

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ADJUDICATION ORDER #6

January 30, 2009

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

Note: On behalf of the Office of the Information and Privacy Commissioner, the Complainant's name has been removed from this unofficial electronic version of the Order.

Date: 20090129

**INFORMATION AND PRIVACY COMMISSIONER
(ADJUDICATOR: ASSOCIATE CHIEF JUSTICE NEIL WITTMANN)**

**IN THE MATTER OF AN INQUIRY PURSUANT to the Freedom of Information
and Protection of Privacy Act, R.S.A. 2000, c. F-25
Respecting Order-in-Council 308-2008**

BETWEEN:

A.B.

Applicant

- and -

THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

Respondent

REASONS FOR DECISION

ASSOCIATE CHIEF JUSTICE NEIL WITTMANN, ADJUDICATOR

APPEARANCES:

A.B.

for himself

M. Mun

Assistant Commissioner

for The Office of the Information and Privacy Commissioner

I. Facts

[1] The complainant in this matter, Mr. B., has requested a review of the Information and Privacy Commissioner's ("the Commissioner") decision, act or failure to act, pursuant to s. 77 of the *Freedom of Information and Protection of Privacy Act* ("FOIP") R.S.A. 2000, c. F-25. Specifically, he complains that his personal information has been disclosed in contravention of the FOIP Act.

[2] Initially, Mr. B. asked the Commissioner to conduct an investigation concerning the disclosure of his personal information in relation to the following allegations:

1. That the law firm of Machida Mack Shewchuck Meagher LLP sent Mr. B.'s personal information to Mr. B. in a transparent Law Society of Alberta envelope; and
2. That the law firm of Parlee McLaws LLP disclosed Mr. B.'s e-mail address, contrary to the *Personal Information and Protection Act* ("PIPA") S.A. 2003, c.P6.5.

[3] By letter dated September 12, 2006, the Information and Privacy Commissioner advised Mr. B. that he was exercising his discretion under PIPA to refuse to conduct an investigation or inquiry in relation to the above allegations. That letter was copied to one of the Benchers of the Law Society of Alberta at the law firm of Machida Mack Shewchuck Maegher LLP and to a Privacy Officer at the law firm of Parlee McLaws LLP.

[4] Mr. B. faxed the Minister of Service Alberta on February 9, 2007 seeking the appointment of an adjudicator pursuant to s.79 of the FOIP Act ("the Request for Review") and a:

Review of the Privacy Commissioner's decision to use FOIP section 4 to deny access to information. It is further alleged that the Privacy Commissioner breached the Act by providing details of [Mr. B.'s] various complaints to third parties that otherwise should not have access to this information. SEE: Attached Letters dated January 3, 2007, as received on January 11, 2007 and dated September 12, 2006 as copied to third parties.

[5] Mr. B. also enumerated a number of complaints, and grounds therefore, in relation to Service Alberta and the Office of the Standing Committee on Legislative Offices. I have no authority to deal with those complaints.

[6] The material requested in the letter dated January 3, 2007, referred to in Mr. B.'s Request for Review, has now been provided to him. Therefore, that issue is now moot. The only issue that remains extant in terms of this adjudication is whether the Commissioner breached the FOIP Act by providing details of Mr. B.'s complaints to third parties by copying those parties with the letter dated September 12, 2006.

[7] The Director, Access and Privacy, Hilary Lynas advised me by letter dated July 21, 2008 that by Order in Council 308/2008, I had been designated as an adjudicator under the FOIP Act. By letter dated September 12, 2008, the Honourable Heather Klimchuck, Minister, Service Alberta, informed the Commissioner of Mr. B.'s request for a review under s.77 of the FOIP Act. The letter stated that the request related to a decision, act or failure to act of the Commissioner when acting as the head of a public body. I also received a letter from Minister Klimchuk dated September 12, 2008 providing me with the Request for Review.

II. Issues

[8] This Application deals with a number of preliminary issues. If I determine that I have jurisdiction to hear the merits of Mr. B.'s complaint, those will be addressed at a later hearing.

[9] The jurisdictional issues that were raised during this Application are:

1. Was the Commissioner acting as the head of the Office of the Information and Privacy Commissioner when he wrote the letter dated September 12, 2006, such that the complaint is subject to review under s.77 of the FOIP Act?
2. Does s.4(1)(d) of the FOIP Act exempt the Commissioner's September 12, 2006 letter from the application of the FOIP Act?
3. Is Mr. B.'s request for a review barred on the basis that it was made after the 60 day time limit provided for in s.79(2)?
4. Had the 90 day time limit within which to complete an inquiry, as provided in s.69(6), expired before I extended that period and, if so, is my jurisdiction thereby extinguished?

[10] If I find that I continue to have jurisdiction in this matter, I will go on to consider the outstanding procedural issues, namely, whether the adjudication of the merits of this case should be held in camera and whether the parties' submissions on the merits should be made orally or in writing.

III. Analysis and Decisions

1. Head of a Public Body

[11] Part 5 of the FOIP Act is titled *Reviews and Complaints*. Divisions 1 and 1.1 of Part 5 deal with reviews by the Commissioner of decisions made by the head of a public body or the Registrar of Motor Vehicle Services. Divisions 1 and 1.1 include ss. 65 to 74.91. Division 2 is titled *Complaints About and Reviews of the Commissioner's Decisions as Head of a Public Body*. As the title suggests, the sections that come within Division 2, being ss. 75 to 81, concern the procedures that govern the adjudication of issues concerning the Commissioner's decisions, actions and failures to act. Those are the procedures that apply to the matter before me.

[12] Section 75 sets out the circumstances under which a judge of the Court of Queen's Bench can be appointed to investigate and review decisions of the Commissioner. It provides, in part:

75(1) The Lieutenant Governor in Council may designate a judge of the Court of Queen's Bench of Alberta to act as an adjudicator

...

(e) to review, if requested under section 77, any decision, act or failure to act of the Commissioner as the head of the Office of the Information and Privacy Commissioner,

....

[13] Section 77 enumerates when a complainant has the right to ask for a review of a decision, act or failure to act by the Commissioner. The relevant portions of s. 77 read:

77(1) This section applies

(a) to a decision, act or failure to act of the Commissioner when acting as the head of the Office of the Information and Privacy Commissioner,

....

(4) A person who believes that the person's own personal information has been collected, used or disclosed in contravention of Part 2 may ask an adjudicator to review the matter.

[14] The Commissioner submits that s.77(4) applies only when the condition in s. 77(1)(a) is met. In other words, there must be a decision, act or failure to act by the Commissioner as head of the Office of the Information and Privacy Commissioner as a prerequisite to the application of s.77(4). Once that criterion is met, an adjudicator may be asked to review whether a person's personal information has been collected or disclosed in contravention of Part 2.

[15] The Commissioner takes the position that he was not acting as the head of the Office of the Information and Privacy Commissioner when he wrote the September 12, 2006 letter and copied it to third parties. Rather, he argues that because he was making a ruling under PIPA, denying Mr. B.'s request for an inquiry, he was acting in his "legislative function". On that basis, he contends that a review by an adjudicator is not available under s.77. In his submission, the Commissioner would be performing his function as head of the Office of the Information and Privacy Commissioner only when he is dealing with core administrative functions, such as human resources matters, staffing issues and IT services.

[16] Mr. B. submits that I have the requisite jurisdiction to hear his complaint. He further argues that I must consider the intent and purpose of the FOIP Act and the legislative provisions at play in determining this issue.

[17] The "modern principle" is the preferred approach to statutory interpretation. That approach was outlined by: Sullivan and Driedger, *Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002), at 1 (quoting Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974), at 67):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[18] The pre-eminence of the modern approach has been confirmed by the Supreme Court of Canada on a number of occasions including in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at 41, and *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559.

[19] I agree that reading the various subsections of s.77 together leads to the conclusion that a review of the Commissioner's actions is only available when he is acting as the head of the Office of the Information and Privacy Commissioner. In my view, the composition and dissemination of the September 12, 2006 letter, which is the subject of the complaint, comes within the Commissioner's role as the head of that office.

[20] Section 1(f)(ii) defines "head" in relation to a public body that is an agency, board, commission, corporation or office or other body designated as a public body as:

....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.

[21] The purposes of the FOIP Act are expressly stated at s.2:

- (a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act,
- (b) to control the manner in which a public body may collect personal information from individuals, to control the use that a public body may make of that information and to control the disclosure by a public body of that information,
- (c) to allow individuals, subject to limited and specific exceptions as set out in this Act, a right of access to personal information about themselves that is held by a public body,
- (d) to allow individuals a right to request corrections to personal information about themselves that is held by a public body, and
- (e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.

Thus, the purposes of the FOIP Act are very broad and are in large part directed at limiting the actions of public bodies.

[22] Section 45(1) states that the Lieutenant Governor in Council must appoint an Information and Privacy Commissioner “to carry out the duties and functions set out in this Act.” Section 53(1) gives the Commissioner the responsibility of monitoring how the FOIP Act is administered to ensure that its purposes are achieved. The Commissioner has the power to conduct investigations, inquiries and reviews and to make orders to ensure compliance with the FOIP Act. The Commissioner is also vested with the authority to allow public bodies to disregard requests to correct personal information and requests for information.

[23] I was not directed to any reference concerning the “legislative functions” of the Commissioner within the FOIP Act, nor could I find any. Section 4(d), which will be discussed in greater detail below, refers to the functions of an officer of the Legislature under an Act of Alberta. However, there is nothing to suggest that these functions are not, or could not, be taken by that officer in his or her role as the head of a public body.

[24] It is also instructive that, although s.77(1) uses the phrase “the head of the Office of the Information and Privacy Commissioner”, the title of Part 5, Division 2 uses the phrase “Head of a Public Body”. The phrase “head of a public body” is used throughout the FOIP Act and, in particular, is used to describe the entity to whom a request is made for access to a record or for correction of personal information. This suggests that the actions taken by and as the head of a public body are not restricted to administrative issues.

[25] If I were to accept the Commissioner’s submissions, it would be tantamount to finding that the Legislature saw fit to enact legislation that allows for reviews of the Commissioner’s actions, only in so far as they relate to duties he fulfills in administering his office. This would be a very narrow reading of s.77(4), perhaps limiting the right to request a review of the disclosure, collection or use of one’s own personal information to the Commissioner’s staff. Had this been the Legislature’s intent in the face of the FOIP Act’s breadth and the scope of the powers provided to the Commissioner, one would have expected an express provision to that effect within the Act.

[26] I find that the Commissioner was acting as the head of the Office of the Information and Privacy Commissioner when he prepared and circulated his correspondence dated September 12, 2006 and thereby allegedly disclosed Mr. B.’s personal information. In my view, the interpretation advanced by the Commissioner is contrary to the scope of the FOIP Act and would be absurd in the context of the broad powers that have been bestowed upon the Commissioner.

[27] In sum, I find that the Commissioner’s role as head of the Office of the Information and Privacy Commissioner is not limited to core administrative functions. This interpretation is consistent with the scheme and object of the FOIP Act and reflects the intention of the Legislature.

2. Section 4(1)(d)

[28] The Commissioner takes the position that the September 12, 2006 letter was prepared by the Commissioner under his mandate under PIPA, as part of his “legislative function” and, as such, is not subject to the FOIP Act as a result of s. 4(1)(d).

[29] Section 4(1)(d) states:

4 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

....

(d) a record that is created by or for or is in the custody or under the control of an officer of the Legislature and relates to the exercise of that officer's functions under an Act of Alberta;

....

[30] On a plain reading of s. 4(1)(d) it would appear that the interpretation and conclusion urged upon me by the Commissioner is correct. However, such an interpretation would mean that the provisions of the FOIP Act, including those that control and limit the dissemination of personal information by public bodies, are inapplicable to records created by the Commissioner that are circulated to other parties. It is absurd to conclude that the Legislature intended that the office that is charged with reviewing complaints about the disclosure of personal information by public bodies is itself immune from reviews of such conduct. Indeed, if the Commissioner's ability to disseminate the personal information of parties before him is unlimited, it may create a chilling effect. Put another way, condoning the circulation of parties' personal information free from the constraints imposed by the FOIP Act, may deter complainants from seeking the assistance of the Office of the Information and Privacy Commissioner.

[31] It is also notable that the other subsections included in s.4(1) exclude the application of the FOIP Act from records that are created for the private use of a public body in the exercise of its duty. For example, the following information is all excluded from the FOIP Act: (a) the record of a judge of the Court of Queen's Bench; (b) a personal note created by someone acting in a quasi-judicial capacity; (e) information relating to disclosure statements of the deputy ministers that have been deposited with the Ethics Commissioner; and (k) records made relating to prosecutions that are not complete. This buttresses the argument that s.4(1)(d) was not intended to apply to information that is disseminated by the Commissioner's office. Rather, it suggests that s.4(1)(d) applies to other records that are created by the Commissioner, for instance, those that are created in the course of an inquiry or during the investigation of a complaint.

[32] Accordingly, I find that the letter dated September 12, 2006, and Mr. B.'s complaint in that regard, are not exempted from review under s. 4(1)(d) of the FOIP Act.

3. Section 79

[33] Section 79 sets out how an individual may ask for a review under Part 5, Division 2 of the FOIP Act. It provides:

79(1) To ask for a review under this Division, a written request must be delivered to the Minister.

(2) A request for a review of a decision must be delivered

(a) if the request is pursuant to section 65(1), (3) or (4), within

(i) 60 days after the person asking for the review is notified of the decision, or

(ii) any longer period allowed by the adjudicator,

or

(b) if the request is pursuant to section 65(2), within 20 days after the person asking for the review is notified of the decision.

[34] The Commissioner notes that the Request for Review in relation to the September 12, 2006 letter was dated February 9, 2007. Thus, the Commissioner argues that the Request for Review was made more than 60 days following Mr. B.'s receipt of the letter.

[35] The Commissioner acknowledges that the adjudicator can, pursuant to s. 79(2)(a)(ii), allow a longer period within which to submit a request for review. However, he submits that it is up to the complainant to make such a request and for the adjudicator to decide the matter.

[36] Mr. B. argues that because he is seeking adjudication of a possible privacy breach, rather than a review of a decision, the time lines referred to in s.79 are inapplicable.

[37] Section 79 references requests pursuant to s.65, which is under Part 5, Division 1. The Request for Review here is under s.77 within Division 2. However, in light of my finding on this issue, I will assume that s.79 is applicable and deal with Mr. B.'s complaint as though it were under s.65(3), a review concerning the disclosure of one's own personal information.

[38] It is reasonable to assume that Mr. B. received the Commissioner's letter within a few days of September 12, 2006. Mr. B. did not suggest that there was a delay in the receipt of the letter. Because the Request for Review was dated almost five months later, it has run afoul of the 60 day limitation provided in s.79(2)(a)(i).

[39] In my view, the limitation provided in s.79(2)(a)(i) is intended to ensure that matters are moved along in a timely manner, such that none of the parties are prejudiced by the passage of time. It is not intended to arbitrarily cut off the opportunity for a member of the public to request a review by an adjudicator. As no prejudice to the Commissioner has been raised, I will extend the time allowed to deliver the Request for Review to February 9, 2007, when Mr. B.'s fax was received by the office of the Minister of Service Alberta, or as necessary, pursuant to s. 70(2)(a)(ii).

4. Section 69

[40] The issue of my jurisdiction to hear this matter has also been challenged in relation to s.69 of the FOIP Act. Specifically, it is alleged that I have exceeded the time lines set out in s.69(6) of the FOIP Act.

[41] Section 69 falls within Part 5, Division 1 and is titled *Inquiry by Commissioner*. It provides:

69(1) Unless section 70 applies, if a matter is not settled under section 68, the Commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.

....

(6) An inquiry under this section must be completed within 90 days after receiving the request for the review unless the Commissioner

(a) notifies the person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review that the Commissioner is extending that period, and

(b) provides an anticipated date for the completion of the review.

[42] Section 81(1) under Part 5, Division 2 relates s.69(6) to reviews of the Commissioner's decisions by an adjudicator:

An adjudicator has the powers and duties given to the Commissioner by sections 68 and 69(1) and (2), and sections 69(3) to (6) and 71 apply to an inquiry conducted by an adjudicator.

[43] The Commissioner takes the position that the issues concerning whether I am within the time limits imposed by s.69 are issues of mixed fact and law arising in the course of this inquiry and, as such, are subject to adjudication. Specifically, he has identified the following questions that are raised by the application of s. 69 in this context:

1. Whether the time starts to run from when the Minister receives the request for review, or from the time that the adjudicator receives the request for review?
2. Whether the Minister or the adjudicator can provide the extension?
3. Whether the extension can be granted after the expiry of the initial 90 day deadline?
4. Whether further extensions are required if the inquiry is not completed by the date

set by the first extension?

[44] The Commissioner notes that no adjudicator has previously extended the time pursuant to s.69(6) or considered the application of that section in relation to an inquiry under Division 2. However, this issue has been the subject of judicial review in relation to those time lines as they relate to reviews by the Commissioner under Division 1.

[45] Mr. B. argues that I do not have the requisite jurisdiction to determine the issue of whether I am within the time lines set out under s.69(6). He argues that it is an issue of law that can only be determined by the Court of Queen's Bench and that the Commissioner must bring an application for Judicial Review. He relies on *Kellogg Brown and Root Canada v. Information and Privacy Commissioner (Alberta)*, (2007), 343 A.R. 311 (Q.B.), wherein Belzil J. dealt with a prohibition application concerning a similar deadline under PIPA.

[46] The Commissioner first raised this issue in correspondence to me, dated October 27, 2008. I responded by letter dated October 29, 2008, wherein I explained the basis upon which I believed I was not outside of the 90 day time limit. I also invited the parties to make submissions on this issue during the hearing on the preliminary issues. Because I outlined the basis upon which I felt I retained jurisdiction in my correspondence of October 29, 2008, Mr. B. takes the position that I have already made my determination on this issue and that I can not consider it further.

[47] The Commissioner submitted that this decision should be decided as part of the application on the merits. Mr. B. objected, stating that due to his limited resources, he would prefer that, if I was inclined to consider this issue at all, that I do so at the preliminary stage. Otherwise, he may have to argue the matter later, which may require another trip to Edmonton from where he lives, only to have it then determined that I have lost jurisdiction. I have decided to answer this issue as one of the preliminary issues so as not to inconvenience the parties unnecessarily.

[48] I reject Mr. B.'s submission that I am not permitted to hear and determine the issue. I made it clear in my letter of October 29, 2008, that I would hear the parties' submissions before making a decision. The explanation provided in my letter was simply to advise the parties of my initial thoughts on the question in order that they could focus their submissions. In any event, I have not been persuaded to change my original view of the issue.

[49] Nor do I find the decision in *Kellogg Brown and Root Canada* to be of assistance. In that case, the relief requested was prohibition. The issue in this case has been brought before me in the first instance by the Commissioner and I will determine it as a matter of law relating to the adjudication, as I am entitled to do by virtue of ss.69(1) and 81(1). If the parties disagree with my determination then they may refer it to the courts for Judicial Review.

[50] As stated, Mr. B. requested this review on February 9, 2007. The Order in Council designating me as the adjudicator was approved and ordered on July 9, 2008. I was advised of my designation by letter dated July 21, 2008 and received by my office on July 23, 2008. I received the Request for Review from Minister Klimchuck on September 16, 2008. I advised the parties of my designation and extended the deadline set out in s.69 by letter dated October 14, 2008.

[51] Section 81(1) makes s.69(6) applicable to inquiries conducted by an adjudicator. Reading these two sections together I conclude that the adjudicator, as the conductor of the inquiry, is given the power to extend the 90 day time limitation provided in s.69(6). This is consistent with Part 5, Division 1, which provides the Commissioner with the authority to extend the 90 day limitation. Additionally, I was not directed to any provision of the FOIP Act that would suggest that the Minister would be the proper party to grant the extension under Division 2.

[52] Section 69(6) specifies that the time begins to run “after receiving the request for the review”. The Commissioner suggests that this may mean after the Minister receives the request for review.

[53] Section 69(6) allows the Commissioner to extend the 90 days after the request for review is received. Section 81(1) applies that section to an inquiry conducted by an adjudicator.

[54] If the time began to run from the time the Minister received the request, the 90 days may be over before it is received by the adjudicator. Such an interpretation would frustrate the purposes of the FOIP Act. In this case, the Order in Council was not made until 17 months after Mr. B.’s Request for Review was received by the Minister’s office. This negative operational impact must be considered in the interpretation of ss.69(6) and 81(1). Accordingly, I find that the time begins to run from the time that the adjudicator receives the request for the review.

[55] As noted, I received the Request for Review on September 16, 2008. Thus, I find that the 90 day period did not expire until December 15, 2008. As I granted the extension in my letter of October 14, 2008, I conclude that I have maintained the jurisdiction provided to me by Order in Council 308/2008.

[56] Had I determined that the extension I had granted was outside of the 90 day time limit prescribed by s. 69(6), I would nonetheless conclude that I maintained jurisdiction on the basis that the 90 day limitation is directory as opposed to mandatory. In this regard, I rely upon the decision of Veit J. in *Business Watch International Inc. v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 10. In that case, Veit J concluded at para. 59:

Although it is not necessary to go so far as to say that the Commissioner’s decision that he had not lost jurisdiction because the statutory time limits that applied in the circumstances here were merely directory and were not mandatory was a correct decision, I am able to say that the Commissioner’s decision on this issue is not only reasonable, but is also correct. The Legislature intended only that the pertinent subsections be directory.

[57] In arriving at this conclusion Veit J. had regard to the following factors:

1. That it would only cause more delay to restart the process, which could easily be done;
2. It was in the best interests of the parties that the Commissioner, in that case, had sufficient time to make whatever inquiries he believed to be necessary; and
3. The complainant did not contest the delay.

Those factors also apply to the case before me.

[58] The issues of whether an extension may be granted after the expiry of the initial deadline or whether further extensions are required if the inquiry is not completed within the currency of the initial extension are not before me on the facts of this case. Accordingly, I decline to consider them.

5. Written Review Process

[59] The Commissioner argues that a written inquiry is appropriate. Specifically, he argues that: the records speak for themselves; the issues can be argued effectively through written submissions; and it would be more efficient and cost effective than an oral hearing.

[60] Mr. B. submitted that the hearing should include an oral component. Because he is not legally trained, he expressed concern that his written arguments may not be as clear as he would like, and an opportunity to explain them orally would be beneficial.

[61] In my view the merits of the case are best explored through written and oral submissions. I will contact the parties to discuss deadlines for their respective submissions and to arrange for a further date for an oral hearing.

6. Private Proceedings

[62] The Commissioner argued that the adjudication of the merits of this matter should be dealt with in camera. He submits that a public hearing would only aggravate the effects of the disclosures that form the basis of Mr. B.'s complaint. The Commissioner submits further that a public hearing would increase the time and cost for little if any benefit to third parties and would still allow the orders emanating from the hearing to be made public.

[63] Mr. B.'s position on this issue is not clear from the transcripts of the preliminary hearing nor from the written submissions he provided. Accordingly, I am reserving my ruling on this issue until after I have received his written submissions prior to the oral hearing on the merits and provided him with an opportunity to address it at the commencement of that hearing.

Dated at Calgary, Alberta this 30th day of January, 2009.

Neil Wittmann
Associate Chief Justice
Court of Queen's Bench