' Conflict of Interest Act* must control the meaning to be given to that term as it is used in paragraph (d) of the definition of "public body" in the Act. Again, the proper approach, in my view, is to use principles of statutory interpretation to interpret the Act and its relationship with the *Members' Conflict of Interest Act* and other legislation.

Derogation From Legislative Privilege

At one level, the Conflict Commissioner's argument reflects a concern that, if the Act applies to his Office, it will significantly and gravely intrude upon his interactions with members of the Legislative Assembly in the course of carrying out his statutory duties as Conflict Commissioner. This concern is difficult to sustain, in my view, in light of the broad effect of s. 3(1)(c) of the Act, which is quoted above and is discussed below. That section excludes from the scope of the Act records that relate to the exercise of an officer of the Legislature's functions under an Act.

On another level, the Conflict Commissioner submits that legislative privilege has a constitutional dimension which precludes its supervision by the executive branch of government or the courts. In this regard, I think it is important to recognize that the jurisdiction of the courts to review the lawfulness of the Conflict Commissioner's actions, as considered in *Tafler*, was quite different from what would be the foundation of my office's jurisdiction over the Conflict Commissioner. In *Tafler*, the source of jurisdiction at issue was the inherent jurisdiction of superior courts to exercise oversight over inferior tribunals.

I have no such jurisdiction. Nor do I have any powers of supervision which flow at large from the executive branch of government. My jurisdiction comes from the Act, which was enacted by the Legislature following debate and passage in the Legislative Assembly. The Conflict Commissioner is also a creature of statute. If the Legislature sees fit to make him and his office subject to the Act, then surely it may do so.

To the extent that application of the Act to the Conflict Commissioner through his designation as a public body might affect a privilege of the Legislative Assembly, this is contemplated by s. 50(1) of the *Constitution Act*. That section provides that the Legislature may define the privileges, immunities and powers to be held, enjoyed and exercised by the Legislative Assembly. This conclusion also appears to be acknowledged implicitly in paragraph 27 of the Conflict Commissioner's initial submission, which I quoted above.

Paragraphs 24 and 25 of the Conflict Commissioner's initial submission, also quoted above, appear to reflect an argument that, if the Act does purport to apply to the Conflict Commissioner, it cannot do so for constitutional reasons. Such an argument would challenge the constitutional validity of the Act and would require notice under s. 8 of the *Constitutional Question Act* (which has not been, to my knowledge, given). It would also require authority, which it is not clear to me that I have, to rule on the constitutionality of the Act. For these reasons, I decline to deal with this issue.

Section 3(1)(c) of the Act

The significance of the definition of "officer of the Legislature" in Schedule 1 to the Act is its relationship to s. 3(1)(c) of the Act. As I noted above, s. 3(1)(c) excludes from the Act's scope "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".

The effect of designating various officers as public bodies in Schedule 2 to the Act, and then defining their designated "heads" as "officers of the Legislature" in Schedule 1 is that these offices and officers fall under the scope of the Act but, because of s. 3(1)(c), any record that "relates to" the exercise of their statutory functions is excluded from the scope of the Act. This does not mean that all records in the custody or under the control of these offices and officers are excluded from the Act. Records that are not case-specific and are administrative in nature remain subject to the Act.

Section 3(1)(c) has been considered in decisions of Supreme Court judges appointed as adjudicators under s. 60 of the Act. The jurisdiction of adjudicators is to review the functioning of the office of the Information and Privacy Commissioner as a public body. The various adjudicators' decisions agree on the breadth of the s. 3(1)(c) exclusion of records from the scope of the Act. For example, in *Adjudication Order No. 3* (June 30, 1997), Levine J. agreed that any record that is specific to a case file is an operational record related to the exercise of the Information and Privacy Commissioner's functions and is therefore excluded from the Act under s. 3(1)(c). See, also, *Adjudication Order No. 1* (September 6, 1996, Esson C.J.S.C.), *Adjudication Order No. 5* (September 22, 1997, Levine J.), *Adjudication Order No. 6* (November 10, 1997, Bauman J.) and *Adjudication Order No. 7* (January 5, 1998, D. Smith J.).

The Legislature evidently saw some utility in designating the Ombudsman, the Auditor General, the Information and Privacy Commissioner and others as public bodies under

the Act, while at the same time excluding, under s. 3(1)(c), records relating to the exercise of their statutory functions. The result is that all case-specific or operational records, that are created by or for them or are in their custody or control, are excluded from the scope of the Act. It is reasonable to suggest this is likely to constitute most, but not all, of their records. As an example of some records that may be covered by the Act, any record that contains employment information of an employee of one of these public bodies, and that does not relate to a specific case or exercise of a statutory function, would be subject to the Act. This means that, for the most part, such employees have the right under the Act of access to their own personal information in the custody or under the control of the public body. As a further example, in *Adjudication Order No. 2* (October 2, 1996), Bauman J. dealt with a request by a third party for access to administrative records relating to employees of the Information and Privacy Commissioner's office, as a public body. Such records were not excluded from the Act by s. 3(1)(c) and Bauman J. dealt with the case on the basis of whether the exception to the right of access set out in s. 22 of the Act applied to personal information in the records.

As is noted above, in light of s. 3(1)(c) of the Act the Conflict Commissioner's submissions here overstate the extent of the impact of the Act if he or his office should fall under it. There would, in fact, be no impact on records relating to his operational functions. By the same token, but at the other end of the spectrum, the applicant may have an overly optimistic view of the scope of the records which would, in light of s. 3(1)(c), be subject to the Act if the office of the Conflict Commissioner is a public body. Although the question of which records would be responsive to the applicant's access request is not before me, it is certainly foreseeable that some or all of the records the applicant has requested might be excluded from the Act by s. 3(1)(c).

Interpretation of the Act

The Conflict Commissioner makes several points about interpretation of the Act. He argues that, because *Tafler* had not been decided when the Act was enacted in 1993, the Legislature may not have understood that the duties of the Conflict Commissioner involved the exercise of legislative privilege. He relies upon the decision in *Cope & Taylor* v. *Scottish Union & National Insurance Company* (1897), 5 B.C.R. 329 (C.A.), in which the following passage from *Mollwo March & Company* v. *Ct. of Wards*, L.R. 4 P.C. (J.C.P.C.), at p. 437, was cited with approval, at p. 334:

> The enactment is, no doubt, entitled to great weight as evidence of the law, but it is by no means conclusive; and when the existing law is shewn to be different from that which the legislature supposed it to be, the implication arising from the statute cannot operate as a negation of its existence … .

In *Cope & Taylor*, the Court was concerned with the authority of the Lieutenant Governor in Council to set, and then repeatedly postpone, the coming into force of a statute. The postponements in issue were held to be invalid and references to them in a subsequent statute were held not to give rise to an implication that the postponements were valid.

The Act should not, in my view, be interpreted on the basis that it incorporates a supposed 'mistake' by the legislators as to the nature of the Conflict Commissioner's duties or status. In any case, I fail to see how the question of the application of the Act to the Conflict Commissioner is the same as, or comparable to, the issue in *Cope & Taylor*. When the Act was enacted, the *Members' Conflict of Interest Act* already provided that the Conflict Commissioner was an officer of the Legislative Assembly.

Of course, *Tafler* was decided after the Act was enacted. The *Tafler* decision determined that the Conflict Commissioner's functions as an officer of the Legislative Assembly involve the exercise of legislative privilege and are not amenable to judicial review. This may or may not have been apparent to perceptive observers before *Tafler* was decided. The *Tafler* case did not introduce an element of 'error' by the Legislature in its treatment of the Conflict Commissioner in the Act. At the time the Legislature enacted the Act, the Conflict Commissioner was known to be appointed under the *Members' Conflict of Interest Act* as an "officer of the Legislative Assembly". Section 39 of the *Constitution Act* (in the form of the *Constitution Act*, R.S.B.C. 1979, c. 62, s. 44) also existed. The Act was written as we have it and, in my view, the task at hand is not to establish whether the Legislature was *mistaken* but rather to interpret what the language it used in the Act was intended to *mean*.

The Conflict Commissioner also argues that, because of the importance of legislative privilege, the Act should only be construed to apply to the Conflict Commissioner if there is an explicit provision to that effect. He says that if there is any ambiguity on the point, the exclusion of the Conflict Commissioner from the scope of the Act is to be preferred. In response to this, the applicant offers a simple but attractive argument. As is noted above, he says that "officer of the Legislative Assembly" under the Act means the permanent officers referred to in the *Constitution Act*, "such as the Speaker of the House, the Clerk and the Sergeant at Arms". To conclude otherwise would give no meaning to the Conflict Commissioner's express inclusion in the public bodies listed in Schedule 2 to the Act, or in the definition of "officer of the Legislature" in Schedule 1 to the Act. This cannot have been intended when an obvious and logical reconciliation of the language in the Act manifests itself by construing "officer of the Legislative Assembly" in paragraph (d) of the definition of "public body" to have the same or a similar meaning as in s. 39 of the *Constitution Act*.

Using this approach, there is no internal inconsistency in the definition of "public body". The Conflict Commissioner is a public body under paragraph (b) because he is expressly listed in Schedule 2 to the Act; he is not excluded from the definition of "public body" because he is not an officer of the Legislative Assembly in paragraph (d). For the purpose of the Act's application – specifically, the further excluding provision of s. 3(1)(c) – the Conflict Commissioner is included in the definition of "officer of the Legislature" in Schedule 1 to the Act. This does not change his status under the *Members' Conflict of Interest Act* as an officer of the Legislative Assembly. To the extent that the Conflict Commissioner's legislative privilege may be affected – minimally, in view of s. 3(1)(c) of the Act – by his inclusion as a public body under the

Act, the language of the Act (*i.e.*, the Schedule 2 listing of the Conflict Commissioner as a public body) is express and should be given its clear and ordinary meaning.

This interpretation harmonizes the various related provisions of the Act. It also reconciles the Act with s. 39 of the *Constitution Act* and s. 14 of the *Members' Conflict of Interest Act*. The interpretation advanced by the Conflict Commissioner, on the other hand, is not persuasive because it creates an inconsistency between paragraphs (b) and (d) of the definition of "public body" and, ultimately, would give no meaning to the Conflict Commissioner's inclusion as a public body in Schedule 2 to the Act or to his inclusion in the definition of "officer of the Legislature" in Schedule 1.

It also follows, from what I have said above, that I do not agree with an alternative suggestion in the Conflict Commissioner's argument that the statutory language relating to his inclusion within the scope of the Act is ambiguous. This is not a case of statutory language which inherently supports two plausible interpretations. No question arises, therefore, of preferring one interpretation over another in order to minimize impact upon the Conflict Commissioner because his functions involve the enjoyment or exercise of legislative privilege.

After careful deliberation, I have concluded that the linchpin of the Conflict Commissioner's submission – that he is an "officer of the Legislative Assembly" within the meaning of paragraph (d) of the definition of "public body" in Schedule 1 to the Act – is not sustainable. The interpretation I have articulated above – which harmonizes the various related provisions in the Act, provisions of the *Members' Conflict of Interest Act* and provisions of the *Constitution Act* – is to be preferred.

4.0 CONCLUSION

For the reasons given above, I find that the office of the commissioner appointed under the *Members' Conflict of Interest Act* is a "public body" within the meaning of the Act and that the Conflict Commissioner is the head of that public body for the purposes of the Act. The Conflict Commissioner is therefore required, under Part 2 of the Act, to respond to the applicant's request for access to records. In compliance with my duty under s. 58(1) of the Act to make an order, under s. 58(3)(a) of the Act I order the Conflict Commissioner to respond to the applicant's request for access to records.

July 31, 2000

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia