

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2022-16

March 15, 2022

CANADIAN ENERGY CENTRE LTD.

Case File Number 021303

Office URL: www.oipc.ab.ca

Summary: The Applicant sought copies of records from the Canadian Energy Centre Ltd. (CEC). In response, the CEC advised that it was not a public body under the *Freedom of Information and Protection of Privacy Act* (the Act). The Applicant sought a finding that the CEC qualifies as a public body despite the fact that it has not been designated as such. The Adjudicator determines that the CEC is not a public body within the meaning of the definitions set out in the Act. The Adjudicator determines that the decision to subject the Canadian Energy Centre Ltd. to public scrutiny and accountability under the Act does not rest with the Information and Privacy Commissioner. Only the government can decide to designate the CEC as a public body covered by the Act. The Adjudicator concludes that the CEC does not qualify as a public body and so is not subject to the Act.

Statutes Cited: **AB:** *Financial Administration Act*, R.S.A. 2000, c. F-12; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 6, 7, 69, 72, 94; *Freedom of Information and Protection of Privacy Regulation* A.R. 186/2008 s. 2, Schedule 1; *Freedom of Information and Protection of Privacy Regulation* A.R. 56/2009; *Schedule*; *Interpretation Act*, R.S.A. 2000, c. I-8, ss. 3, 26; *Government Organization Act*, R.S.A. 2000, c. G-10, ss. 1(a), 2 and 7. **BC:** *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996 c. C-165, s.1, schedule 1. **MN:** *The Freedom of Information and Protection of Privacy Act*, CCSM c F175, s. 1(1)(b). **NL:** *Access to Information and Protection of Privacy Act 2015*, SNL 2015 c. A-1.2, s. 2(x). **NS:** *Freedom of Information*

and Protection of Privacy Act, SNS 1993 c. 5, s. 3(1)(j). **ON:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, s. 2(3); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 2(1)(b); **PE:** *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, c. F-15.01, s. 1(k)(ii).

Authorities Cited: **AB:** Orders H2006-002 , F2006-003 and P2006-003 ; **BC:** Orders 04-08 and 02-30; **ON:** Order M-343; **PE:** Interim Order No. FI-15-001.

Cases Cited: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario*, 2008 ONCA 366 (ON CA); *Ontario (Divisional Court) v. Ontario (Attorney General)*, 1997 34 O.R. (3d) 611 (ON CA); *Greater Vancouver Mental Health Services Society v. British Columbia (Information and Privacy Commissioner)*, [1999] BCJ No. 198 (BCSC).

Other Authorities Cited: Energy, Annual Report 2020-2021; Canadian Energy Centre Ltd., Annual Report 2020-2021; J. Stephens Allan et. al. *Public Inquiry Into Anti-Alberta Energy Campaigns*, Edmonton: 2021; Sullivan, Ruth. *Statutory Interpretation*, 3rd ed., Irwin Law Inc., 2016; Bellenfontaine, Michelle. “Alberta energy war room not subject to freedom of information rules”, CBC News, Posted October 10, 2019.

I. BACKGROUND

[para 1] An applicant made an access request dated May 21, 2021, under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act) to the Canadian Energy Centre Ltd. (CEC) for

[A]ll records as defined by section 1(q) of the Act related to all contracts between the Canadian Energy Centre and any other organizations and/or individuals. To clarify, this request includes -- but is not limited to -- the contracts themselves, as well as all records related to how they came to be awarded.

The timeframe for the request was October 1, 2019 to May 21, 2021.

[para 2] The CEC responded to the Applicant by email dated May 21, 2021, stating that “FOIP requests for the CEC are handled through the FOIP Coordinator... in the department of Energy.”

[para 3] In response the Applicant stated, “...to be clear, I am submitting a request to the Canadian Energy Centre, not to Alberta Energy for records in its custody about the centre. And as we both know, the CEC was incorporated” (email dated May 21, 2021).

[para 4] The CEC subsequently informed the Applicant (email dated May 25, 2021):

We understand that you are making your request under the *Freedom of Information and Protection of Privacy Act*. However, the Canadian Energy Centre is a private

corporation incorporated under the Alberta *Business Corporations Act*. The setup of the CEC and how FOIP applies would be best addressed by the government of Alberta.

FOIP requests can be made to the Department of Energy and it will determine if it has any records responsive to your request in its custody or control.

[para 5] The Applicant also corresponded directly with the area responsible for responding to access to information requests made to Energy (the “Energy FOIP area”) (email dated May 21, 2021). The Applicant stated

I am trying to submit a FOIP request to the Canadian Energy Centre (to be clear, the request is to the centre, not to Alberta Energy for records about the centre).

The CEC referred me to Alberta Energy.

How can I submit a request directly to the centre?

[para 6] The Energy FOIP area responded by informing the Applicant that an access to information request cannot be made to the CEC as it is not a public body subject to the Act (email dated May 31, 2021).

[para 7] The Applicant was not satisfied with the response and on May 31, 2021 requested a review by our Office. By letter dated June 23, 2021, the Commissioner informed the Applicant and CEC that she decided to proceed directly to inquiry under s. 69 of the Act to get a decision on the jurisdictional issue.

[para 8] Energy was invited to participate in the inquiry, and agreed to participate as a disclosed affected party.

II. RECORDS AT ISSUE

[para 9] This inquiry relates to preliminary matters and so there are no records at issue.

III. ISSUES

[para 10] The Notice of Inquiry, dated September 29, 2021, states the issues for this inquiry as follows:

1. Is the Canadian Energy Centre Ltd. a “public body” within the meaning of s. 1 of the Act?
2. Are the requested records in the custody or under the control of the Department of Energy or another public body within the meaning of s. 4 and s. 6 of the Act?

IV. DISCUSSION OF ISSUES

[para 11] The modern principle of statutory interpretation has been consistently adopted by Canadian courts and by this office¹. The modern principle says I must read the words in an enactment “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”.²

[para 12] The modern principle must be applied in conjunction with the *Interpretation Act*, which says “[a]n enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects”³.

[para 13] I have taken this approach in the discussion that follows.

1. Is the Canadian Energy Centre Ltd. a “public body” within the meaning of s. 1 of the Act?

[para 14] Section 1 of the Act provides in part:

Definitions

1 In this Act

(p) “public body” means

(i) a department, branch or office of the Government of Alberta,

(ii) an agency, board, commission, corporation, office or other body designated as a public body in the regulations,

In my view it is clear that paragraphs (iii) to (ix) of the definition of public body, found in s. 1(p) do not apply in this case. Accordingly, I will restrict my discussion to ss. 1(p)(i) and (ii) of the Act along with the related provisions set out below.

[para 15] Section 94(1)(a) sets out the power of government to make regulations related to designations:

94(1) The Lieutenant Governor in Council may make regulations

(a) designating agencies, boards, commissions, corporations, offices or other bodies as public bodies;

[para 16] Section 1(p)(ii) of the Act must also be read in conjunction with Regulation 186/2008 which provides the criteria to be used for designating public bodies.

¹ See for example Order H2006-002 at para 47-49 for a list of leading cases and orders from this office.

² *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para 21.

³ *Interpretation Act*, R.S.A. 2000, c. I-8 s. 10.

Criteria to be used for designating public bodies

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.

There are two ways entities listed in s. 1(p)(ii) of the Act may be designated as public bodies. First, the Lieutenant Governor in Council may designate an entity in accordance with s. 94(1)(a) and Regulation 186/2008. Those agencies are listed in Schedule 1 of the Regulation. The CEC is not listed in Schedule 1.

[para 17] Alternatively, the Minister responsible for the Act may also designate an entity according to s. 94(3):

94(3) The Minister may by regulation designate an agency, board, commission, corporation, office or other body as a public body on the same criteria established by regulation on which the Lieutenant Governor in Council may designate a public body, but only at the request of the Minister responsible for that agency, board, commission, corporation, office or other body.

[para 18] Regulation 56/2009 lists the ministerial designations. The CEC is not listed under ministerial designations Regulation.

[para 19] Schedule 1 of Regulation 186/2008 also includes two general provisions allowing for inclusion of certain entities without a designation requirement: all boards, committees and councils established under s. 7 of the *Government Organization Act* and any subsidiary of a public body designated in Schedule 1.

[para 20] One final provision of relevance is s. 94(2) of the Act which provides that a body designated under s. 94(1)(a) or (3) may be deleted only if the Commissioner is satisfied that it is not contrary to the public interest to delete the public body and that the further requirements of s. 94(2) are met.

Submissions by the parties

[para 21] The Applicant's position is that the CEC is a public body for the following reasons:

- It is a clear offshoot of Alberta Energy;
- It is funded using taxpayer money via the Technology, Innovation and Emissions Reduction fund;
- Since 2019 the Board of Directors has been composed entirely of government ministers;
- Its voting shareholder is the Alberta government as represented by the Energy minister;
- The fact that it is a corporation does not mean that it cannot also be a public body under the Act – see for example the Alberta Investment Management Corporation.

[para 22] The Applicant's view is that the incorporation of the CEC was a deliberate manoeuvre to try to sidestep the Act and ensure the CEC's internal records are not accessible to the public. This, the Applicant submits, is contrary to the letter and spirit of the Act. The Applicant cites an Ontario Court of Appeal decision⁴ for the proposition that a corporation cannot be excluded from freedom of information legislation where its structure and purpose clearly meant it was subject to the Act.

[para 23] The CEC submits that the Act reflects a balancing of interests where the promotion of transparency and access to information is tempered by countervailing policy considerations. The CEC points to "carve-outs" in s. 4 of the Act and exceptions to the broad right of access in s. 6 of the Act as examples of the limitations on the right of access. In addition, the CEC notes that the Act contains a detailed definition of public body which reflects further legislative decision making regarding what information is subject to disclosure.

[para 24] The CEC submits that the CEC is not a public body because it has not been designated as a public body. The CEC points to a number of decisions it says illustrates that other jurisdictions have respected this legislative choice. Further the CEC argues that it is not the role of the Information and Privacy Commissioner (IPC) to determine whether the government should have designated the CEC as a public body. The IPC's role is to apply the law not make it. Finally the CEC points to legislation in other jurisdictions which do not require corporations to be designated. This contrast, it says, underlines the legislative intent in Alberta. The Legislature could have defined the term public body so as not to require a designation, but it did not. As such, the regulatory designation must be given meaning and viewed as a prerequisite to a public body finding.

⁴ *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario* 2008 ONCA 366 (ON CA).

[para 25] Energy submits that unlike other jurisdictions, when drafting the Act, the Legislature decided not to automatically make corporations that met the criteria in the Regulation public bodies. Contrary to the Applicant's argument that not having the CEC subject to the Act is contrary to the intent of the Act, Energy submits that it clearly aligns with the intention of the Act as evidenced by the relevant provision of the legislation. The wording of the Act illustrates that the Legislature was aware that there are corporations such as the CEC whose directors, funding, and/or shareholders are closely tied to the Government of Alberta and it chose not to deem those corporations public bodies. Instead, the Legislature put in a specific provision that would allow the Government to choose to make these types of corporations public bodies or not.

[para 26] With respect to the general provisions in Schedule 1 of Regulation 186/2008, Energy points out that the CEC has no legislated role and was not established under s. 7 of the *Government Organization Act*.

[para 27] Energy agrees that the CEC meets the criteria under s. 2(a) of Regulation 186/2008 and could have been designated as a public body but was not. Energy emphasizes that in fact no corporations are deemed public bodies under the Act and that the reasons for non-designations are not relevant to the jurisdictional issue.

Discussion

1. Is the Canadian Energy Centre Ltd. a “public body” within the meaning of s. 1 of the Act?

[para 28] There are three possible ways that the CEC might qualify as a public body under the Act:

- a) Because it fits within the two general provisions under Schedule 1.
- b) Because it is a department, branch or office of the government of Alberta pursuant to s. 1(p)(i) of the Act.
- c) Because it fits within the meaning of s. 1(p)(ii) of the Act.

(a) Do either of the two general provisions of Schedule 1 apply to the CEC?

[para 29] As noted earlier, Schedule 1 of Regulation 186/2008 includes two general provisions allowing for inclusion of certain entities without a designation requirement: all boards, committees and councils established under s. 7 of the *Government Organization Act* and any subsidiary of a public body designated in Schedule 1. The CEC was not established under s. 7 of the *Government Organization Act* and there is no evidence that it is a subsidiary of any public body listed in Schedule 1. Therefore, I find that the two general provisions found in Schedule 1 do not apply in this case.

(b) Does s. 1(p)(i) of the definition of public body apply to the CEC?

[para 30] Section 1(p)(i) provides that public body means *a department, branch or office of the Government of Alberta.*

[para 31] Only the Department of Energy addressed the issue of whether or not the CEC met the definition of public body in s. 1(p)(i) of the Act. Energy argues that a reasonable interpretation is that the CEC cannot be defined as a “department, branch or office” of the Government of Alberta under s. 1(p)(i) precisely because it is a corporation, which is specifically referenced in s. 1(p)(ii). According to Energy these two provisions were clearly intended to deal with two different classes of bodies or organizations. Since the CEC meets the criteria in s. 2 of the Regulation 186/2008 it is, therefore, an example of the type of corporation meant to be subject to the Act only if it is designated to be. Energy goes on to state that if it were the case that every corporation that met the criteria in s. 2 of the Regulation 186/2008 were a department, branch or office of the Government of Alberta, then s. 1(p)(ii) would be redundant. Since these types of corporations were meant to be included in s. 1(p)(ii) of the Act they were not meant to be considered a department, branch or office of the Government.

[para 32] The terms “department, branch or office of the Government” are not defined in the Act. “Department” is defined in *Government Organization Act* as a department of Government established by the Lieutenant Governor in Council.⁵ The CEC is a corporation not a department within the meaning of the *Government Organization Act* and so, in my opinion, it is not a department within the meaning of the Act.

[para 33] What remains is the possibility that the CEC is a branch or office of government. In that case it is important to keep in mind some basic statutory interpretation principles:

It is presumed that every feature of a legislative text has been deliberately chosen and has a particular role to play in the legislative design. The legislature does not include unnecessary or meaningless language in its statutes; it does not use words solely for rhetorical or aesthetic effect; it does not make the same point twice. This is what is meant when it is said that the legislature “does not speak in vain.”⁶

[para 34] I agree with Energy’s submission that if a corporation’s characteristics consist only of the three criteria for designation set out in Regulation 186/2008 then s. 1(p)(ii) of the Act must apply and further, the entity must be designated in order to qualify as a public body. To say otherwise would be to ignore the deliberately chosen legislative design. However, if a corporation has other characteristics not listed in Regulation 186/2008 that

⁵ *Government Organization Act*, R.S.A. 2000, c. G-10 s. 1(a) and s. 2.

⁶ Ruth Sullivan, *Statutory Interpretation*, 3rd ed. Irwin Law Inc., 2016 at page 43.

could qualify it as a branch or office of government, is it possible that the corporation might fall under the definition of public body in s. 1(p)(i)?

[para 35] Previous decisions of this office have found that to qualify as a public body under s. 1(p)(i), the body must be a branch or office of government, not a branch or office of a department⁷.

[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.⁸. 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 37] According to the Energy Annual Report, a key priority for government is to inform Canadians and citizens around the world about how Canadian energy is produced with the world's highest environmental, social, and governance standards. The Report states further that engaging with and educating Canadians about Alberta's natural resource development is the first step in ensuring that the sector's economic potential is achieved to the benefit of the entire country. The Ministry ensures misinformation about Alberta's energy industry is addressed, which includes activities associated with the Canadian Energy Centre.⁹

[para 38] Since the work of the CEC is work on a "key priority for government" this appears to support a conclusion that the CEC is an "office of government".

[para 39] However, the Ontario Court of Appeal considered whether the nature of the work of an agency might qualify it as a part of an institution (equivalent to a public body). In deciding that the agency was not a part of an institution the court said if it were, any agency of a ministry would automatically be subject to the Act and s. 2(1)(b), designating specified agencies to come within the Act, would be superfluous.¹⁰ This then supports the conclusion that the CEC is not an branch or office of government based solely on the nature of the work it does.

[para 40] Six of the seven entities that make up the Ministry are public bodies under the Act: the Department of Energy¹¹, the Alberta Energy Regulator, the Alberta Utilities Commission, the Alberta Petroleum Marketing Commission, the Post-closure Stewardship

⁷ Order F2006-003 and P2006-003 at para 35 citing Order 96-007.

⁸ Energy, Annual Report 2020-2021 at p. 9.

⁹ Energy, Annual Report 2020-2021 at p. 54 and 97.

¹⁰ *Ontario (Divisional Court) v. Ontario (Attorney General)*, 1997 34 O.R. (3d) 611 (ON CA). Section 2(1)(b) of the Ontario Act provides: "institution" means...(b) any agency, board, commission, corporation or other body designated as an institution in the regulations.

¹¹ As defined in s. 1(p)(i) of the Act.

Fund¹² and the Balancing Pool¹³. 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.

[para 41] Like the CEC each of the other entities contribute to the priorities of government yet are only public bodies because they have been designated under s. 1(p)(ii) of the Act. This supports the conclusion that s. 1(p)(i) of the Act does not apply to the CEC.

[para 42] In summary then, while the nature of the CEC's work supports a conclusion that it is an office of government, all of the other factors listed above support the opposite conclusion.

[para 43] I find that the Canadian Energy Centre Ltd. does not qualify as a department, branch or office of government within the meaning of s. 1(p)(i) of the Act.

(c) Does s. 1(p)(ii) of the definition of public body apply to the CEC?

[para 44] Section 1(p)(ii) of the Act states that "public body" means an agency, board, commission, corporation, office or other body designated as a public body in the regulations.

[para 45] As noted earlier, the CEC is not listed as a public body in Schedule 1 of Regulation 186/2008 nor is it listed as a public body via ministerial designation under Regulation 56/2009.

[para 46] The CEC is a corporation but it has not been designated as a public body in the regulations.

[para 47] The CEC's position is simple. Since the CEC has not been designated it is not a public body under the Act. Energy agrees.

[para 48] The Applicant's position is also straightforward: although the CEC has not been designated it ought to have been designated because a corporation cannot be excluded from freedom of information legislation where its structure and purpose clearly meant it was subject to the Act.

[para 49] The Applicant made no argument that the criteria for designation set out in s. 2(b) of Regulation 186/2008 applies in this case. Section 2(b) provides that where a 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 a designation, the body may be designated. Energy submits that the CEC has no duties

¹² These four entities are listed in Schedule 1 of Regulation 186/2008.

¹³ The Balancing Pool was designated as a public body via ministerial designation under Regulation 56/2009.

required by an enactment. As there has been no argument or evidence in support of the application of s. 2(b) of Regulation 186/2008 I cannot find that it applies in this case.

[para 50] The Applicant argues that the CEC satisfies all of the criteria for designation set out in s. 2(a) of Regulation 186/2008. I agree. Under the heading “Criteria to be used for designating public bodies” Regulation 186/2008 provides that the Lieutenant Governor in Council may designate a body as a public body if any one of three conditions are satisfied:

1. The Government of Alberta appoints a majority of the members of the body or governing body of the entity or
2. The Government provides a majority of the entity’s continuing funding or
3. The Government holds a controlling interest in the share capital of the entity.

[para 51] The Government of Alberta established the CEC in 2019 as an independent corporation under the *Financial Administration Act*.¹⁴ The CEC is funded by a grant from the Government of Alberta’s industry-funded Technology, Innovation and Emissions Reduction (TIER) fund¹⁵. The Board of Directors is made up of three provincial cabinet ministers¹⁶. The CEC is one of seven entities that make up the Ministry of Energy for which the Minister of Energy is responsible.¹⁷ The Government holds 100% of the voting shares of the CEC.¹⁸

[para 52] On that basis I find that the CEC satisfies all of the criteria for designation as a public body set out in Regulation 186/2008.

[para 53] However, this does not end the question of whether or not the CEC is a public body. The law requires that there be a designation. Section 1 of Regulation 186/2008 provides that the Lieutenant Governor in Council may designate an entity as a public body if any one of the criteria listed are satisfied. Section 94(3) of the Act provides that the Minister may designate an entity as a public body on the same criteria but only at the request of the Minister responsible for the entity.

[para 54] The use of the word “may” means that the decision as to whether or not to designate a body as a public body is a discretionary one. In other words, even though an entity might satisfy some or even all of the pre-requisite conditions for being designated as a public body, it is ultimately a discretionary decision by either the Lieutenant Governor in Council or the Minister responsible for the Act.

¹⁴ Energy 2020-2021 Annual Report (2021) at p. 54.

¹⁵ Canadian Energy Centre 2020-2021 Annual Report (2021) at p. 11.

¹⁶ J. Stephens Allan et. al. *Public Inquiry Into Anti-Alberta Energy Campaigns*, Edmonton at para 1498.

¹⁷ Energy 2020-2021 Annual Report (2021) at p. 5 and p. 9.

¹⁸ The Applicant’s submissions dated October 26, 2021 included a copy of a Corporate Registration System Search dated October 20, 2021 for the Canadian Energy Centre Ltd. That search result lists the Government of Alberta as the sole voting shareholder with 100% of the voting shares.

[para 55] A survey of other access to information laws across Canada reveals that some other jurisdictions have taken a different approach to defining public bodies. In Nova Scotia¹⁹, Newfoundland²⁰ and Manitoba²¹ for example, factors such as government appointment of members of the board, government ownership of shares or acting as public servants in the discharge of their duties are sufficient to qualify a corporation as a public body. No designation is required. Ontario²², PEI²³ and British Columbia²⁴ access laws are similar to Alberta's in that public body is defined to include a corporation designated as a public body in the regulations.

[para 56] This review of other jurisdictions is informative. Alberta had a choice as to whether or not to automatically deem corporations with certain defined characteristics as public bodies in a manner similar to Nova Scotia or Newfoundland. Instead, the Alberta law clearly requires that even where the corporation has all of the required characteristics a designation must occur before the corporation can be considered to be a public body subject to the rules under the Act.

[para 57] It is evident from the definition of "public body" in the Act and Regulations that the Legislature chose not to designate, as a class of public bodies under the Act, corporations owned or controlled by the Province. Instead the legislators have made Crown-owned or controlled corporations public bodies under the Act through specific individual designations.²⁵

[para 58] Despite the fact that the Applicant acknowledges that the CEC has not been designated, she argues that the CEC ought to have been designated and that the IPC should right this error.

[para 59] The Applicant cites an Ontario Court of Appeal decision in *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario*²⁶ (TEDCO) in support of her position that the CEC ought to have been designated as a public body. She argues that TEDCO stands for the proposition that a corporation cannot be

¹⁹ *Freedom of Information and Protection of Privacy Act*, SNS 1993 c. 5, s. 3(1)(j). In Nova Scotia where the government appoints all members of the board, the corporation is deemed to be a public body. Where any member of the board is appointed by government, or controlling interest in the share capital is owned by Her Majesty in Right of the Province, the Governor in Council may designate the corporation to be a public body pursuant to s.49(1)(f).

²⁰ *Access to Information and Protection of Privacy Act 2015*, SNL 2015 c. A-1.2, s. 2(x).

²¹ *The Freedom of Information and Protection of Privacy Act*, CCSM c F175. The Manitoba law also allows for the designation of any other body as a "government agency" in accordance with the regulations pursuant to s. 1(1)(b).

²² *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 2(1)(b).

²³ *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, c. F-15.01, s. 1(k)(ii).

²⁴ *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996 c. C-165, s. 1, Schedule 1.

²⁵ This is a paraphrasing of the same conclusion reached by the British Columbia Information and Privacy Commissioner with respect to a similar provision in the BC law in Order 04-08 at para 13.

²⁶ *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario*, 2008 ONCA 366 (ON CA).

excluded from access legislation where its structure and purpose clearly mean that it is subject to the Act. However, the decision cited is based on a different statutory provision, one that does not require a designation. The court was examining the issue of whether or not the City of Toronto Economic Development Corporation qualified as an institution (equivalent to a public body) within the meaning of Ontario's municipal access to information law. The relevant statutory provision at issue was:

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 municipality 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 municipality.²⁷
[emphasis added]

[para 60] In other words, the requirement at issue in TEDCO was a deeming provision not a designation provision. The Court therefore was not determining whether TEDCO ought to be designated as a public body, instead it was assessing whether it met the requirements to be deemed a public body.

[para 61] The Applicant also argues that other Alberta corporations are treated as public bodies and so incorporation does not act as an automatic bar to finding that the CEC is a public body. She provides the Alberta Investment Management Corporation (AIMCo) as an example of an Alberta corporation that is a public body. However, AIMCo is a public body because it has been designated as such. It can be found listed with the other designated bodies in Schedule 1 to Regulation 186/2008.

[para 62] The Applicant further asserts that a failure to designate the CEC as a public body is contrary to the principles of transparency and accountability that underpin the Act. She provided news articles from the time of the creation of the CEC that reported the Government's explanation for not including the CEC as a public body under the Act:

"The CEC's internal operations are not subject to FOIP, as this would provide a tactical and/or strategic advantage to the very foreign-funded special interests the CEC is looking to counter," Christine Myatt, press secretary to Premier Jason Kenney, said in an email.

"For example, we would not let those foreign-funded special interests seeking to attack our province see our detailed defence plans."²⁸

²⁷ *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M. 56, s. 2(3) as cited in TEDCO at para 2.

²⁸ Michelle Bellenfontaine, "Alberta energy war room not subject to freedom of information rules", CBC News, Posted October 10, 2019 as provided by the Applicant in her submissions dated October 26, 2021.

[para 63] Energy states that there were two decisions made in setting up the CEC that are relevant to this inquiry. First, one of the goals of the CEC was to be able to respond rapidly, to anticipate what's coming at it. The chosen corporate structure gave it more freedom to be efficient. Second, the decision not to designate the CEC was made in order to avoid giving certain special interest groups a tactical and strategic advantage²⁹.

[para 64] Energy submits that the language used in the relevant provision of the Act is discretionary, not mandatory. The Act does not include any language that indicates the reason for incorporating an entity is relevant to whether a corporation could be designated as a public body.

[para 65] The CEC's position is that it is not the role of the Information and Privacy Commissioner to determine whether or not the government should have designated the CEC nor to adjudge the motives of government decision making³⁰. The CEC then goes on to note that, even so, the evidence does not support the contention that the CEC was incorporated as a "deliberate manoeuvre [*sic*] to try to sidestep the FOIP Act" as alleged by the Applicant. Instead, the CEC argues that the statements by officials at the time of the incorporation establish that the CEC was incorporated to allow it the freedom to be efficient and to respond rapidly.

[para 66] In terms of the decision to designate or not, the CEC submits that legislative decisions to include and exclude particular bodies must be respected³¹. The CEC provides a number of examples of decisions in other jurisdictions where bodies were determined not to be public bodies in their own right because they had not been designated as such.

[para 67] The Applicant is not alone in her criticisms in relation to the openness and transparency of the CEC. The recently released *Public Inquiry Into Anti-Alberta Energy Campaigns* concludes that the criticisms of the governance of the not for profit/charitable sector apply to the CEC including the need for independence, openness, transparency and accountability³².

[para 68] As noted earlier, the language used in s. 2 of Regulation 186/2008 is that the Lieutenant Governor in Council *may* designate. Likewise the language used in s. 94(3) of the Act states that the Minister *may* designate. The use of the word "may" as opposed to "must" means that the decision to designate in both provisions is a discretionary one.

[para 69] Other jurisdictions with similar designation provisions likewise have discretionary language. It is informative to review some of the decisions made under these equivalent provisions.

²⁹ Department of Energy Submissions provided November 23, 2021 at paragraphs 35-36.

³⁰ Canadian Energy Centre Submissions dated Novemer 23, 2021 at paragraph 22.

³¹ Citing *Greater Vancouver Mental Health Services Society v. British Columbia (Information and Privacy Commissioner)*, [1999] BCJ No. 198 (BCSC) at para 31.

³² J. Stephens Allan et. al. *Public Inquiry Into Anti-Alberta Energy Campaigns*, Edmonton: 2021 at para. 1498.

[para 70] PEI's access law is similar to Alberta's in that it requires a designation for a corporation to be considered a public body under the law. In Interim Order FI-15-001 the Commissioner determined that the Atlantic Lottery Corporation had been appointed as the agent of the Prince Edward Island Lotteries Commission (a public body) to conduct manage and operate gaming centres on Prince Edward Island. The Commissioner's succinct analysis concludes:

The Lieutenant Governor in Council has the power to designate an organization as a public body [s. 77(1)(a)], and a list of these public bodies is found at Schedule 1, Part 2 of the regulations to the *FOIPP Act*. The significance of this designation is that the organizations listed as public bodies are subject to the *FOIPP Act*. The ALC is not included in the list of designated public bodies.³³

The ALC is not a public body by definition, nor is it listed in the regulations as a designated public body. The ALC is not a public body in its own right.³⁴

[para 71] In British Columbia there have been a number of cases considering whether or not a variety of entities, including corporations, qualify as public bodies within the meaning of the access to information law. The decision in Order 02-30³⁵ is a good example of the approach taken in that jurisdiction. In this case the Commissioner was examining whether or not a Foundation associated with the University of Victoria, could be considered a public body in its own right. The Commissioner notes a number of factors that suggest that the Foundation could be a public body however, the Commissioner determines that the only way the Foundation could be considered a public body would be if it was designated by the government. The Foundation was not listed as a designated public body. The Commissioner concludes that:

...the decision to subject the Foundation's activities to public scrutiny and accountability under the Act does not rest with me. Only the government can decide, under s. 76.1 of the Act, to designate the Foundation as a public body covered by the Act.³⁶

[para 72] As noted earlier, under the Act the only mention of the Commissioner with respect to designations is in s. 94(2) which provides that a body designated under s. 94(1)(a) or (3) may be deleted only if the Commissioner is satisfied that it is not contrary to the public interest to delete the public body and that the further requirements of s. 94(2) are met. The role of the Commissioner with respect to designations then is limited to oversight of deletions.

³³ Interim Order FI-15-001 (PE IPC) at para 12.

³⁴ *Ibid.*, at para 12-13.

³⁵ Order 02-30 (BC IPC).

³⁶ *Ibid.*, at para 28.

[para 73] In summary then, the statutory scheme in Alberta's Act is discretionary; corporations that satisfy the criteria listed may be designated. Designation is not mandatory. Further, Alberta had a clear legislative drafting choice available as evidenced by access legislation in other jurisdictions. Alberta could have chosen to deem corporations that satisfy listed criteria as public bodies but instead chose to require designation. This drafting choice must be respected – otherwise the Legislature would be speaking in vain. Likewise there was a legislative choice to limit the role of the IPC with respect to designations to oversight over decisions to delete designated bodies. Decisions in other jurisdictions with similar designation schemes support this conclusion. I conclude that the decision as to whether or not a body ought to be designated is a decision for the government.

[para 74] In this case, the Applicant has strenuously argued that the CEC ought to have been designated as a public body under the Act. Indeed, the evidence establishes that the CEC is eligible for designation under all three of the available criteria for designation. Further according to the most recent Energy Annual Report, the work of the CEC supports the government of Alberta's strategic plan. Finally, I note that the justification given for not designating the CEC may well have been addressed by existing exceptions to disclosure under the Act such as disclosure harmful to the economic and other interests of the public body and the exception related to advice from officials. However, the decision to subject the Canadian Energy Centre Ltd. to public scrutiny and accountability under the Act does not rest with the IPC³⁷. Only the government can decide, under s. 94(1)(a) of the Act, to designate the CEC as a public body covered by the Act.

[para 75] I find that the Canadian Energy Centre Ltd. is not a public body within the meaning of s. 1(p)(ii) of the Act.

2. Are the requested records in the custody or under the control of the Department of Energy or another public body within the meaning of s. 4 and s. 6 of the Act?

[para 76] When the Applicant initially made her request to the CEC, she was advised to make her request to the Department of Energy. In the exchange of communications that followed, the Applicant made clear that she did not want to make an access to information request to the Department of Energy for copies of CEC records it might have in its possession. Instead, she wanted to make an access to information request directly to the CEC – an entity the Applicant believed was a public body in its own right. The CEC ultimately advised the Applicant that it was not subject to the Act but that she could make an access request for the records she sought from the Department of Energy who could then determine if it had custody or control of the records.

³⁷ This is a paraphrase of the same conclusion reached by the Commissioner in Order 02-30 (BC IPC) at para 28.

[para 77] The Applicant provided no submissions in response to this issue. Both the CEC and Energy submitted that this is not the forum to address this issue as there is no outstanding access to information request with the Department of Energy. They say a determination as to whether requested records are in the custody or control of Energy needs to be made on a record by record basis in the course of responding to an access request to Energy.

[para 78] The Applicant's obligation under the Act is set out in s. 7.

7(1) To obtain access to a record, a person must make a request to the public body that the person believes has custody or control of the record.

[para 79] In this case, despite being advised that responsive records might be in the custody or control of Energy, the Applicant chose to focus her request solely on the CEC. Therefore, there is no outstanding access to information request before Energy and so the Applicant has not met her obligation under s. 7 of the Act.

[para 80] On that basis I find that this is not the appropriate forum to examine this issue.

V. ORDER

[para 81] I make this Order under section 72 of the Act.

[para 82] The Canadian Energy Centre Ltd. is not a public body under the Act. As a result, it has no duties under the Act in relation to access requests and is not required to respond to the Applicant within the terms of the Act.

Catherine Tully
External Adjudicator