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Is The Canadian Energy Centre A Department, Branch or Office of the Government of Alberta?

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Decision Commented On: *Re Canadian Energy Centre Ltd*, [Order F2022-16](#) (AB OIPC)

The Office of the Information and Privacy Commissioner (OIPC) released a *Re Canadian Energy Centre Ltd*, [Order F2022-16](#) finding that the Canadian Energy Centre (CEC), which is also known as the ‘War Room’, is not subject to the *Freedom of Information and Protection of Privacy Act*, [RSA 2000, c F-25](#) (*FOIP*). This is the outcome the Alberta government intended when creating the CEC, and Alberta Energy participated in the hearing to argue the CEC was not subject to *FOIP*. Despite that, my view is that the OIPC adjudicator made errors in interpreting *FOIP* and their conclusion is wrong. The CEC is a ‘public body’ subject to *FOIP*.

The Decision

A requester (not identified in the decision, but actually the freelance investigative reporter Jennie Russell) filed an access request under *FOIP* on May 21, 2021 to the CEC. After the CEC told the requester that the CEC was not subject to *FOIP*, the requester filed for a review by the OIPC on May 31, 2021.

The adjudicator described the general ways organizations become ‘public bodies’ subject to *FOIP*:

- (1) By being on the list of things defined as ‘public bodies’ in the definition of public bodies in *FOIP*, section 1(p)(i),(iii)-(vii) and not excluded by (viii) or (ix),
- (2) By being “an agency, board, commission, corporation, office or other body designated in the regulations” made by the Minister under the *Freedom of Information and Protection of Privacy (Ministerial) Regulation*, [Alta Reg 56/2009](#).
- (3) By being “an agency, board, commission, corporation, office or other body designated in the regulations” made by the Lieutenant Governor in Council under the *Freedom of Information and Protection of Privacy Regulation*, [Alta Reg 186/2008](#) (*FOIP Regulation*),
- (4) By being a subsidiary of one of the organizations designated in the *FOIP Regulation*, or
- (5) By being one of the “boards, committees and councils established under section 7 of the *Government Organization Act*, [RSA 2000, c G-10 \(GOA\)](#)” as set out in schedule 1 of the *FOIP Regulation*.

This multi-layered method of determining if an organization is subject to *FOIP* is an ugly and complicated mess (see paras 14-19 for the adjudicator’s summary of it). To check if an organization is a public body, a person needs to check three lists, figure out if the organization is

a subsidiary, how it was created, and interpret the phrase “department, branch or office of the Government of Alberta” from *FOIP* section 1(p)(i).

The most complicated part was possibility 1. Included in the definition of a ‘public body’ is “a department, branch or office of the Government of Alberta” (*FOIP* section 1(p)(i)), but *FOIP* does not define the words “department, branch or office of the Government of Alberta.”

The adjudicator considered the definition of “department” from the *GOA* (at para 32). The adjudicator does not establish a definition of “branch” or “office”, and the reasoning on whether the CEC is a “branch” or “office” is very hard to follow (at paras 33-43).

For possibilities 2 and 3, the CEC also has not been designated a ‘public body’ by the Minister of Energy or the Governor in Council. The Applicant argued that the CEC should have been designated because the CEC met all three of the requirements for the Minister to designate it a ‘public body’ under section 2(a) of the *FOIP Regulation* (at para 50) and the CEC was obviously government created, funded, and controlled (at para 50). The adjudicator found that *FOIP* uses a designation approach, meaning the Minister or Governor in Council had control of the decision to designate an agency, board, commission, corporation, office or other body as a public body. The adjudicator determined the OIPC had no power to consider any arguments, no matter how good, that an organization should have been designated a ‘public body’ (at paras 73-74).

Possibilities 4 and 5 were easily dismissed. The CEC was not established under section 7 of the *GOA* and is not a subsidiary of a public body listed under the *FOIP Regulation* (at para 29).

On this basis, the adjudicator determined the CEC is not a ‘public body’ and not subject to *FOIP*.

The Delay

I note that the issue was sent directly to inquiry (at paras 1-8). Files at the OIPC normally go through a mediation process first that typically takes several months. The ten-month delay in getting this decision on a single preliminary question finished is an example of how the underfunding and understaffing of the OIPC has strangled *FOIP* with delays.

The Adjudicator’s Errors

I agree with the adjudicator on possibilities 2-5. However, in my view, the adjudicator failed to properly interpret the phrase “a department, branch or office of the Government of Alberta” (*FOIP* section 1(p)(i)).

As mentioned above, the adjudicator considered the definition of “department” from the *Government Organization Act* (at para 32). This is a bizarre approach, as *FOIP* does not refer to the *GOA* to define ‘department’, and ‘department’ has different (and usually broader) definitions in the *Public Service Act*, [RSA 2000, c P-42](#) (section 1(b)), the *Financial Administration Act*, [RSA 2000, c F-12](#) (section 1(1)(f)), and the *Government Emergency Management Regulation*, [Alta Reg 248/2007](#). It is not a correct approach to statutory interpretation to pull a definition from a different statute without justification. The approach is also strange because it was not used to interpret

‘branch’ or ‘office’, because those terms are not defined in the *GOA*, which is clear evidence *FOIP* is not using definitions drawn from the *GOA*.

The adjudicator compared the CEC to the other six entities making up the Ministry of Energy:

[para 36] In the most recent Energy Annual Report the CEC is described as one of the entities making up the Ministry of Energy which includes the Department of Energy, Alberta Energy Regulator, Alberta Utilities Commission, Alberta Petroleum Marketing Commission, Post-closure Stewardship Fund, the Balancing Pool and Canadian Energy Centre Ltd. The Minister of Energy is responsible for each of these entities. This suggests that at most the CEC is an office of the Ministry of Energy, not an office of government.

...

[para 40] Six of the seven entities that make up the Ministry are public bodies under the Act: the Department of Energy, the Alberta Energy Regulator, the Alberta Utilities Commission, the Alberta Petroleum Marketing Commission, the Post-closure Stewardship Fund and the Balancing Pool. The Department of Energy is a public body by virtue of s. 1(p)(i) but the remaining entities are public bodies by virtue of s. 1(p)(ii). This means that they have not been treated as either a branch or office of government.

(footnotes omitted)

The adjudicator’s decision says the Post-closure Stewardship Fund is listed in Schedule 1 of the *FOIP Regulation* (para 36 and footnote 12). It is not. The Post-closure Stewardship Fund is not an agency or entity of any kind; it is a fund held and administered directly by the Minister (see section 122 of the *Mines and Minerals Act*, [RSA 2000, c M-17](#)).

Once the Post-closure Stewardship Fund error is set aside, the remaining entities all fit a simple pattern. The Ministry of Energy is controlled directly by the Minister and did not require designation in one of the two regulations under *FOIP*. The other four that were public bodies by virtue of designation by regulation all have independent control by some form of board or commission and are not within the direct control of the Minister.

(1) For the Alberta Energy Regulator see Part 1, Division 1 of the *Responsible Energy Development Act*, [SA 2012, c R-17.3](#);

(2) for the Alberta Utilities Commission, see Part 1 of the *Alberta Utilities Commission Act*, [SA 2007, c A-37.2](#);

(3) for the Alberta Petroleum Marketing Commission see sections 2-8 of the *Petroleum Marketing Act*, [RSA 2000, c P-10](#); and

(4) for the Balancing Pool see part 4 of the *Electric Utilities Act*, [SA 2003, c E-5.1](#).

The adjudicator looked for a distinguishing characteristic of a “department, branch or office of the Government” separate from the requirements listed in section 2 of the *FOIP Regulation*. The adjudicator considered whether the work of the corporation contributing to the priorities of government might be the distinguishing feature and draws no conclusion I can understand, first saying that it does point to the CEC being an ‘office of government’ (at para 38) and then saying that it does not (at para 41) and then saying they considered a list of factors (at para 42) even

though there does not appear to be such a list in the decision. The adjudicator failed to find any interpretation of “branch or office of government.”

The Interpretation of “department, branch, or office of the Government”

The ordinary sense of the phrase “a department, branch, or office of the Government of Alberta” is bodies that are a part of the Government of Alberta. The adjudicator should have considered the context, as the phrase “a department, branch or office of the Government of Alberta” appears in one other place in *FOIP*, the definition of “head” in section 1(f)(i):

(f) “head”, in relation to a public body, means

- (i) if the public body is a department, branch or office of the Government of Alberta, the member of the Executive Council who presides over it,
- (ii) if the public body is an agency, board, commission, corporation, office or other body designated as a public body in the regulations, the person designated by the member of the Executive Council responsible for that body to act as the head of that body or, if a head is not so designated, the person who acts as the chief officer and is charged with the administration and operation of that body,

This definition shows that a “department, branch, or office of the Government of Alberta” is always presided over by a member of the Executive Council, and “an agency, board, commission, corporation, office or other body designated as a public body in the regulations” is never presided over by a member of the Executive Council.

On this basis, I suggest that direct control by the executive branch is the distinguishing characteristic of a “department, branch or office of the Government” as opposed to “an agency, board, commission, corporation, office or other body” that may or may not be designated as a ‘public body’ based on the considerations in section 2 of the *FOIP Regulation*, which reads:

2 The Lieutenant Governor in Council may designate an agency, board, commission, corporation, office or other body as a public body and add the name of that body to the list in Schedule 1

(a) where the Government of Alberta

- (i) appoints a majority of the members of that body or of the governing board of that body,
- (ii) provides the majority of that body’s continuing funding, or
- (iii) holds a controlling interest in the share capital of that body,

or

(b) where that body performs an activity or duty that is required by an enactment and the Minister responsible for the enactment recommends that the Lieutenant Governor in Council make the designation.

The CEC fits 100% with the three options under section 2 of the *FOIP Regulation*: (i) the Government of Alberta appoints the entire governing board, (ii) provides the entirety of the body's funding, and (iii) holds the entire interest in the share capital. But the CEC also exceeds option (i) in an important way: the Government of Alberta does not just appoint the Board of the CEC; it is the Board of the CEC.

The CEC's board of directors consists of three members of the Executive Council, and the Chair of the CEC board is the Minister of Energy. A member of the Executive Council presides over the CEC. As that is the defining characteristic of "a department, branch or office of the Government of Alberta" under *FOIP*, no designation by regulation is required. In my view, the adjudicator's decision is incorrect, and the CEC is a public body under section 1(p)(i) of *FOIP*.

Although the full explanation is complex, the basic reasoning is intuitive. Because the government did not set up the CEC with an even nominally independent board and retained complete control in the hands of Ministers, the CEC is a department, branch, or office of the Government of Alberta. The corporate personhood of the CEC changes nothing in the same way natural personhood would change nothing – when a new human employee is hired by the Minister of Energy to work directly under the Minister's supervision and direction, no one would question if the new employee was part of the Government.

On a policy level, it should go without saying that the adjudicator's decision leads to a wildly absurd outcome – the government could move government functions into corporations completely controlled by the executive branch and gain immunity from *FOIP*. Hopefully the adjudicator's decision is reversed by appeal, regulation, or legislative change to clarify *FOIP*. If it happens by legislative change, *FOIP* could use [some other fixes too](#).

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