



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

Information About Written Inquiries
under the
Freedom of Information and Protection of Privacy Act

January 2008



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Note: Words in *italics* are defined at the end of this document.

You have been invited to participate in a written *inquiry* conducted by the Office of the Information and Privacy Commissioner (“OIPC”). To help you get ready, we have prepared answers to the most commonly asked questions about written inquiries.

If you have further questions regarding the inquiry process after reading this information, please ask for assistance from the Registrar.

1.0 Why Are Inquiries Held?

During a review or complaint investigation, the Portfolio Officer attempts to mediate a settlement between the applicant, the public body and any third parties. If the participants cannot settle their differences, the Commissioner¹ may decide the matter through an inquiry. After completing the inquiry, the Commissioner makes an order. The Commissioner can, for example, order the public body to withhold or disclose requested records, to reconsider its decision or to correct personal information.

2.0 Why is the Inquiry Written?

The Commissioner decides whether to hold a written or oral inquiry. Since most inquiries involve the straightforward application of sections of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) and clearly-defined factual issues, inquiries are usually written rather than oral.

¹ References to “Commissioner” in this document include an “adjudicator” to whom the Commissioner may delegate conduct of an inquiry or other matter.

3.0 Who participates?

The applicant and the public body to which the request was made, or about which the complaint was made, will be invited to make a submission in the form of *argument* and *evidence*.

If an inquiry involves information about another individual or a business (*third party*), the third party will also usually be invited, as an *appropriate person*, to make a submission. The Commissioner may also invite other appropriate persons who have a direct interest in the inquiry issues to participate in the inquiry.

In addition, other organizations, agencies or individuals may have a broader interest in, or knowledge of, the implications of an issue or may be able to provide a different perspective. The Commissioner may invite these organizations, agencies or individuals to make submissions in the inquiry as *intervenors*.

4.0 What happens during a written inquiry?

The procedures followed during a written inquiry are similar to some court procedures, but a written inquiry is less formal.

A written inquiry involves sending a written *submission* to the OIPC. You are not required to appear in person in front of the Commissioner.

You may, at your own expense, have a lawyer or another person represent you in the inquiry.

The following is an outline of what is involved at each stage of a written inquiry:

4.1 Notice of Inquiry & Fact Report Are Distributed

The Registrar of Inquiries, who is responsible for the administrative aspects of all inquiries and other applications to the Commissioner, sends a Notice of Inquiry and the Portfolio Officer's Fact Report to all participants. These documents are described below. If a third party or other appropriate person is participating in the inquiry, then the Registrar will also send the applicant's original request for review to that party.

4.1.1 Notice of Written Inquiry

The Notice of Inquiry generally contains the following information, as appropriate to the specific inquiry:

- names of the participants² in the inquiry

² See para. 6.1 below for more information.

- the sections of FIPPA under consideration
- the issues to be decided in the inquiry
- the inquiry's date
- who has the *burden of proof*, where applicable
- the deadlines for the receipt of initial and reply submissions and
- the number and form of copies of submissions and other documentation that participants must provide for the inquiry

Any objections to the notice of inquiry must be received by the OIPC in writing within three days of it being issued and must be copied concurrently to the other parties.

4.1.2 Portfolio Officer's Fact Report

The Portfolio Officer responsible for the matter will prepare a statement of facts for distribution to all participants. This Fact Report outlines the chronology of the request, review and inquiry processes, the facts and the issues in dispute and any factual outcomes of mediation, such as changes in the issues or the exceptions applied; changes to the scope of the records in dispute; and changes to, or waivers of, fees the public body assessed.

The Fact Report does not include any information about offers or attempts to settle the matter during mediation before the inquiry process. Any objections to the Fact Report must be received by the OIPC in writing within three days of it being issued and must be copied concurrently to the other parties.

4.2 Initial and Reply Submissions

The participants must deliver the requested number of copies of their initial and reply submissions to the Registrar on or before the dates set out in the Notice of Inquiry, under "Schedule for Submissions". Initial submissions must deal only with those issues set out in the Notice of Inquiry and should include evidence and written argument. Each participant will receive a copy of the other participants' initial submissions, except for portions received *in camera*.

The participants may submit a reply to the initial submissions. A reply submission must not raise any new issues or contain any new facts (except in response to facts in other participants' initial submissions) and must be filed before the deadline stated in the Notice of Inquiry. Each participant will receive a copy of the other participants' reply submissions, except for those portions received *in camera*, and then the inquiry is closed. After the inquiry is closed, the Registrar will not accept any further submissions from any participant.

A participant who does not deliver an initial submission will not be allowed to deliver a reply submission, except under extenuating circumstances. In such circumstances, the participant must make an application in writing to the Registrar, requesting permission to make a reply submission.

Participants must submit any objections about *procedural issues* relating to the inquiry in a timely manner. In any event, the Office must receive them before the Registrar closes the inquiry.

With the exception of initial and reply submissions, the participants must copy each other on any correspondence with the OIPC relating to the inquiry. Participants may contact the Registrar for guidance where they do not have the necessary contact information.

(See below for further details on the contents of submissions.)

4.3 Decision

In order to consider the case and make a decision, the Commissioner is provided with the following material:

- the applicant's original access or correction request, the public body's response, the applicant's request for review and any other relevant correspondence relating to the request
- the Notice of Inquiry
- the Portfolio Officer's Fact Report
- the participants' initial and reply submissions
- copies of any records in dispute and
- other material or correspondence relevant to the inquiry

The Commissioner may request further submissions where the Commissioner considers more information is necessary or desirable.

After considering the material, the Commissioner issues a written decision, or "order", to the participants, which includes an order made under s. 58 of FIPPA. Among other things, FIPPA authorizes the Commissioner to order the public body to change or reconsider its decision or to confirm the public body's decision.

The public body has 30 business days to comply with the Commissioner's order, unless an application for judicial review is filed in the British Columbia Supreme Court within that time period.

The Registrar will first provide each participant with a copy of the order and then make it available to the public by publishing it on the OIPC website.

5.0 Preparing for a Written Inquiry

How you prepare depends largely on your role, the nature of the inquiry and who has the *burden of proof* in the inquiry. The burden of proof will, where applicable, be described in the Notice of Inquiry.

Participants are encouraged to consult previous orders to determine how similar inquiries have been decided in the past and on what basis. Orders are published on the OIPC website, arranged by the year in which they were issued. The OIPC website also has a sectional index. It lists, for each of FIPPA's sections, the orders that have considered that section. There are also other online resources which provide access to the Commissioner's orders, links to orders issued by the Information and Privacy Commissioners for other jurisdictions and decisions made by courts which may be relevant.

5.1 Burden of Proof

Access to Disputed Information: When FIPPA imposes a burden of proof on a party in an inquiry, it means that party must provide evidence and argument proving, on a balance of probabilities, that the party's position about the issue in dispute is the correct one.

In inquiries involving a decision under Part 2 of FIPPA to give or refuse access to information, the public body has, with two exceptions, the burden to prove that it made the correct and appropriate decision regarding the access request.

The exceptions are:

- If the records in dispute contain personal information about a third party, it is up to the applicant to prove that having access to the records would not be an unreasonable invasion of the third party's personal privacy under s. 22 of FIPPA.
- If the records in dispute contain business information about a third party that the public body has decided to disclose to the applicant, then it is up to the third party to prove that s. 21 of FIPPA applies and that the public body must refuse the applicant access to the records.

Other Issues: For other issues, FIPPA does not set out a burden of proof. In these cases, each party has an obligation to bring forward evidence and argument that justify its position on the issue.

Examples:

If the issue is a **fee waiver denial** under s. 75 of FIPPA, the applicant provides evidence and argument about why s/he should be excused from paying the fee, such as how the records relate to a matter of public interest, why the applicant cannot afford to pay the fee or any other reason why it is fair to excuse payment.

The public body provides evidence and argument about why the applicant should not be excused from paying the fee.

If the issue is the disclosure of information in the **public interest** under s. 25 of FIPPA, the applicant, the public body and any third party must all provide evidence and argument about whether the conditions for disclosure under s. 25 of FIPPA apply.

5.2 Suggestions for Preparing Submissions

Each participant makes an initial submission. All participants make their initial submissions at the same time.

A participant's initial submission should contain evidence and argument that support its case. The argument should include the participant's interpretation of how the relevant sections of FIPPA apply in the circumstances and explain how the evidence presented supports the participant's position. Initial submissions must deal only with issues stated in the Notice of Written inquiry.

Evidence is comprised of assertions of fact on which a participant relies and is generally submitted through *affidavits* or other documents containing factual information that can be used to support a participant's argument. An individual participant is not required to submit evidence in affidavit form, although public bodies and other participants who are represented by legal counsel are generally expected to do so. If a participant wishes to rely on evidence from another person, as opposed to a document, the evidence from that person should generally be provided through an affidavit.

Hearsay evidence is evidence given in the inquiry by one person about what another person said. Because an inquiry results in the Commissioner making a final order that disposes of the issues, it is not generally appropriate for participants to submit affidavits made on information and belief or that include hearsay evidence. Wherever possible, the person with direct knowledge of the facts, or who made the statements, should be the one to attest to those facts or statements.

5.3 Guidance on Content and Form of Submissions

To preserve the confidentiality of the mediation process, a participant may not, without the written consent of all other participants, include or refer to, in any submission:

- records or information generated during, and related to, the mediation process;
- records or information provided by any party related to the mediation process; or
- records or information relating to attempts to settle the issues before the inquiry began.

If the participant has not obtained written consent, then the Registrar will remove this mediation material from the submission and return it to the submitting participant. The Commissioner will not consider it in reaching a decision and issuing an order.

“Mediation material” refers generally to communications made in furtherance of offers or attempts to settle the matter during mediation, including any opinions on the merits of the matter by the Portfolio Officer conducting the mediation. It does not include information related to the factual outcomes of mediation, such as changes in the issues or the exceptions applied; changes to the scope of the records in dispute; and changes to or waivers of fees assessed by the public body.

A participant must provide a list of orders, court cases, statutes and other legal authorities mentioned in the participant’s submission and must cite the sources relied on.

In addition to this list, the participant must provide the following:

- For all published Canadian authorities referred to, the full name of the order, decision or legislation referred to and a proper citation for either QuickLaw or CanLII (Canadian Legal Information Institute, a public website at www.canlii.org) or the neutral citation assigned to the order or decision by the issuing body
- For all unpublished or foreign authorities referred to, a copy of the order, decision or legislation
- For all other material referred to, including books, articles and academic journals, a copy of the relevant section, chapter or article and complete bibliographic information indicating the title, author, publisher and date of publication

The submitting party is responsible for ensuring that the materials and citations referred to or provided are accurate and complete.

In addition to the required number of paper copies, participants should provide with their reply submissions one electronic copy of all submissions made by the party in the inquiry (including affidavits) in MS Word on a disc or CD. An exception to this will be made for those participants who do not have access to the technical means to comply. We do not at this time accept submissions sent by e-mail, and we no longer accept submissions by fax.

Initial and reply submissions must be:

- double-spaced;
- no longer than 30 pages each (excluding affidavits);

- in 12-point type or clear and legible hand-printing; and
- divided into numbered paragraphs.

Submissions that do not meet the above criteria must be approved by the Registrar before being submitted.

Submissions, affidavits and any copies of relevant authorities should be 3-hole-punched and should not be bound, cerloxed or placed in plastic covers.

5.4 Submissions made *in camera*

A submission made *in camera* means that the material is submitted privately and kept from the other participants in the inquiry and from the public. A participant may, in limited cases, ask the Commissioner receive part or all of a submission on an *in camera* basis. The Commissioner may accept *in camera* material if it discloses the contents of a record in dispute in the inquiry or discloses sensitive information (personal information or other types of information) or information that might otherwise be subject to an exception under FIPPA.

A participant who wishes to make an *in camera* submission must explain in writing why the material submitted *in camera* should be accepted as such by the Commissioner. The Commissioner will then review the *in camera* material and consider the participant's written explanation and may request further information from the participant, before making a final decision about whether the *in camera* material will be accepted.

If a participant intends to submit *in camera* material in the inquiry, the participant must tell the Registrar in writing, copied concurrently to the other participants, five days before the due date for initial submissions. The due date for initial submissions will not change. The Registrar will normally re-schedule dates for exchange of initial submissions and for submission of replies while the Commissioner makes a final decision about whether the *in camera* material will be accepted.

On the due date for initial submissions, the participant proposing to include *in camera* material must provide one copy of the submission that clearly identifies which sections are submitted *in camera*, for example, in bold or underlined type or by boxing or highlighting the *in camera* text. It is not acceptable to provide one clear copy and one severed copy of the material being submitted *in camera*. If the material is submitted *in camera* with respect to only some of the other participants in the inquiry, then this must also be clearly indicated.

The Registrar will not accept submissions that include *in camera* material unless the *in camera* portions are clearly identified. Similarly, the Registrar will not

accept submissions that include *in camera* material if the participant does not provide, as required, written reasons explaining why the material is properly submitted *in camera*.

Once the Commissioner has made a final decision about whether to accept the *in camera* material, the Registrar will provide further instructions to the participant about the appropriate number and form of copies of the submission that the participant must provide to the OIPC for the Commissioner's use and for distribution to the other parties in the inquiry. The Registrar will then communicate with all participants in the inquiry and, as necessary, schedule new dates for exchange of the initial submissions and for reply submissions.

5.5 Standards for Preparation of Records in Dispute

Public bodies must submit copies of any records in dispute with their initial submissions and must prepare them as follows:

- the records must be numbered clearly, beginning with the numeral 1, in the top right or lower right corner of each page;
- information and pages that have been severed and withheld must be highlighted, boxed or otherwise clearly marked to show that they have been withheld or severed (it is not acceptable to provide one clear copy and one severed copy of the records in dispute); and
- in each instance, the section and subsection of FIPPA the public body relied on must be clearly indicated next to the severed information.

Public bodies must also, wherever practicable, provide a table listing the records in dispute by record or page number and listing the sections of FIPPA applied, by record or page number.

6.0 Other Questions

6.1 Will my name be disclosed?

The Notice of Inquiry, Portfolio Officer's Fact Report and the order name the public body and any intervenors. These documents do not name the applicant or any third party, except where the applicant or third party is a corporate entity. An individual applicant's or third party's identifying information may be severed from the request for review sent to third parties, other appropriate persons or intervenors.

6.1 Are written submissions public documents?

We do not make written submissions available to the public. We refer any request for a copy of a submission to the participant who prepared it.

6.3 Are orders final and binding?

Orders are final and there is no further avenue of appeal under FIPPA. A participant other than an intervenor can apply to the Supreme Court of British Columbia for judicial review of the order.

The public body must comply with the order within 30 business days after the date of the order, unless an application for judicial review has been filed within that time.

7.0 Definitions of Terms

Affidavit: A written statement of facts, the truth of which has either been sworn or affirmed before a Commissioner for taking Affidavits in British Columbia. Lawyers, notaries, Government Agents and Municipal City Clerks are Commissioners for taking Affidavits in British Columbia.

Applicant: A person who makes a formal request for access to information or for correction of personal information in a record that is held by a public body; or a person who makes a complaint to the Commissioner under FIPPA.

In cases where a public body makes application to the Commissioner under s. 43 or s. 56, the public body is the “applicant” for the purposes of that application only.

Appropriate Person: Any individual or organization that has an interest in the records in dispute and that the Commissioner considers appropriate to invite to participate in the inquiry.

Burden of Proof: A participant’s obligation to prove its case to the Commissioner. The participant with the burden of proof must convince the Commissioner of its case in order to be successful at the inquiry. The Notice of Inquiry states which participant has the burden of proof for an inquiry where that is indicated under FIPPA.

Complaint Investigation: An examination by OIPC staff of a public body’s compliance with FIPPA. A complaint investigation involves an examination of the public body’s actions and any relevant records, and mediation to assist the applicant and the public body to settle the matter. There is no specific time limit within which a complaint investigation must be completed.

Evidence: The means used to present facts to prove or disprove an allegation. This may include documents, physical evidence and oral or written testimony.

Evidence received in an inquiry by affidavit is sworn evidence. Evidence received in an inquiry without an affidavit is unsworn evidence.

Inquiry: A quasi-judicial process in which the Commissioner receives submissions from applicants, public bodies, third parties and sometimes other participants, in order to consider and determine all questions of fact and law with respect to a public body's decision in response to a request for access to records or correction of personal information.

In Camera: Evidence or argument that is presented to the Commissioner in private, *i.e.*, on a confidential basis, and which is not made available to other participants in the inquiry or to the public.

Intervenor: A person, group of persons or an organization that has a broader interest in an issue being decided at an inquiry and is invited by the Commissioner to make representations. The Commissioner has the authority to decide who will be granted intervenor status in an inquiry and may consider requests or recommendations from the applicant, public body or a third party.

Order: A binding decision of the Commissioner which resolves the issues in an inquiry.

Participant: A person or group of persons with a direct or indirect interest in the review and representing one position during an inquiry. The participants in an inquiry are usually the applicant, the public body and, where applicable, any third parties or other appropriate persons, or intervenors.

Portfolio Officer: A member of the OIPC staff responsible for conducting reviews, investigating complaints and assisting the participants to settle matters in dispute.

Procedural Issues: Matters relating to the procedures used in the inquiry, including: the accuracy of a Fact Report; whether the matter at inquiry has already been decided; receipt of *in camera* submissions; and use of mediation material in submissions made in the inquiry.

Public Body: An organization that is subject to FIPPA. Currently, this includes provincial ministries, local public bodies and agencies, boards, commissions and Crown corporations listed in Schedule 2 of FIPPA; and the self-governing professional bodies listed in Schedule 3 of FIPPA. The head of a public body is the person responsible for the administration of FIPPA within the public body and is usually the minister, chief executive officer or equivalent.

Records: FIPPA defines records as including books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records.

Review: An examination by OIPC staff of a public body's decision, action, or failure to act with respect to a request for access to information. Reviews are usually initiated at

the request of an applicant, but may also follow a request by a third party to review a public body's decision to disclose the third party's personal or business information.

Submission: The argument and evidence prepared by a participant and submitted to the Commissioner at an inquiry under FIPPA.

Third party: Any person, group of persons or organization, other than the applicant and the public body dealing with the request, whose information or interests may be involved in a request.

Examples:

In the case of **business information**, if Company A were to request a copy of a report which contained the trade secrets or other business information of several companies, B, C and D, each of those companies B, C and D would be a third party.

In the case of **personal information**, a third party is an individual, other than the applicant, whose personal information is in a record to which the applicant has requested access.
