



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

**Instructions for Written Inquiries**  
**under the**  
***Freedom of Information and Protection of Privacy Act***

**February 2009**

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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 these instructions, please ask for assistance from the Registrar of Inquiries, directly at 250-356-7953 or through the toll-free Enquiry B.C. line 604-660-2421 (Greater Vancouver Area) or 1-800-663-7867 (elsewhere in BC).

Words in *italics* are defined at the end of this document. Other terms are defined in Schedule 1 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

### **1.0 Why Are Inquiries Held?**

During a review, the Portfolio Officer attempts to mediate a settlement between the *applicant*, the public body and any third parties. If the parties cannot settle their differences, the Commissioner or his delegate (“adjudicator”) may decide the matter through an inquiry. After completing the inquiry, the adjudicator makes a decision and issues an order. The adjudicator can, for example order the public body to:

- withhold or disclose requested records
- reconsider its decision

### **2.0 Why is the Inquiry Held in Writing Rather than Orally?**

Since most inquiries involve the straightforward application of sections of FIPPA and clearly-defined factual issues, inquiries are usually written rather than oral. The adjudicator decides whether to hold a written or oral inquiry.

### **3.0 Who participates?**

The applicant and the public body to which the request was made will be invited to make a submission. If an inquiry relates to 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. If an inquiry flows from a request for review by a third party, the original applicant for records will normally be invited to make submissions, along with the third party and the public body.

The adjudicator may also invite other appropriate persons who have an interest in the inquiry issues to participate in the inquiry. In addition, the adjudicator may invite as *intervenors* 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.

## **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 your written *submissions* to the OIPC and exchanging copies of your submissions with the other participants in the inquiry. You are not required to appear in person in front of the adjudicator.

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 *The OIPC Distributes the Notice of Inquiry & Fact Report***

The Registrar of Inquiries, who is responsible for the administrative aspects of all inquiries and other applications to the adjudicator, sends the Notice of Inquiry and the Portfolio Officer's Fact Report to all participants, together with a list of the participants in the inquiry and their contact information. The Notice of Inquiry and Fact Report are described below. If a third party or other appropriate person is participating in the inquiry, then the registrar may, if this has not already been done, provide that party with notice under s. 54 of the review, as well as a copy of the applicant's original request for review. The registrar will also provide the participants with instructions on the number of copies of their submissions they are to provide to the OIPC and to each other.

#### **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 participants<sup>1</sup> in the inquiry
- 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 delivery and exchange of initial and reply submissions

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

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<sup>1</sup> See para. 6.1 below for more information.

#### **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 these things:

- the chronology of the request
- the review and inquiry processes
- the facts and the issues in dispute
- any factual outcomes of mediation, such as:
  - changes in the issues or the exceptions applied
  - changes to the scope of the records in dispute
  - 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 the fact report being issued and must, at the same time, be copied to the other parties.

#### **4.2 Initial and Reply Submissions**

The participants must provide the requested number of paper copies of their initial and reply submissions to the OIPC **on or before** the dates set out in the Notice of Inquiry, under “Schedule for Submissions”.

Participants must also, **at the same time**, provide the appropriate number of paper copies of their initial and reply submissions **to each other, on or before** the dates set out in the Notice of Inquiry, under “Schedule for Submissions”. Participants may contact the registrar for guidance on this process.

Where a party's identity is in issue or otherwise to be kept private from other participants, the OIPC will — in these cases only — accept and exchange submissions for all parties. In these cases, participants will receive additional instructions on the number of submissions they are to provide to the OIPC.

Initial submissions must deal only with those issues set out in the Notice of Inquiry and should include evidence and written argument. Initial submissions must not raise any new issues or exceptions.

Participants may reply to each other's 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).

The inquiry is then 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. The registrar may also

not accept late submissions, except under extenuating circumstances. In such circumstances, the participant must make an application in writing to the registrar, with reasons, requesting permission to make a reply submission or a late submission, as the case may be.

Participants must copy each other, at the same time and in a timely manner, on any correspondence with the OIPC relating to the inquiry, such as requests for more time to make submissions or objections about procedural issues relating to the inquiry. The OIPC must receive any procedural objections before the registrar closes the inquiry.

Where participants have legal counsel, those legal counsel are expected to provide their clients with copies of inquiry documents.

The adjudicator or registrar may, with the consent of the parties or where appropriate and reasonable in the circumstances and at the written request of a participant, allow participants more time to make submissions.

See below for further details on the contents of submissions.

### **4.3 Decision**

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

- the applicant's original request, the public body's response, the applicant's request for review and any other relevant correspondence
- 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 relevant to the inquiry

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

After considering the material, the adjudicator 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 adjudicator to order the public body to disclose records or to reconsider its decision. The adjudicator may also confirm the public body's decision.

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

The OIPC 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 our 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 our orders, links to orders issued in 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 to support the party's position.

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.

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.

### **5.2 *Submissions***

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

A participant's initial submission should contain argument and *evidence* 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.

It is not necessary to reproduce the tests from past orders for applying exceptions to disclosure. Parties may refer to relevant orders in this regard.

Evidence is comprised of assertions of fact on which a participant relies and is generally submitted in the form of *affidavits* or other documents containing factual information that supports 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 adjudicator 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.

Affidavits prepared as part of a submission must include the name, legibly typed or written, of the commissioner before whom the affidavit was sworn, in addition to the signature.

### **5.3 Content and Form of Submissions**

#### **5.3.1 Mediation Material**

“Mediation material” refers generally to information or communications that relate to 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.

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
- records or information referring or 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. The adjudicator will not consider it in reaching a decision and issuing an order.

“Mediation material” 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.

### **5.3.2 Reference material**

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](http://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.

### **5.3.3 Format of Submissions**

In addition to the required number of paper copies, participants must, with their reply submissions, provide the OIPC with one electronic copy of all submissions and affidavits made by the party in the inquiry, in MS Word on a diskette, CD-ROM or DVD disc, labelled with the OIPC file number and the participant's name. Any *in camera* material must be clearly marked in both the paper and electronic copies in accordance with our instructions on submission of *in camera* material – see below. The OIPC will make an exception to this for those participants who do not have 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. We also do not accept electronic copies of submissions in .pdf or an equivalent format.

Initial and reply submissions must be:

- double-spaced
- no longer than 30 pages each (but excluding affidavits)
- in 12-point type or clear and legible handwriting
- divided into numbered paragraphs

Parties must also provide a summary of no longer than one page for each submission.

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

### **5.3.4 *In camera* Submissions**

A submission made *in camera* means that the material is submitted privately and kept from the other participants in the inquiry and the public. *In camera* material will also not be disclosed in an order. A participant may ask an adjudicator to receive part or all of a submission on an *in camera* basis. The adjudicator may accept *in camera* material if it discloses the contents of a record in dispute in the inquiry or discloses information that might be subject to an exception under FIPPA.

A participant who wishes to submit *in camera* material must explain in writing why the material submitted *in camera* should be accepted as such by the adjudicator and should limit the *in camera* material to the absolute minimum necessary to protect the information in question.

An adjudicator will 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.

As necessary, 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 other participants in the inquiry and to the OIPC.

#### ***How to submit in camera material to the OIPC for approval***

If a participant intends to submit *in camera* material in the inquiry, the participant must, no later than five business days before the due date for initial submissions, provide to the registrar the following:

- a) one copy of its initial submission containing any material that is submitted *in camera*
- b) a separate written submission and any supporting authority explaining why the material is properly submitted *in camera*.

The material proposed for *in camera* submission must be clearly marked, for example, by bolding, underlining or boxing the *in camera* text or by highlighting the *in camera* text in a different colour. It is not acceptable to provide one complete (unsevered) 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.

Please note that if the only *in camera* material that a public body wishes to submit is the information or records in dispute, it is not necessary to submit this *in camera* material for pre-approval to the OIPC.

### **5.3.5 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 number 1, in the top right or lower right corner of each page
- information and pages that have been severed and withheld must be clearly marked, for example, by bolding, underlining or boxing the withheld text or pages or by highlighting the withheld text or pages in a different colour; it is not acceptable to provide one complete (unsevered or unmarked) copy and one severed copy of the records in dispute
- the sections and subsections of the FIPPA exceptions the public body relies on must be clearly indicated on the withheld page or next to the severed information, as the case may be

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 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, as well as the applicant and any third parties when these are corporate entities. The Notice, Fact Report and order do not normally name applicants or third parties who are individuals.

### **6.2 *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 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**

**adjudicator:** An individual to whom the Commissioner has delegated conduct of an inquiry or other matter.

**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 request under FIPPA for access to records or for correction of personal information in a record that is held by a public body.

**appropriate person:** Any individual or organization that has an interest in the records in dispute and to whom the adjudicator considers it appropriate to give notice under s. 54 of FIPPA to participate in the inquiry.

**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:** Information submitted to prove or disprove a fact or 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:** An adjudicative process in which the adjudicator receives submissions from applicants, public bodies, third parties and sometimes other participants, considers and determines all questions of fact and law in relation to the review and disposes of the issues in the form of an order.

***in camera*:** Evidence, argument or records presented to the adjudicator in private.

**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 adjudicator to make representations. The adjudicator has the authority to decide who will be granted intervenor status in an inquiry and may consider requests or recommendations from the person or organization in question or from the applicant, public body or a third party.

**participant:** 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.