

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

DECISION F2015-D-01

February 27, 2015

CALGARY REGIONAL PARTNERSHIP INC.

Case File Number F7874

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request for records under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Calgary Regional Partnership Inc. (the Calgary Regional Partnership). The Calgary Regional Partnership responded that it was not subject to the FOIP Act.

The Applicant requested review by the Commissioner of the Calgary Regional Partnership's response to his access request. He argued that the Calgary Regional Partnership was a public body through operation of section 1(i)(xii) of the FOIP Act, which establishes that an entity created or owned by a local government body is itself a local government body.

The Adjudicator decided that the Calgary Regional Partnership was not a local government body or a public body under the FOIP Act for two reasons. First, she determined that section 1(i)(xii) contemplates creation of an entity by one local government body, rather than several local government bodies. Second, she found that membership to the Calgary Regional Partnership is determined by a Board of Directors, and not by a local government body at all. The Adjudicator determined that the Calgary Regional Partnership had no duties under the FOIP Act in relation to the Applicant's access request.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 10, 12; *Interpretation Act* R.S.A. 2000, c. I-8, ss. 3, 26; **ON:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. RSO 1990, c M.56 s. 2

Authorities Cited: ON: Order M-343

I. BACKGROUND

[para 1] The Applicant made an access request to the Calgary Regional Partnership for a list of all the financial codes and account descriptions it uses.

[para 2] The Calgary Regional Partnership responded that it is not a public body under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act), but is a private company, and is not subject to the FOIP Act.

[para 3] The Applicant requested review of the Calgary Regional Partnership's response to his access request.

[para 4] The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 5] The parties exchanged submissions. Once I had reviewed the submissions of the parties, I asked the Calgary Regional Partnership to provide its Articles of Association for my review. The Calgary Regional Partnership did so and the inquiry continued.

II. ISSUES

Issue A: Is the Calgary Regional Partnership a public body within the terms of section 1 of the *Freedom of Information and Protection of Privacy Act*?

Issue B: If yes, did the Calgary Regional Partnership meet its obligation to respond to the Applicant under section 10(1) (duty to assist applicants) and section 12 (contents of response) of the Act?

III. DISCUSSION OF ISSUES

Issue A: Is the Calgary Regional Partnership a public body within the terms of section 1 of the *Freedom of Information and Protection of Privacy Act*?

[para 6] The Applicant argues that the Calgary Regional Partnership is a Public Body within the terms of section 1 of the FOIP Act. He states:

I request a review of the rejected FOIP request made to the Calgary Regional Partnership. Their claim is that they are a private organization and consequently, the FOIP act does not apply to them. I would argue that the FOIP act does apply to them because the organization is comprised of public bodies, i.e. municipalities. I believe that 1(i)(xii) applies to the CRP:

"(xii) any board, committee, commission, panel, agency or corporation that is created or owned by a body referred to in subclauses (i) to (xi) and all the members or officers of which are appointed or chosen by that body, but does not include EPCOR Utilities Inc. or EN MAX Corporation or any of their respective subsidiaries"

In my opinion, the CRP was created and is owned by municipalities, which are subject to the FOIP act as they are public bodies. In the CRP's words: "The Calgary Regional Partnership (CRP) is a collaborative network of 14 municipalities in the Calgary Region that work together to ensure growth occurs in a sustainable manner."

I also performed a corporate registry search for the CRP which is attached. Its directors/shareholders are the mayors of the municipalities which comprise its membership.

In closing, I believe CRP is a local government body. Despite its private corporation status, l(i)(xii) applies to the CRP and as such they should accept my FOIP request and produce the records requested.

[para 7] The Calgary Regional Partnership argues that it is not a public body within the terms of the FOIP Act. It argues:

As noted by the Alberta Court of Queen's Bench, the determination of whether an organization is a public body under the *FOIP Act* is solely a matter of statutory interpretation.

The *FOIP Act* deals with the right to access records in the custody or under the control of public bodies. As such, requests for access to information in accordance with the *FOIP Act* can only be made to public bodies.

To determine if the CRP is a public body, the OIPC must have regard to the definition sections of the *FOIP Act*. Under Section l(p) of the *FOIP Act* a "public body" is defined as including:

(vii) a local public body

A "local public body" is defined under Section l(j) as including:

(iii) a local government body

A local government body is defined under Section l(i) as including:

(xii) any board, committee, commission, panel, agency or corporation that is created or owned by a body referred to in subclauses (i) to (xi) and all the members or officers of which are appointed or chosen by that body ...

The Applicant claims that the CRP is a "local government body" pursuant to the *FOIP Act*.

It is respectfully submitted that the CRP does not fall under the definition of "local government body" and therefore is not a public body pursuant to the *FOIP Act* for the following reasons:

a. The CRP is distinguishable from other inter-municipal boards with respect to how it was created and the parameters of its membership. As an example, the CRP is different from the Capital Region Board, which was established by regulation and made specifically subject to the *FOIP Act*. The CRP was not established by any legislation or regulation and neither the *FOIP Act* nor Schedule 1 of the *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 186/2008 specifically identifies the CRP as being subject to the *FOIP Act*;

b. The CRP is a non-profit private company established pursuant to the *Companies Act*, R.S.A. 2000 c. c-21 and its membership is completely voluntary;

c. Although the current members of the CRP are all municipalities, CRP's governance model could potentially evolve in the future to include private corporate entities to its membership; and

d. The CRP is not a municipal or inter-municipal board that was created pursuant to mandatory legislative requirements. In *Edmonton (City) v. Alberta (Information and Privacy Commissioner)*, the Court held that the City's subdivision and development appeal board was a public body under the *FOIP Act* because the board was created by the City pursuant to mandatory requirements of the *Municipal Government Act*. That is not the case here.

By virtue of the definitions in the *FOIP Act*, as well as the distinguishing features of the CRP, it is respectfully submitted that the CRP is not a public body pursuant to the *FOIP Act*. Therefore, it is not subject to and is not required to comply with the *FOIP Act*.

[para 8] Both the Applicant and the Calgary Regional Partnership referred me to section 1(i)(xii) in their submissions. This provision states:

I In this Act,

(i) "*local government body*" means

(xii) *any board, committee, commission, panel, agency or corporation that is created or owned by a body referred to in subclauses (i) to (xi) and all the members or officers of which are appointed or chosen by that body, but does not include EPCOR Utilities Inc. or ENMAX Corporation or any of their respective subsidiaries*

(A) *that own a gas utility as defined in the Gas Utilities Act,*

(B) *that own a generating unit, transmission facility or electric distribution system as defined in the Electric Utilities Act, or*

(C) *whose primary business activity consists of providing electricity services as defined in the Electric Utilities Act;*

To fall within the terms of section 1(i)(xii) a board, committee, commission, panel, agency or corporation must be created or owned by a local government body *and* the local government body that is the creator or owner must appoint or choose all the members or officers.

[para 9] Section 1(i)(xii) refers to the situation in which *a* local government body creates or owns an entity, rather than the situation in which several local government bodies together create a company. In saying this, I acknowledge that section 26(3) of the *Interpretation Act* R.S.A. 2000, c. I-8 states:

26(3) *In an enactment, words in the singular include the plural, and words in the plural include the singular.*

[para 10] However, section 3 of the *Interpretation Act* states:

3(1) *This Act applies to the interpretation of every enactment except to the extent that a contrary intention appears in this Act or the enactment.*

(2) *The provisions of this Act apply to the interpretation of this Act except to the extent that a contrary intention appears in this Act.*

(3) *Nothing in this Act excludes the application to an enactment of a rule of construction applicable to it and not inconsistent with this Act.*

The question becomes whether 1(i)(xii) indicates a contrary intent to the principle that the plural is included, even though the singular is used.

[para 11] Section 1(i)(xii) of the FOIP Act refers to members or officers of the entity it describes as *all* having been appointed or chosen by *that body* (a body referred to in subclauses (i) – (xi)) as a necessary characteristic. This requirement appears intended to distinguish between an entity whose proceedings a local government body may merely take part in, and one that it can be said to have created or to own through exercise of its authority. Having or choosing only one representative on a body does not mean that a local government body has created or owns a body; rather, within the terms of section 1(i)(xii), a local government body will have created the body if it appoints or chooses *all* the body's members or officers. The use of the word "all" in section 1(i)(xii) precludes the interpretation that more than one public body may create a local government body under its authority. I say this because if local government bodies each choose a member to participate in a body, none of the participating public bodies acting singly or collectively could be said to have appointed or chosen *all* the officers of the body.

[para 12] The use of the word "all" to describe the number of members or officers a body referred to in subclauses (i) to (xi) must appoint for an entity to fall within the terms of section 1(i)(xii) precludes the application of section 26(3) of the *Interpretation Act*.

[para 13] If the Calgary Regional Partnership is a local government body within the terms of section 1(i)(xii), then it is also a local public body within the terms of section 1(j)(iii) of the FOIP Act, and a public body within the terms of section 1(p)(vii). If an entity is a public body as defined by section 1(p), then section 6 of the FOIP Act creates a right of access to records in its custody or control.

[para 14] The Applicant argues that the Calgary Regional Partnership is a public body within the terms of section 1(i)(xii) because its members are the mayors of municipalities.

[para 15] The Calgary Regional Partnership counters that it was not created by, and is not owned by, a public body or public bodies. It states that it is a private non-profit organization incorporated under the *Companies Act*, RSA 2000 c. C-21. It notes that its governance model could change and include private organizations as members.

[para 16] The Calgary Regional Partnership also notes that it is not a regional services commission as defined by section 1(i)(iv).

[para 17] As discussed above, section 1(i)(xii) of the FOIP Act refers to a local government body *appointing* or choosing *all* the members of the entity this provision describes. For an entity created or owned by a municipality to fall within the terms of section 1(i)(xii) the local government body must appoint or choose all the new entity's members.

[para 18] The Calgary Regional Partnership cannot be said to have been created by a public body, or said to be owned by a public body, so as to fall within the terms of section 1(i)(xii) because it is an entity whose members are drawn from several municipalities, each one of which is a public body in its own right. No one member of the Calgary Regional Partnership can be said to have chosen or appointed all the members of the Calgary Regional Partnership.

[para 19] The Calgary Regional Partnership's Articles of Association shed light on the means by which municipalities become members of this organization. Article 4 states:

The Member Municipalities of the CRP shall consist of any municipality or applicable jurisdiction that is approved for membership by ordinary resolution of the Board of Directors.

[para 20] The Calgary Regional Partnership has a board of directors that is responsible for admitting members by resolution. The board of directors of a private company, such as the Calgary Regional Partnership, is not an entity referred to in subclauses (i) to (xi), and therefore, a body created by such a board, is not a local government body within the terms of subclause (xii).

[para 21] I draw support for this view from Order M-343, in which Adjudicator Fineberg from the Ontario Office of the Information and Privacy Commissioner considered whether a commission was an institution within the terms of section 2(3) of the *Municipal Freedom of Information and Protection of Privacy Act*. Section 2(3) stated:

Every agency, board, commission, corporation or other body not mentioned in clause (b) of the definition of "institution" in subsection (1) or designated under clause (c) of the definition of "institution" in subsection (1) is deemed to be a part of the municipal corporation for the purposes of this Act if all of its members or officers are appointed or chosen by or under the authority of the council of the municipal corporation.

[para 22] The Adjudicator determined that as members of the Commission were appointed by a board of directors, they were not appointed by the municipality. She said:

The corporate documents show that By-law No. 1 was amended on May 12, 1981 as a result of Supplementary Letters Patent dated January 14, 1981. This latter instrument changed the method of selecting directors, and rescinded the provision that the Mayor shall be an ex-officio member of the Commission. Instead, the document stipulated that the Mayor shall be a director. There was no change to the method of selecting members as set out in the original by-law.

It is, therefore, my view that members were admitted to the Commission by the Board of Directors, and that this approach did not change until By-law No.1 was amended on August 31, 1993. Section 38 of this by-law states:

38. Entitlement. Membership in the Corporation, shall be limited to persons interested in furthering its objects and shall consist of those persons as may from time to time be *admitted into membership by the Secretary* in accordance with rules for membership, if any, in the Corporation which have been approved by resolution of the board of directors, *and* those persons as may from time to time be admitted into membership in the Corporation *by resolution of the board of directors*. Each member shall be promptly informed by the Secretary of their admission as a member. [emphasis added in original]

I have very carefully reviewed all of the representations, the documents pertaining to the corporate history of the Commission, and those documents compiled as a result of a corporate search ordered by this agency. I find that the members of the Commission were "appointed or chosen" by the Board of Directors both at the date of the request, February 11, 1993 and at the date of the filing of the appeal on April 1, 1993. This is also the current situation.

Conclusion:

I have found above that as of the dates of the request and the appeal, neither the "members" nor the "officers" of the Commission were "appointed or chosen by or under the authority of" the Town Council pursuant to section 2(3) of the Act.

I agree with the foregoing analysis. The requirement that a body referred to in subclauses (i) to (xi) appoint all members of corporation is not met when the members of the corporation are appointed by a private company's board of directors.

[para 23] As was the case in Order M-343, membership in the Calgary Regional Partnership is not decided by a municipality or group of municipalities, but by a resolution of the company's Board of Directors.

[para 24] Even though the Board of Directors of the Calgary Regional Partnership is presently made up of mayors or councilors from various municipalities, it remains a separate legal entity from the municipalities the members of the Board of Directors represent as mayors or councilors. The decisions of the Board of Directors are not made on behalf of each municipality, but on behalf of the Calgary Regional Partnership. This holds true of decisions regarding the appointment of members.

[para 25] As none of the member municipalities has appointed all the members of the Calgary Regional Partnership, but rather, the Calgary Regional Partnership's Board of

Directors does so, the requirements of section 1(i)(xii) are not met in relation to the Calgary Regional Partnership.

[para 26] I am unable to identify any provision in the FOIP Act that would allow me to find that the Calgary Regional Partnership is a public body. As a result, I find that the FOIP Act does not create a right to request records in the custody or control of this entity.

[para 27] To summarize, I find that the Calgary Regional Partnership is not a public body for two reasons: first, section 1(i)(xii) contemplates creation of an entity by one local government body, rather than several local government bodies. Second, membership to the Calgary Regional Partnership is determined by a Board of Directors, and not a local government body.

[para 28] Although the Applicant does not say so explicitly, it appears that he is concerned that the Calgary Regional Partnership makes decisions that would typically be made by a government body, but is not subject to the FOIP Act as a government body would be. However, my conclusion that the Calgary Regional Partnership is not a public body would not necessarily mean that any records it produces are exempt from the FOIP Act and therefore from public scrutiny. Rather, if any such records could be said to be in the custody or control of its members, which are public bodies, then the Applicant may well have a right of access to such records under section 6 of the FOIP Act, should he make a request for the records to a public body that is a member.

Issue B: If yes, did the Calgary Regional Partnership meet its obligation to respond to the Applicant under section 10(1) (duty to assist applicants) and section 12 (contents of response) of the Act?

[para 29] As I have found that the Calgary Regional Partnership is not a public body, and as the FOIP Act does not create duties for entities that are not public bodies, it follows that I find the Calgary Regional Partnership is not required to comply with the terms of sections 10 or 12.

V. DECISION

[para 30] As discussed, above, I have decided that the Calgary Regional Partnership is not a public body under the FOIP Act. As a result, it has no duties under the FOIP Act in relation to access requests and is not required to respond to the Applicant within the terms of the FOIP Act.

Teresa Cunningham
Adjudicator