

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-029

October 5, 1999

CHIEF ELECTORAL OFFICER

Review Number 1622

I. BACKGROUND

[para 1.] On April 21, 1999, the Applicant applied under *the Freedom of Information and Protection of Privacy Act* (the “Act”) to the Chief Electoral Office (the “Public Body”), for the “records of individual contributions to Alberta’s Progressive Conservative Party” for the fiscal year 1992 to the most recent annual return. The Applicant specifically requested “those returns associated with annual financial statements and with campaign periods where the contribution exceeded \$375”. The Applicant also requested that these records be made available in an electronic format.

[para 2.] The Public Body responded by saying that this information is available to the public in paper form and that the electronic form is not available to the public. Moreover, section 4(1)(c) excludes the records from the Act. The Applicant’s position was that the records in paper form were not as useful or relevant to the Applicant and that the Public Body should disclose the records in electronic form because section 4(1)(c) does not exclude the records from the Act.

[para 3.] Mediation was authorized but was not successful. The matter was set down for an oral inquiry on September 23, 1999.

[para 4.] The written Notice of Inquiry was dated July 29, 1999 and sent to the Public Body and the Applicant as parties to the inquiry. It stated

the sole issue at the inquiry would be the application of section 4(1)(c) to the records requested by the Applicant. It also stated that if the Commissioner decides that the records are subject to the Act, he may schedule an inquiry at a later date to consider whether the Public Body must provide the records in the form requested by the Applicant.

[para 5.] This Order contains the written reasons for my oral decision provided at the conclusion of the inquiry on September 23, 1999. It also proceeds on the basis of the Act as it existed before the amendments to the Act came into force on May 19, 1999.

II. RECORDS AT ISSUE

[para 6.] The information requested is provided by registered political parties, registered candidates and registered constituency associations pursuant to the *Election Finances and Contributions Disclosure Act*, R.S.A. 1980, c. E-3, as amended ("*EFCDA*"). As provided by section 10(1) of the *EFCDA*, this information, in paper form, is available in the public files of the Public Body. However, the electronic form is not available for viewing or for purchase.

[para 7.] The Public Body provided me with a sample of the information requested, in paper form, for the year 1998. In the Record, the contributor's name, address, record number, the date recorded, the amount and expenses are listed.

[para 8.] The information requested will be referred to as "Records".

III. ISSUES

[para 9.] There are two issues in this inquiry:

- A. Does the Commissioner have the authority under the Act to decide in what order issues are to be heard at an inquiry?
- B. Does section 4(1)(c) exclude the Records from the application of the Act?

IV. DISCUSSION

Issue A: Does the Commissioner have the authority under the Act to decide in what order issues are to be heard at an inquiry?

[para 10.] Prior to the inquiry, my office decided to split the inquiry into two parts: Part 1 to deal with jurisdiction (whether section 4(1)(c) excluded the records from the Act) and Part 2 to subsequently determine other issues flowing from my decision in Part 1 of the inquiry. Should I

decide that 4(1)(c) does exclude the records from the Act's application, Part 2 of the inquiry would not be necessary.

[para 11.] Being concerned that the splitting of the issues would cause undue delay, the Applicant applied at the beginning of the inquiry to have me hear all the issues raised in the Applicant's request for access. The Applicant outlined two issues:

- the application of section 4(1)(c), and
- the right to request records in electronic form.

[para 12.] The Applicant also stated in the submissions that the Applicant also wished to deal with any exceptions applied to the records in the inquiry. However, the Public Body has not yet applied exceptions to the records.

[para 13.] The Applicant argued that hearing only the jurisdictional issue at the inquiry compromised the Applicant's rights to a full inquiry on all the issues. The Applicant stated that hearing all the issues at the same time will save time and ultimately enables the Applicant to gain quicker access to the records. In the Applicant's submissions, the Applicant questioned my ability to decide which issues are to be heard at an inquiry.

[para 14.] In Order 97-009, I canvassed what standard of procedural fairness applies to an inquiry under the Act. One of the main rules of natural justice is that a person must be given an adequate opportunity to be heard. This rule requires that a person be given adequate notice of the case to be met, the right to bring evidence and the right to make argument.

[para 15.] Order 97-009 concluded that the Act maintains certain rights related to natural justice and procedural fairness for Applicants such as:

- the requirement for an inquiry (section 66(1));
- the opportunity to make representations to the Commissioner during the inquiry (section 66(3));
- the right to be represented by counsel (section 66(5));
- the right to notice of the procedural information related to the inquiry (section 64).

[para 16.] In deciding what are the issues to be heard at an inquiry, I must balance the Applicant's right to an inquiry and right to make representation with the Public Body's right to have proper notice. Splitting an inquiry into two parts is a process that is practiced in my

office when there is a jurisdictional issue to be determined, as in this inquiry. I find that this practice saves both my and the parties' time and energy.

[para 17.] Moreover, I do not find that splitting the inquiry into two parts prejudices either party's rights under the Act. Section 66(1) gives the Applicant the right to an inquiry. I have decided that Part 1 of the inquiry be only on the issue of jurisdiction. Should I find that the records are not excluded by section 4 of the Act, I will proceed to hear the other issues that flow from that finding. The Applicant's right to an inquiry on the issues raised by the request for access is not being denied by holding the inquiry into two parts because all the issues raised by the Applicant will be heard. Of course, if I find that I do not have jurisdiction under section 4, there is no need to hear the matter further.

[para 18.] Therefore, the requirement for an inquiry under section 66(1) is being respected. Accordingly, the Applicant will have the opportunity to make representation on all the issues that arise from the Request for access in accordance with section 66(3) of the Act.

[para 19.] Finally, there is nothing in the Act which says I must determine the issues in the order the Applicant sees fit. To the contrary, the Act allows the Commissioner considerable latitude to determine his own procedure. The Applicant has a right to an inquiry and the right to make representations. The Commissioner must deal with all the issues in an inquiry. However, the Applicant does not have the right to dictate how the inquiry will be conducted, including the order of and timing of hearing the issues. As a result, I find that the Applicant's right to fairness will not be compromised by hearing the other issues the Applicant wishes to bring, at a later date.

[para 20.] The Applicant's application to hear all the arguments was therefore denied. At Part 1 of the inquiry, I proceeded to hear only the jurisdictional question. Nonetheless, to accommodate the Applicant's request to have the inquiry held as expeditiously as possible, I rendered an oral decision on the jurisdiction issue at the conclusion of the hearing.

Issue B: Does section 4(1)(c) exclude the Records from the application of the Act?

[para 21.] Section 4(1)(c) reads:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

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

[para 22.] For a record to be excluded under section 4(1)(c), three criteria must be met:

- (a) (i) a record created by or
- (ii) a record in the custody of or
- (iii) a record under the control of
- (b) an officer of the Legislature
- (c) and relates to the exercise of that officer's functions under an Act of Alberta.

[para 23.] The wording requires that the Records be within one of the first three options of the first criterion.

Criterion (a): Are the Records created by or in the custody or under the control of the Chief Electoral Officer?

[para 24.] Before I can determine whether the Records are “created by or in the custody or under the control of the Chief Electoral Officer”, I must first ensure that the electronic records the Applicant is requesting is indeed a “record” within the meaning of the Act. According to section 1(1)(q) of the Act “record” would include the electronic version of a written record.

[para 25.] I also stated in Order 97-008:

In the Act, a “record” means a record of information in any form. In other words, the same information can appear in several different forms of record. A record is merely a conduit for the information. I believe the form in which information appears is secondary to the essence of the information the Act seeks to exclude. The purpose of section 4(1)(c) is to exclude a certain type of information. Presumably, the intent of the Legislature is to exclude that type of information in all its forms.

[para 26.] I find that the Applicant's request for the electronic version of the Records constitutes “records” for the purpose of section 4(1)(c).

[para 27.] I will now proceed to determine whether the Records fall within criterion (a). Criterion (a) contains its own three criteria: (i) created by,

(ii) in the custody, and (iii) under the control. By including “or” in the wording of section 4(1)(c), a record has to meet only one of criteria (i) to (iii) to be excluded. Accordingly, it is not necessary that the Records be created by, and in the custody of and under the control of the Public Body to be excluded. Criteria (i) to (iii) are worded in the alternative such that the failure to meet one or even two of these criteria does not preclude the application of section 4(1)(c).

[para 28.] Therefore, the Public Body need only show that one of criteria (i) to (iii) has been met for section 4(1)(c) to apply.

[para 29.] The records requested by the Applicant are set out in section 26 of the *EFCDA*. The *EFCDA* requires political parties, registered candidates and registered constituency associations to provide certain information to the Chief Electoral Officer.

[para 30.] The relevant parts of section 26 read:

(3) Every registered party and registered candidate shall file with the Chief Electoral Officer within the period during which a financial statement must be filed relating to a campaign period, a return setting out

- (a) the total amount of all contributions received during the campaign period that did not exceed \$375 in the aggregate from any single contributor, and*
- (b) the total amount contributed, together with the contributor’s name and address, when the contribution of that contributor during the campaign period exceeded an aggregate of \$375.*

(4) Every registered party and registered constituency association shall file with the Chief Electoral Officer within the period during which an annual financial statement must be filed, a return setting out

- (a) the total amount of all contributions received during the year that did not exceed \$375 in the aggregate from any single contributor, and*
- (b) the total amount contributed, together with the contributor’s name and address, when the contribution of that contributor during the year exceeded an aggregate of \$375,*
- (c) repealed 1992 c12 s54*

but, in the case of a registered party, excluding any information included in a return under subsection (3).

[para 31.] Because the records are filed with the Chief Electoral Officer, the records are in the custody of the Chief Electoral Officer. Therefore, the first criterion of section 4(1)(c) is satisfied.

Criterion (b): Is the Chief Electoral Officer an officer of the Legislature?

[para 32.] The Chief Electoral Officer is an officer of the Legislature as set out in section 1(1)(m) of the Act.

[para 33.] Section 1(1)(m) of the Act reads:

(m) “officer of the Legislature” means the Auditor General, the Ombudsman, the Chief Electoral Officer, the Ethics Commissioner or the Information and Privacy Commissioner;

Criterion (c): Does the Record relate to the exercise of the Chief Electoral Officer’s function under an Act of Alberta?

[para 34.] To be excluded under section 4(1)(c), the Records must also be related to the exercise of that officer’s functions under an Act of Alberta.

[para 35.] The Chief Electoral Officer’s duties with respect to the Records are set out in the *EFCDA* and the *Election Act*, R.S.A. 1980, c. E-2.

[para 36.] In general, these statutes set out the Chief Electoral Officer’s responsibilities relating to the conduct of elections in the province. This includes the monitoring of the financial affairs of the parties, candidates and constituency associations.

[para 37.] For example, section 3 of the *EFCDA* describes the Chief Electoral Officer’s duties. It says:

3(1) The Chief Electoral Officer, in addition to his other powers and duties under this Act, the Election Act and the Senatorial Selection Act,

- (a) may examine all financial statements required to be filed with the Chief Electoral Officer;*
- (b) may inquire into or conduct periodic investigations of the financial affairs and records of*
 - (i) registered parties and constituency associations, and*
 - (ii) registered candidates in relation to election campaigns;*

- (c) *shall prescribe forms necessary for use under this Act and provide for their printing and distribution;*
- (d) *shall cause a statement setting out the amount if the expenses in total based on the financial statement submitted by each candidate pursuant to section 35 to be published in a newspaper circulated in the electoral division of that candidate within 30 days after the date in which the financial statement is approved by the Chief Electoral Officer.*

(2) The Chief Electoral Officer shall after the end of each year prepare a report on the exercise of his functions under this Act and shall transmit the report to the Speaker of the Legislative Assembly who shall thereupon lay the report before the Assembly if it is then sitting or, if it is not then sitting, within 15 days after the commencement of the next ensuing sitting of the Assembly.

[para 38.] The *EFCDA* also says the Chief Electoral Officer has, for the purpose of carrying out an inquiry or conducting an examination, the powers of a commissioner under the *Public Inquiries Act* (section 4(1)). This statute also sets out limits on the amounts of contributions that may be made to registered parties, registered constituency associations or registered candidates (section 15(1)). Furthermore, the Chief Electoral Officer may impose penalties for contribution violations (section 43(1)). Finally, no prosecution can be instituted under the *EFCDA* without the consent of the Chief Electoral Officer.

[para 39.] Section 4(1) of the *Election Act* also specifies the duties and powers of the Chief Electoral Officer. It says:

4(1) The Chief Electoral Officer shall

- (a) provide guidance and supervision respecting the conduct of all elections, enumerations and plebiscites conducted under this Act and the Senatorial Selection Act;*
- (b) enforce on the part of all election officers fairness and impartiality in the conduct of their duties and compliance with this Act and the Senatorial Selection Act;*
- (c) issue to election officers any information and guidance he considers necessary to ensure the effective carrying out of the provisions of this Act and the Senatorial Selection Act;*
- (d) perform all duties assigned to him by this or any other Act.*

[para 40.] After reviewing the statutes governing the Chief Electoral Officer's duties and powers regarding elections, I believe that it is clear the Records relate to this officer's function under the *Elections Act* and

the *EFCDA* as required by section 4(1)(c). The Chief Electoral Officer is the overseer of elections in Alberta. Therefore, I find that records of individual contributions to Alberta's Progressive Conservative Party where the contribution exceeded \$375 relate to the Chief Electoral Officer's functions under the *Elections Act* and the *EFCDA*.

Conclusion

[para 41.] After considering the Applicant's and the Public Body's arguments and evidence, I find, based on the above reasons, that because the Records are in the "custody" of the Chief Electoral Officer (the Public Body), who is an officer of the Legislature, and the Records relate to the exercise of the Chief Electoral Officer's functions under the *Elections Act* and the *EFCDA*, the criteria of section 4(1)(c) have been met. The clear legislative intent expressed in section 4(1)(c) is to enable the Chief Electoral Officer to fulfill his duties outside the provisions of the Act. The Records requested are therefore excluded from the Act's application. Consequently, it will not be necessary to hold Part 2 of this inquiry.

[para 42.] I am sympathetic to the Applicant's arguments that even though the written version of the Records are available to the public, as required by section 10(1) of the *EFCDA*, the electronic version would be more useful and relevant. However, given that the Records are outside of the Act's jurisdiction, I can not comment on whether the Public Body should provide to the public with the Records in a certain format.

V. ORDER

[para 43.] I make the following Order under section 68 of the Act.

1. The Commissioner has the authority under the Act to decide in what order issues are to be heard at an inquiry.
2. Section 4(1)(c) of the Act excludes the Records from the application of the Act.
3. Based on the above determination, it is not necessary to hold Part 2 of the inquiry.

Robert C. Clark
Information & Privacy Commissioner