

Interim Order No. PP- 07 - 001

Re: Elections PEI

**Prince Edward Island Acting Information and Privacy Commissioner
Karen A. Rose, Acting Commissioner**

May 7, 2007

I. BACKGROUND

On January 25, 2007, the Office of the Information and Privacy Commissioner received a privacy complaint relating to electoral procedures at the polling stations of elections held on Prince Edward Island. The complainant (“the Complainant”) contends that a representative of the Office of the Chief Electoral Officer violated Part II of the *Freedom of Information and Protection of Privacy Act* (the “*FOIPP Act*”) in disclosing the Complainant’s personal information to a representative of a political party without the Complainant’s consent. It is the Complainant's opinion that while electoral officers are required to keep records of names and addresses of those who attend to vote at municipal, provincial and federal elections, it is an invasion of privacy to allow electoral officers to disclose that same information to agents of political parties attending at polling stations during an election.

II. PRELIMINARY ISSUE

Given that the information at issue is disclosed from a record of the Office of the Chief Electoral Officer, a question of jurisdiction arose at the outset. I asked the Chief Electoral Officer to respond to questions concerning section 4 of the *FOIPP Act*, as this would enable me to make an informed decision regarding the jurisdiction of the Office of the Information and Privacy Commissioner over this complaint.

More specifically, the preliminary issue arising from this complaint is as follows:

1. Does the Office of the Information and Privacy Commissioner have jurisdiction to investigate and attempt to resolve a complaint against the Office of the Chief Electoral Officer that personal information has been collected, used or disclosed by the Office of the Chief Electoral Officer in violation of Part II of the *FOIPP Act*?

III. ANALYSIS AND FINDINGS

There are three issues which need to be considered in order to reach a reasoned conclusion regarding the preliminary issue as described above. They may be described as follows:

1. Does the Office of the Chief Electoral Officer constitute a public body in accordance with the *FOIPP Act*?
2. Are records of the Office of the Chief Electoral Officer excluded from the application of the *FOIPP Act*?
3. If so, does the exclusion of records affect the jurisdiction of the Information and Privacy Commissioner to investigate this complaint against the Office of the Chief Electoral Officer?

Is the Office of the Chief Electoral Officer a "public body"?

Pursuant to the definition under section 1(h) of the *FOIPP Act*, the Chief Electoral Officer is a named “officer of the Legislative Assembly” and, as set out in subsection 1(k)(iv) below, an officer of the Legislative Assembly is considered a “public body”:

1. In this Act

(h) “officer of the Legislative Assembly” means the Auditor General, the Clerk, Clerk Assistant and Sergeant-at-Arms, **Chief Electoral Officer**, the Information and Privacy Commissioner or the Conflict of Interest Commissioner; [*emphasis added*]

...

(k) “public body” means

...

(iv) the office of an officer of the Legislative Assembly, but

...

It is clear from the above definitions that the *FOIPP Act* specifically intends for the Office of the Chief Electoral Officer to be a public body subject to the remaining provisions of the *FOIPP Act*. The Office of the Chief Electoral Officer is not included in any of the exceptions noted under subsections 1(k)(v) and (vi) of the *FOIPP Act*.

Are records of the Office of the Chief Electoral Officer excluded from the application of the FOIPP Act?

The jurisdiction of the Office of the Information and Privacy Commissioner to investigate and attempt to resolve the complaint that personal information has been collected, used or disclosed by the Office of the Chief Electoral Officer in violation of Part II of the *FOIPP Act* may also depend on the interpretation of “record” under section 4(1) of the *FOIPP Act* as it pertains to the record at issue, namely, the Register of Electors.

The related subsections of section 4(1) are as follows:

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 for or is in the custody or under the control of **an officer of the Legislative Assembly** and relates to the exercise of that officers’ functions under an enactment; [*emphasis added*]

...

From the above subsection, we see that the *FOIPP Act* does not apply to a record if:

- (i) the record is created by or for or is in the custody or under the control of an officer of the Legislative Assembly; and
- (ii) the record relates to the exercise of that officers’ functions under an enactment.

The information which is allegedly disclosed by the Office of the Chief Electoral Officer in violation of Part II of the *FOIPP Act* is information from the Register of Electors. The Register of Electors contains four items of personal information: (i) name; (ii) address; (iii) date of birth; and (iv) gender of the elector. The Chief Electoral Officer advises that this list is created, revised and maintained by the Chief Electoral Officer pursuant to subsections 24.1(1) and (2) of the *Election Act*, as follows:

24.1 (1) The Chief Electoral Officer shall establish and maintain a Register of Electors.

(2) The Chief Electoral Officer may create, revise and maintain the Register by using all or any of the following sources of information:

- (a) information obtained from conducting a confirmation of electors under this Act;
- (b) information provided by the Chief Electoral Officer of Canada that was used for compiling lists of electors for use at a general election, by-election, plebiscite or referendum conducted by the Chief Electoral Officer of Canada;
- (c) any other information obtained by or available to the Chief Electoral Officer.

...

(5) The Register may only contain the following information about persons ordinarily resident in the province who are electors or are eligible to be electors:

- (a) the civic address, including the postal code of the person, and the mailing address, including the postal code, if the mailing address is different from the civic address;
- (b) the surname, given name and middle name or initial of the person;
- (c) the telephone number of the person;
- (d) the gender of the person;
- (e) the day, month and year of birth of the person.

...

(9) A person referred to in subsection (5) is entitled to have access to the information in the Register about himself or herself for the purpose of determining whether the information is correct.

(10) The Chief Electoral Officer shall refuse to disclose information in the Register to an applicant except in the circumstances permitted under subsection (9).

Further, the Chief Electoral Officer provided evidence that the creation, control and custody of the Register of Electors is central to his duties as Chief Electoral Officer of the Province of Prince Edward Island. As an example of the use of this register, the Chief Electoral Officer cited section 62 of the *Election Act*, which states as follows:

62. (3) As soon as possible after the completion of a confirmation of electors, the Chief Electoral Officer shall, using the information in the Register, prepare and print a preliminary list of electors in the prescribed form for each polling division and the Chief Electoral Officer shall supply each returning officer with sufficient copies to

- (a) transmit to each registered party registered under the Act in each electoral district not less than 5 copies of the preliminary list of electors of every polling division in the electoral district;
- (b) keep or post one copy in his or her headquarters where it shall be kept available for public inspection;
- (c) transmit two copies to each deputy returning officer in his or her electoral district with instructions that the same be posted at or in a public place as near as practicable to the polling station; and
- (d) retain not less than 5 copies for use in the performance of his or her duties.

It is clear from the above evidence that the Register of Electors is created by the Chief Electoral Officer and is in the custody and under the control of the Chief Electoral Officer, thus satisfying the first part of the test under section 4 of the *FOIPP Act*, as described above.

It is also clear that the Register of Electors relates very closely to the exercise of the functions of the Chief Electoral Officer under the *Election Act*, satisfying the final portion of the test. Therefore, I find that the records of the Office of the Chief Electoral Officer, including the Register of Electors, are excluded from the operation of the *FOIPP Act*.

Does the exclusion of records affect the jurisdiction of the Information and Privacy Commissioner to investigate this complaint?

The finding regarding the exclusion of the Register of Electors does not necessarily end the matter at issue. The *FOIPP Act* is divided into two distinct parts. As I noted in Order 03-005, Part I of the *FOIPP Act* deals with the positive obligations of a Public Body to disclose its records as part of its freedom of information duties. Part II of the *FOIPP Act* deals specifically with the positive obligations of a Public Body as they relate to protection of privacy. Although the *FOIPP Act* is generally interpreted as a whole, Part I and Part II of the *FOIPP Act* require procedural differences.

Since 2003, a number of orders have been issued by my office in freedom of information reviews. It can be seen from a reading of those orders that whatever issue is being reviewed, it always involves specific records of a public body to which someone requests access. These records are often referred to as the “record at issue”, as I have referred to the Register of Electors above. This description emanates from the wording associated with access requests contained in Part I of the *FOIPP Act*, and set out in section 2:

2. The purposes of this Act are
 - (a) to allow any person a right of access to the **records** in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act; [*emphasis added*]

By the use of the specific term “records” in section 2 of the *FOIPP Act* and throughout Part I of the *FOIPP Act* dealing with freedom of information, the legislature makes it clear that section 4, as described earlier, refers to records which are the subject of “access requests”.

The question remains, however, whether the legislature also intended to exclude the Office of the Chief Electoral Officer from investigation of “privacy complaints” by the Information and Privacy Commissioner, where the information alleged to be wrongfully disclosed originated from such a “record”.

One possible answer may be found upon a reading of Part II of the *FOIPP Act* in its entirety. In fact, the term “record” is not used when describing the obligations of the Public Body with regard to protection of personal information. Rather, the term “information” is used again and again. A public body must collect, use and disclose **information** in accordance with the requirements set out in Part II.

A further response may be found at section 50 of the *FOIPP Act*, which sets out the powers and obligations of the Information and Privacy Commissioner. Section 50 of the *FOIPP Act* permits the Commissioner to investigate and attempt to resolve complaints that personal information has been collected, used or disclosed by a public body in violation of Part II of the *FOIPP Act*.

Given the above analysis, I conclude that, despite the application of section 4 of the *FOIPP Act* to “records” of the Office of the Chief Electoral Officer, the Information and Privacy Commissioner is authorized to investigate a complaint that the Chief Electoral Officer has disclosed personal information in violation of Part II of the *FOIPP Act*.

IV. CONCLUSION

Given my finding that the Office of the Information and Privacy Commissioner has the jurisdiction to investigate this complaint, I will proceed with the investigation forthwith. This interim order will be incorporated into the final order in this matter, bearing the same order number as noted on the first page hereof.

Karen A. Rose
Acting Information & Privacy Commissioner