



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

Order F07-07

**ELECTIONS BRITISH COLUMBIA**

David Loukidelis, Information and Privacy Commissioner

March 30, 2007

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**Summary:** The applicant requested records relating to termination of the applicant's appointment under the *Election Act* as an electoral officer. By virtue of s. 3(1)(c), the records are excluded from FIPPA and Elections BC was not required to disclose them.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, s. 3(1)(c); *Election Act*, ss. 10, 12, 18, 20 & 21.

**Authorities Considered:** B.C.: Adjudication Order No. 1; Adjudication Order No. 2; Adjudication Order No. 6; Adjudication Order No. 8; Adjudication Order No. 12; Adjudication Order No. 17.

## 1.0 INTRODUCTION

[1] The applicant requested records, under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), from Elections British Columbia ("Elections BC"). She asked for "all information your office holds on me pertaining to my contract of employment" with Elections BC, giving specific dates. Her request quoted from a letter she had received from the Chief Electoral Officer ("CEO"), which had mentioned "documented concerns from a number of sources, which indicate that you have not performed your duties satisfactorily and that your actions in the workplace have not complied with our standards of conduct."<sup>1</sup> In response to the applicant's access request, the CEO declined to provide access to any records on the basis that FIPPA does not cover records relating to the exercise of his functions under an Act. The letter repeated information that

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<sup>1</sup> The quoted language was cited by the applicant as having come from a September 28, 2004 letter to her from the CEO.

the CEO had earlier provided to the applicant and said his decision to “rescind” her appointment was “based on documentation supplied to me in confidence by third-party sources”, with that information being covered by s. 22 of FIPPA. The letter included this paragraph:

Further to your telephone conversation with Jill Lawrance and my letter, I must reiterate that concerns regarding your work performance were communicated to you on several occasions by District Electoral Officer ...[name removed]. Similar concerns were also expressed to me by Elections BC staff during the District Electoral Officer training session. I am satisfied that the information supplied to you provides sufficient detail of my reasons for rescinding your appointment.

[2] The CEO added that, if FIPPA did apply to the records, s. 22 required Elections BC to refuse to disclose third-party personal information in them.

[3] The applicant then requested a review of the CEO’s refusal to disclose records and, mediation having failed, an inquiry was held under Part 5 of the Act.

[4] During mediation, Elections BC released one of the responsive records in severed form and a summary, consistent with s. 22(5) of FIPPA, of the information that was withheld from the applicant. Elections BC has made it clear in its submissions in this inquiry, however, that it takes the position that FIPPA does not apply to the records.

[5] This Office gave notice of the inquiry, under s. 54(b) of FIPPA, to two individuals whose personal information is found in the responsive records. One individual replied by saying that the individual had no records or information, taking no position on disclosure of her or his personal information. The other individual replied by consenting to disclosure of her or his personal information.

## **2.0 ISSUE**

[6] The only issue I need address is whether the requested records are excluded from FIPPA by operation of s. 3(1)(c). The Notice of Inquiry issued to the parties indicated that, if the records did fall within the scope of FIPPA, the application of s. 22 to the records would be considered. In light of my decision regarding s. 3(1)(c), I need not consider s. 22.

## **3.0 DISCUSSION**

[7] **3.1 Background**—The CEO appointed the applicant as a deputy district electoral officer (“electoral officer”). As indicated in Elections BC’s letter offering that appointment to the applicant, the position’s term was to end on the earlier of the expiry of six months after the election day for the next provincial election and the date on which the electoral district was “disestablished”. The applicant signed an Elections BC appointment agreement that indicated the

applicant was aware of the duties and responsibilities of the position “as established under the *Election Act*” and the applicant signed an oath of office.<sup>2</sup>

[8] Less than a month later, the CEO wrote to the applicant and rescinded her appointment as an electoral officer, effective immediately. His letter cited s. 18(9) of the *Election Act*, which he said provided “the authority to rescind the appointment of” an electoral officer. The applicant later made her access request under FIPPA.

[9] **3.2 Exclusion from FIPPA’s Scope**—The CEO is an officer of the Legislature by virtue of s. 4 of the *Election Act*. Elections BC is named in Schedule 2 to FIPPA as a public body to which FIPPA applies. The CEO is designated in Schedule 2 as the “head” of Elections BC for the purposes of FIPPA.

[10] Schedule 1 to FIPPA defines “officer of the Legislature” as including “the Chief Electoral Officer”. Section 3(1)(c) of FIPPA reads as follows:

**Scope of this Act**

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;<sup>3</sup> ....

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

[12] There is no dispute that the responsive records were created by or for the CEO and that they are in the custody or under the control of the CEO. The real issue is whether those records relate to the exercise of the CEO’s functions under an Act for s. 3(1)(c) purposes.

[13] The interpretation of s. 3(1)(c) of FIPPA, in particular the meaning of the exercise of an officer’s functions under an Act, has been the subject of a number of previous orders. As discussed below, these orders have distinguished between operational records, which are exempted from FIPPA under s. 3(1)(c),

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<sup>2</sup> Under s. 20 of the *Election Act*, an election official must swear an oath as prescribed in that section before taking office.

<sup>3</sup> Section 3(3) of FIPPA is not relevant here. It extends to Officers of the Legislature and those associated with them certain privacy-protection requirements of Part 3 of FIPPA.

and administrative records, to which FIPPA applies. In addition, in Adjudication Order No. 1,<sup>4</sup> Esson C.J.S.C. found that, for s. 3(1)(c) purposes, an officer's functions under an Act extend to a duty, power or function of the officer that is capable of being delegated or otherwise performed by others, including staff or consultants appointed or retained to enable the officer to perform the duties of that office.<sup>5</sup>

[14] As regards the distinction between which records of this office are operational and which are administrative, British Columbia Supreme Court judges acting as adjudicators under FIPPA have consistently held that 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 the commissioner or staff, and other 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.<sup>6</sup> These types of records are outside the scope of FIPPA by virtue of s. 3(1)(c). Similarly, I have held that records relating to the investigation and disposition of complaints under the *Ombudsman Act* by the Ombudsman or her delegates are operational records falling outside the scope of FIPPA under s. 3(1)(c).<sup>7</sup>

[15] By contrast, adjudicators have accepted that administrative records, which are subject to FIPPA, include such records as personnel, competition and office management files.<sup>8</sup> In its initial submission, Elections BC acknowledges this and acknowledges that, because the records at issue relate to the applicant's professional performance, "it could be suggested that they be considered personnel records, administrative in nature and therefore subject to the Act".<sup>9</sup> Elections BC goes on, however, to argue—relying in particular on ss. 12 and 18 of the *Election Act*—that the records are actually operational in nature:

(12) The appointment and rescission of [*sic*] election officials are functions of the Chief Electoral Officer under the *Election Act* and are not made under the *Public Service Act*. The *Freedom of Information and Protection of Privacy Act* does not apply to records created by or in the custody or control of an Officer of the Legislature that relate to an exercise of that Officer's function under an Act. For this reason, the records requested by the applicant fall outside the scope of the *Freedom of Information and Protection of Privacy Act* as outlined in s. 3(1)(c).

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<sup>4</sup> [www.oipc.bc.ca/orders/adjudications/Adj1a.html](http://www.oipc.bc.ca/orders/adjudications/Adj1a.html).

<sup>5</sup> At para. 20.

<sup>6</sup> See, for example, Adjudication Order No. 17, [www.oipc.bc.ca/orders/adjudications/AdjOrder17.pdf](http://www.oipc.bc.ca/orders/adjudications/AdjOrder17.pdf) and previous decisions referred to there.

<sup>7</sup> See Order 01-42, [2001] B.C.I.P.C.D. No. 44, and Order 02-12, [2002] B.C.I.P.C.D. No. 12.

<sup>8</sup> See, for example, Adjudication Order No. 2, [www.oipc.bc.ca/orders/adjudications/Adj2a.html](http://www.oipc.bc.ca/orders/adjudications/Adj2a.html); Adjudication Order No. 6, [www.oipc.bc.ca/orders/adjudications/Adj6a.html](http://www.oipc.bc.ca/orders/adjudications/Adj6a.html).

<sup>9</sup> At para. 8.

(13) The legislated ability of the Chief Electoral Officer to delegate authority to an individual appointed under the Act is a particularly significant power. Delegation of authority facilitates the decentralized model of electoral administration used in B.C. by placing the same authority in the hands of District Electoral Officers (or their Deputy in the District Electoral Officer's absence) as that held by the Chief Electoral Officer (other than the power to make regulations). For that reason, the Act also requires election officials to follow the directions of the Chief Electoral Officer and help maintain a high level of public trust in electoral administration. The Chief Electoral Officer must monitor closely the actions of election officials to ensure fairness and impartiality, and take swift action if appointees are not following the directions of the Chief Electoral Officer.

(14) The relationship of District Electoral Officers and Deputy District Electoral Officers to the Chief Electoral Officer is therefore one of delegated authority to an appointee, rather than an employment or contractual relationship. The role of a District Electoral Officer or Deputy District Electoral Officer is very much a public one with significant importance in the functioning of the electoral process. The Chief Electoral Officer has a statutory duty to investigate complaints made against those involved in the process and to rescind the appointments of election officials if warranted. The records in question form part of the investigation of concerns raised over the applicant's discharge of her duties of office. They are therefore not administrative personnel records but clearly relate to the function of the Chief Electoral Officer under the *Election Act*, which renders them operational in nature.

[16] There are no previous decisions in which the CEO's functions under the *Election Act* have been considered for the purposes of s. 3(1)(c). I must, of course, consider the legislative scheme that governs the officer of the Legislature in question in order to determine if the disputed records can be said to relate to the exercise of that officer's functions under the legislation. What can comfortably be described as administrative in one legislative context may well be considered operational in another, depending on the particular statutory framework and the duties and responsibilities of the officer of the Legislature.

[17] A brief review of the CEO's duties and responsibilities under the relevant legislation, the *Election Act*, is necessary. In general terms, that Act governs elections and by-elections in British Columbia, including the calling of elections, the qualification and registration of voters, the rules governing the nomination of electoral candidates, voting procedures, the registration of political parties and constituency associations, election financing and election advertising. In relation to each of these areas, the CEO is required to carry out a variety of specific functions under the *Election Act*.

[18] The CEO is appointed under s. 4 of the *Election Act* and, under s. 5, he or she is required to declare he or she will faithfully and impartially exercise the powers and perform the duties of the office. The CEO cannot be a member of

a political party, make contributions to a party or candidate or vote in provincial elections. Sections 6, 7 and 8 relate to the CEO's term of office, remuneration, pension and resignation, removal or suspension. Section 9 governs the appointment of an acting CEO, and s. 10, which relates to the CEO's staff, reads as follows:

- 10(1) The chief electoral officer may appoint a deputy chief electoral officer and other employees necessary to enable the chief electoral officer to perform the duties of the office.
- (2) The *Public Service Act* applies to appointments under subsection (1) and, for the purposes of that Act, the chief electoral officer is deemed to be a deputy minister.
- (3) The chief electoral officer may also retain, on a temporary basis, other persons necessary to enable the chief electoral office to perform the duties of the office in relation to short term administrative matters, including the preparation for and conduct of an election, enumeration or plebiscite.
- (4) The *Public Service Act* does not apply to persons retained under subsection (3) and the chief electoral officer may establish their remuneration and the other terms and conditions of their retainers.

[19] The CEO is required to appoint elections officials under Division 3 of Part 2 of the *Election Act*. The term "election official" is defined as follows in s. 1 of the *Election Act*:

- (a) the chief electoral officer and the deputy chief electoral officer,
- (b) an individual appointed as a district electoral officer or deputy district electoral officer under section 18,
- (c) an individual appointed under section 19(1) or section 88(3) or (4), or
- (d) an individual appointed as an election official for the purposes of section 108.

[20] Section 21 of the *Election Act* provides that the *Public Service Act* does not apply to election officials. Instead, the CEO can establish their remuneration and other terms and conditions of their appointments. The term of office for these officers is specified by the particular appointment power and is generally relatively short. In addition, election officials must swear an oath of office similar to that required of the CEO:

#### **Oath of office**

- 20 Before undertaking duties under this Act, an individual appointed as an election official must make a solemn declaration that the individual

- (a) will faithfully and impartially fulfill the duties,
- (b) has not received and will not accept any inducement to perform the duties otherwise than impartially and in accordance with this Act or to otherwise subvert the election, and
- (c) will preserve the secrecy of the ballot in accordance with section 90.

[21] As this indicates, the *Election Act* distinguishes between the appointment of elections officials and the appointment of the CEO's staff, both staff appointed permanently (under the *Public Service Act*) and on a temporary basis (appointed only in relation to short term administrative matters).

[22] The applicant was appointed by the CEO as a deputy district electoral officer under s. 18 of the *Election Act*. Under s. 18(1)(b), deputy district electoral officers are required to "assist the district electoral officer". The term of their appointment is governed by ss. 18(3) and (4) of the *Election Act*, but is subject to the CEO's power to rescind such appointments under s. 18(9), which reads as follows:

- (9) The chief electoral officer may rescind the appointment of a district electoral officer or deputy district electoral officer before what would otherwise be the end of the individual's term of appointment on any of the following grounds:
  - (a) that the official is incapable, by reason of illness or otherwise, of satisfactorily performing the individual's duties under this Act;
  - (b) that the official has not followed a direction of the chief electoral officer;
  - (c) that the official has failed to competently discharge a duty of office to the satisfaction of the chief electoral officer;
  - (d) that, in the opinion of the chief electoral officer, the official has acted in a politically partisan manner during the term of the individual's appointment, whether or not this was done in the course of performing the individual's duties under this Act.

[23] Section 12 of the *Election Act* sets out duties and powers of the CEO that are of significance here:

#### **Duties and powers of the chief electoral officer**

- 12(1) The chief electoral officer has the following duties in addition to all others established by this Act:
  - (a) to provide guidance and supervision respecting the voter registration process and the conduct of elections and plebiscites;

- (b) to ensure that all other officials appointed under this Act carry out their duties with fairness and impartiality;
  - (c) to provide information to the public regarding the voter registration and other electoral processes under this Act.
- (2) The chief electoral officer has the following powers in addition to all others given by this Act:
- (a) to make recommendations to the Legislative Assembly respecting amendments to this Act or other enactments affecting election matters;
  - (b) **to issue to persons appointed or retained under this Act any information and guidelines the chief electoral officer considers necessary to ensure effective implementation of this Act;**
  - (c) **to require election officials and voter registration officials to follow the directions of the chief electoral officer regarding the performance of their duties and the exercise of their powers;**
  - (d) to assign duties and related powers under this Act to election officials and voter registration officials;
  - (e) **to delegate in writing to an individual appointed under section 10 (1), 18 (1) or (1.1) or 22 (1) the authority to exercise any power and perform any duty assigned to the chief electoral officer by this Act, other than the power to make regulations, subject to any limits or conditions imposed by the chief electoral officer;**
  - (f) to prepare directives and guidelines for registered political parties, registered constituency associations, candidates, financial agents and auditors respecting this Act.
- (3) The deputy chief electoral officer may perform the duties and exercise the powers of the chief electoral officer, other than the power to make regulations. [bold emphasis added]

[24] The *Election Act* therefore gives the CEO, among other things, specific oversight responsibilities in relation to election officials. This includes responsibility for ensuring that those officials to whom the CEO delegates authority during the election process carry out their various duties in a manner that is impartial and fair and in accordance with established standards of conduct and the CEO's guidelines. 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. It is, as Elections BC argues, designed to ensure the integrity of, and the public's confidence in, our system of electoral administration.

[25] The applicant's appointment as a deputy district electoral officer was rescinded by the CEO under s. 18(9) of the *Election Act*. The documented



concerns, which are the records in dispute, formed a basis on which the CEO acted under s. 18(9). I conclude that, given the specific statutory provisions relating to election officials and the overall purposes of the *Election Act*, the CEO's action in rescinding the applicant's appointment related to the exercise of his statutory functions. I conclude that the disputed records are properly characterized as operational, not administrative, for the purposes of s. 3(1)(c) of FIPPA and find that s. 3(1)(c) excludes the requested records from FIPPA's scope.

[26] I note, in passing, that the CEO provided the applicant with a summary of the information she requested, making this the third occasion on which the applicant has had the reasons for the termination of her appointment explained to her in reasonable detail.

[27] **3.3 Third-Party Personal Privacy**—As indicated earlier, in light of my finding on FIPPA's application to these records, I need not deal with the s. 22 issue.

#### **4.0 CONCLUSION**

[28] For the reasons given above, I find that FIPPA does not apply to the disputed records and therefore no order under s. 58 is necessary.

March 30, 2007

#### **ORIGINAL SIGNED BY**

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David Loukidelis  
Information and Privacy Commissioner  
for British Columbia