



Court File No. **VIC-S-S-120196**

No. _____
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE JUDICIAL REVIEW PROCEDURE ACT

IN THE MATTER OF THE FREEDOM OF INFORMATION AND
PROTECTION OF PRIVACY ACT

IN THE MATTER OF ORDER F11-34 OF THE OFFICE OF THE INFORMATION
& PRIVACY COMMISSIONER FOR BRITISH COLUMBIA

BETWEEN

LEGISLATIVE ASSEMBLY OF BRITISH COLUMBIA

PETITIONER

AND

STANLEY TROMP

MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE

INFORMATION & PRIVACY COMMISSIONER OF THE OFFICE OF THE
INFORMATION & PRIVACY COMMISSIONER FOR BRITISH COLUMBIA, and

ADJUDICATOR JAY FEDORAK

RESPONDENTS

PETITION TO THE COURT

This proceeding has been started by the Petitioners for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

- (b) serve on the Petitioners
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

TIME FOR RESPONSE TO PETITION

A response to petition must be filed and served on the Petitioners,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1) The address of the registry is:
P.O. Box 9248 Stn Prov Govt 2 nd Floor, 850 Burdett Avenue, Victoria, B.C. V8W 9J2
(2) The ADDRESS FOR SERVICE of the Petitioners is: <i>[Set out the street address of the address for service for each petitioner. One or both of a fax number and an e-mail address may be given as additional addresses for service.]</i>
Waddell Raponi, Barristers & Solicitors 1002 Wharf Street, Victoria, B.C. V8W 1T4
Fax number address for service (if any) of the petitioner(s): <i>[fax number]</i>
250-385-2012
E-mail address for service (if any) of the petitioner(s): <i>[e-mail address]</i>
NONE
(3) The name and office address of the petitioner's(s') lawyer is:

Waddell Raponi, 1002 Wharf Street, Victoria, B.C. V8W 1T4

CLAIM OF THE PETITIONERS

Part 1: ORDER SOUGHT

The Petitioner applies for the following Order:

1. An Order quashing the Order dated December 7, 2011 of the Respondent Adjudicator Jay Fedorak of the Respondent Office of the Information and Privacy Commissioner of British Columbia that the Respondent Ministry of Transportation and Infrastructure has custody and control of records relating to MLA appointments and is required to complete the processing of the request for such records and provide a response to the Respondent Stanley Tromp.

Part 2: FACTUAL BASIS

The facts upon which this Petition are based are as follows:

The Parties

2. The Petitioner is the Legislative Assembly of British Columbia. The affairs of the Legislative Assembly are managed by the Legislative Assembly Management Committee, pursuant to the *Legislative Assembly Management Committee Act*, R.S.B.C. 1996, c. 258. As chair of the committee and delegate of the assembly, the Speaker has the authority to represent the Legislative Assembly in this proceeding and to instruct counsel.
3. The Respondent, Stanley Tromp, is a journalist.
4. The Respondent Ministry of Transportation and Infrastructure is a ministry of the government of British Columbia.
5. The Respondent Information & Privacy Commissioner ("IPC") of the Office of the Information & Privacy Commission ("OIPC") is an officer of the Legislature and is statutorily responsible for the administration of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("FIPPA").
6. The Respondent Adjudicator, Jay Fedorak, is a delegate of the IPC who conducted an inquiry and made the Order referred to in paragraph 1 in relation to the decision of the Respondent Ministry about information requested from the Ministry by the Respondent Mr. Tromp.

History of Proceedings

7. On April 18, 2009, Mr. Tromp made a written request to the Ministry for "the day timer or calendar of the B.C. Transportation Minister, from January 1, 2002 to June 1, 2004".
8. Judith Reid was the Minister of Transportation from June 2001 until January 2004. Kevin Falcon was Minister of Transportation and Infrastructure from January 26, 2004 until June 2009.
9. After receiving the request, staff at the minister's office retrieved, for the relevant time period, paper reproductions or copies of the electronic calendar entries of the two Ministers that were made in the software "Calendar - Microsoft Outlook". These paper copies were printed out in the past by other staff in response to previous requests for the Ministers' calendars.
10. According to their usual practice, the staff reviewed the paper copies and highlighted the calendar entries that they determined were to be excluded from release to Mr. Tromp. These were entries falling under sections 12 to 22.1 of *FIPPA* and entries not relating to the Ministers' execution of ministerial responsibilities, that is, not relating to "Ministry business". Entries not relating to Ministry business include those relating to functions in the Ministers' capacity as MLA such as constituency, party and caucus activities (altogether, relating to "MLA functions").
11. As mentioned, the staff reviewed paper copies of the *complete* calendars of the ministers for the relevant period. They took this approach because it was more economical than reproducing only the entries that related to Ministry business. It is possible to reproduce only those entries since each calendar entry is a separate item that may be viewed and printed.
12. The staff then provided the highlighted copies of the records to employees of the Ministry for their review, and the staff trusted that the employees would use the highlighted entries relating to MLA functions only for the purposes of double checking that they should be excluded on this basis.
13. The employees did, in fact, sever the highlighted calendar entries related to the MLA functions. In deciding to do so, they paid heed to intra-ministry policies that govern the retention and destruction of government records. These policies state that records are *not* government records if they are related to constituency issues, legislative committee activities and the minister's other activities relating to his or her status as an MLA.

14. On April 27, 2009, the Ministry provided Mr. Tromp with the copies of the records without the severed entries. These copies were comprised of reproduced entries from the electronic calendar of Judith Reid for January 2003 to January 2004, and of Kevin Falcon for January 2004 to June 2004. The Ministry was unable to find responsive records for the period January 2002 to January 2003.
15. Wherever the Ministry severed entries from the copies, it marked the area "s. 17", "s. 22" or "out of scope" to indicate by references to *FIPPA* the reason for the particular severance. Those marked "out of scope" were the entries that related to MLA functions.
16. On September 6, 2009, Mr. Tromp wrote to the OIPC asking the OIPC to review the Ministry's decision to sever entries from the copies.
17. The issues relating to the use of sections 17 and 22 to sever entries were resolved during mediation. The issues relating to severances made on the basis of "out of scope" were not resolved.
18. On June 8, 2010, Mr. Tromp asked the OIPC that the matter proceed to an inquiry under section 56 of *FIPPA*.
19. On January 6, 2011, the Ministry provided Mr. Tromp with copies of some entries that it had previously severed as "out of scope". It also explained to Mr. Tromp in a cover letter that entries relating to meetings with the Ombudsperson were now determined not to be "out of scope" but remained severed from the copied records under the exception set out in section 3(1)(c) of *FIPPA*.
20. On January 12, 2011, the OIPC issued to Mr. Tromp and the Ministry a Notice of Written Inquiry, along with a report of an investigator within the OIPC. The notice said the issue for the inquiry was whether the severed entries, on the basis that they were "out of scope", were within the custody or under the control of the Ministry. The notice invited written submissions and set the date of the inquiry as February 16, 2011.
21. The Speaker of the Legislative Assembly was invited to participate in the inquiry as an appropriate person. The Speaker made a submission in the inquiry by way of letter.
22. Both Mr. Tromp and the Ministry of the Attorney General, on behalf of the Ministry, made submissions, consisting of initial submissions, reply submissions and further submissions.

23. On December 7, 2011, the Adjudicator Jay Fedorak completed the inquiry and disposed of the issues in a written decision, Order F11-34, which included the Order referred to in paragraph 1. Among other things, he decided that the Ministry had custody and control of the entries severed as "out of scope", that is, it had custody and control of the entries related to MLA functions: The Ministry was ordered to complete the processing of Mr. Tromp's request.
24. The adjudicator also decided that the Ministry should not have severed the entries related to the Ombudsperson because the exception in section 3(1)(c) of *FIPPA* did not apply in the circumstances.
25. The petitioner is not seeking judicial review of the adjudicator's decision about entries relating to the Ombudsperson.
26. In his decision, the adjudicator noted that the Ministry had not considered or advanced in its submissions one or more of the exceptions in sections 12 to 22.1 of *FIPPA* as alternative bases for severing the entries as "out of scope". He then directed that the Ministry have the opportunity to consider justifying the severances under these exceptions, especially since at least one of the exceptions was mandatory.

Background Facts

27. The government has sector wide policies and procedures that govern the retention, access to, and disposition of government records. These records include those related to a Cabinet minister's execution of his or her ministerial responsibilities. They exclude those related to constituency issues, party issues, and the minister's other activities related to his or her status as a member of the Legislative Assembly (altogether, those related to "MLA functions").
28. Therefore, the government policies and procedures do not require the retention or disposition of a minister's electronic calendar entries that relate to his or her MLA functions. There are no policies that prevent these types of entries from being deleted whenever the minister or his or her staff wish to delete them.
29. Every member of the Legislative Assembly has office space in the Legislative building. The office of a Cabinet minister in the Legislative building is used both in his or her capacity as an MLA and as a member of Cabinet.
30. At his or her office in the Legislative building, the Cabinet minister has his or her own staff. Members of the staff are appointed by Order of the Lieutenant

Governor in Council: they are not employees of the ministry for which the minister is responsible.

31. Each member of the Legislative Assembly has an account for Microsoft Outlook (which includes the calendar program) on a system physically maintained at the Legislative precinct by the legislative information technology department (the "legislature system"). The email address for this account ends in "leg.bc.ca".
32. In addition to his or her account at the Legislative precinct, each Cabinet minister usually has an account for Microsoft Outlook on a system operated by or on behalf of the executive branch of government (the "government system"). The email address for this account ends in "gov.bc.ca".
33. The practice of the staff of Cabinet ministers is to use only the account on the government system for electronic calendar entries. Making entries on one calendar for both MLA functions and Ministry business is more economical and is necessary in order to determine and display to ministry officials when the Minister is available.
34. In the electronic calendar program, "Calendar-Microsoft Outlook", each entry is saved as a separate item. Items that may be entered include appointments, meetings, emails, files, pictures, links, and many other types of information. Each entry can be individually deleted or resized with more or less data.

Part 3: LEGAL BASIS

Standing of the Speaker

35. The Speaker of the Legislative Assembly has standing because of his participation in the adjudication by way of his letter submission and because he is an interested party as an institution responsible for protection of the interests of MLAs and the Legislative Assembly.

The Statutory Framework

36. *FIPPA* is intended to make public bodies more accountable to the public by creating a right of access to government records (*section 2 of FIPPA*).
37. The right is exercised by making a written request to the public body that is believed to have custody or control of the records (*section 5*). The head of a public body then has a statutory duty to make every reasonable effort to respond to the request (*section 6*).

38. *FIPPA* defines "records" to include, among other things, any thing on which information is stored by electronic means. It defines "records" to *exclude* a computer program or any other mechanism that produces records (*Schedule 1*).
39. The right of access to records is not unrestricted. It does not extend to:
 - a. records that are related to the exercise of certain judicial and legislative functions (*section 3 – "Scope of the Act"*);
 - b. records that are not *in the custody or under the control* of a *public body* (*sections 3 and 4*). "Public body" does not include the courts and the "office of a person who is a member or officer of the Legislative Assembly" (*Schedule 1*); and
 - c. records that fall into one of exceptions enumerated in *FIPPA* (*sections 12 to 22.1*).

Standard of Review

40. The standard of review is correctness. The question that arises is jurisdictional. The court is asked to review a decision of the IPC that made a determination under section 3 of *FIPPA*. That is a determination on the scope of the *Act* that certain records of MLAs were subject to *FIPPA* and its provisions requiring a ministry to disclose them upon request.
41. There is jurisprudence on the present question that involves the issue of "scope" under section 3 of *FIPPA*, which concerns the information and public institutions that are subject to the *Act's* provisions. These decisions have already established that the applicable standard is correctness.
42. There is no privative clause in *FIPPA* that would indicate intent of the legislature that the court accord significant deference to the IPC on the present issue.
43. The question that arises is not only jurisdictional, but also important to the legal system as a whole. This matter gives rise to the issue of how the constitutional law of parliamentary privilege affects the scope of *FIPPA* when requests are made for records of an MLA. The consequence of these considerations may affect communications between MLAs and their constituents or the way in which government uses its electronic calendars and distributes its data storage systems.

“Out of scope”: Mr. Tromp’s request does not ask for electronic calendar entries related to MLA functions

44. Entries that are made in the electronic calendar, “Calendar-Microsoft Office”, are each a separate record. They are separately created; separately saved and stored; and separately viewable and printable. They may be created at different physical locations. They may contain radically different data.
45. *FIPPA* does not define records in a way that allows information that is stored electronically to be conceptualized in terms of paper documents. Records at issue here are defined as the *thing* upon which the information is stored by electronic means.
46. In the present circumstances, the *thing* is the hard drive located in the government system. More specifically, it is the physical section of the hard drive that contains the data that is the calendar entry. Different entries may be stored in different physical sections of the hard drive, or even on different hard drives.
47. The paper reproductions of the electronic calendar entries are not records. The definition of records excludes the mechanism that reproduces the records. The mechanism that reproduced the records in these circumstances was printers and paper.
48. The entries in the calendars of Judith Reid and Kevin Falcon that relate to their MLA functions are separate records from the entries that relate to their functions as B.C. Transportation Minister.
49. Mr. Trump did not request the records that relate to the MLA functions. He requested the records that relate to the Ministry business: he requested “the day timer or calendar of the *B.C. Transportation Minister*” (emphasis added).
50. In other words, Mr. Trump’s specific request identifies records created by, on behalf of, or used by the Cabinet minister as the head of the ministry in the conduct of ministry business. The request does not identify records of any person in his or her personal capacity or in his or her capacity as just an MLA.
51. A response to Mr. Trump’s request for the records of “the B.C. Transportation Minister” required the records in respect of *two different persons* in that ministerial capacity, Ms. Reid and Mr. Falcon.
52. The Ministry was not required by *FIPPA* to provide to Mr. Tromp the separate records related to the MLA functions of Ms. Reid and Mr. Falcon because Mr. Trump did not request them.

“Out of scope”: electronic calendar entries related to MLA functions are not in the Ministry’s custody or under its control

53. The records that are the subject matter of these proceedings -- electronic calendar entries related to MLA functions -- were not within the possession of a *public body*.
54. Instead, the records were within the possession of non-public bodies, which were the offices of members of the Legislative Assembly. They were within the MLA offices of Judith Reid and of Kevin Falcon. These offices are expressly excluded from the definition of “public body” in *FIPPA*.
55. The records within a person’s “office” are those that the person is reasonably expected to be responsible for at that physical location. While they include his or her documents that are physically present in that location, they also include those documents of his or hers that he or she retrieves from that location.
56. Increasingly records are in electronic format and stored outside a physical office. They may be stored on a server that is shared with other, unrelated businesses, located in a separate building. Alternatively, they may be stored on the so called “iCloud”. Thus, when a request is made for documents from a person’s “office”, it must be taken to refer to documents that may not be physically stored in that office.
57. Despite their storage on the government system, a location outside their MLA offices, the electronic calendar entries of Judith Reid and Kevin Falcon for the relevant time period were possessed by their MLA offices. At these offices, they or their staff normally dealt with the electronic calendar entries.
58. Even if records are within the possession of a non-public body, they may be within the *control* of a public body, giving a right of access to them under *FIPPA*. There is a two step inquiry to determine *control*. (1) Do the records relate to a matter of the public body? If they do not, then this ends the inquiry: the public body does not have *control*. (2) If the records do relate to a matter of the public body, then the inquiry proceeds: Could senior officials at the public body reasonably expect to obtain a copy from the non-public body upon request? (*Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] 2 S.C.R. 306, 2011 SCC 25)
59. In the present circumstances, the inquiry to determine *control* ends at the first step: the calendar entries related to MLA functions do not relate to a matter of the Ministry, that is, Ministry business. Thus, the Ministry does not have *control*

of the records and members of the public do not have the right under FIPPA to request and access them through the Ministry.

60. Even if the first step of the inquiry was satisfied, the test for control fails at the second step. Senior officials at the Ministry could not reasonably expect to obtain a copy of the electronic calendar entries of the minister that related to his or her MLA functions. These are political records, not government records.

Electronic calendar entries that are related to MLA functions are protected from disclosure by parliamentary privilege

61. More critically, there is constitutional law that protects these records from disclosure. These records are subject to parliamentary privilege protecting communications between constituents and members of the Legislative Assembly. The breach of this privilege by interception or disclosure without the permission of the member is contempt of parliament.
62. This protection from disclosure is given so that constituents can freely and candidly communicate with their MLAs without the spectre of interception by outside institutions, including the executive government and the public at large. The protection is also given so that members are not obstructed in the performance of their legislative duties.
63. *FIPPA* cannot statutorily waive or vacate the privilege by requiring disclosure of the entries related to MLA functions without the permission of the MLA. The privilege is constitutional.
64. *FIPPA* does not purport to affect the privilege; rather, it is harmonious with constitutional law. The exceptions in the Act to the definition of "public body" exclude from access all records that are possessed by the office of a member of the Legislative Assembly -- whether that office is located in the Legislative precinct or the ministry building -- unless those records are within the *control* of the public body -- that is, unless they relate to ministry business (which excludes those related to MLA functions) and senior officials could reasonably be expected to obtain a copy of the records upon request.
65. This exclusion of the office of the MLA is consistent with the scope and purpose of *FIPPA*. The purpose is to increase transparency and accountability in the *executive* branch of government, and the scope of the Act is restricted to accomplish that purpose. The scope is limited by definitions that show *FIPPA* is concerned with records controlled by the executive branches and not the judicial and legislative branches.

66. This exclusion of the office of the MLA is also necessary to maintain equality in the operation of the legislature. Members must be treated equally when it comes to rules about disclosure of constituency and party activities. If the Order sought by this Petition is not granted, then members will not be treated equally. A person could request under *FIPPA* the calendar of a minister and expect disclosure of constituency and party activities. Conversely, a person who made the same request of an MLA who is not a minister would not expect that disclosure. More problematically, a member of the opposition party who makes a request of a minister could expect disclosure of the Minister's (as MLA) political activities. A minister who makes this request of an opposition member could not expect the disclosure.
67. The exclusion of the office of the MLA does not create a "black hole" wherein documents may be located to be out of reach of the access rights under *FIPPA*. Despite being located at such an office, the records must be disclosed if they are within the *control* of a public body such as the Ministry. The inquiry to determine control is set out above. Further, if the IPC believes that records in such an office are under the control of a public body but are not being disclosed, he or she may access the records under his or her investigatory powers to determine whether they are subject to *FIPPA*.

Part 4: MATERIAL TO BE RELIED ON

68. Affidavit #1 of Marilyn Ackerman, sworn January 19, 2012
69. Affidavit #1 of Ian Izard, sworn January 19, 2012

The Petitioners estimate that the hearing of the petition will take **2 hours**.

Dated: January 19, 2012



Signature of _____
c petitioner lawyer for petitioner(s)

Ryan Ashmead, agent for lawyer for the
Petitioner, John Waddell, Q.C.

To be completed by the court only:

Order made

in the terms requested in paragraphs *[specify]* of Part 1 of this petition

with the following variations and additional terms:

[specify]

Date: *[month, day, year]*

Signature of
 Judge Master

No.
Victoria Registry

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PETITION TO THE COURT

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