ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2006-031

September 22, 2008

EDMONTON POLICE SERVICE

Case File Number 3341

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Summary: The Edmonton Police Service ("EPS") objected to the jurisdiction of the Commissioner on the basis that the Commissioner did not meet the 90-day timeline set out in section 69(6) of the *Freedom of Information and Protection of Privacy Act*.

The Commissioner found that the timeline had been met in this case. He also held that, even if he had not met the timeline in section 69(6), section 69(6) is not mandatory. He further held that, even if section 69(6) is mandatory and he had not met the timeline, in the circumstances of the present case, the Legislature would not have intended that a loss of jurisdiction should result. These circumstances were that there would be no alternative remedy for the Complainant for an alleged breach of his privacy rights and the Complainant would suffer prejudice; any breach of the timeline by the Commissioner's Office was technical or trivial; and as the EPS had participated in setting the dates for completion of the inquiry, it was not prejudiced by any alleged failure of the Commissioner to anticipate the date of completion of the inquiry. He also found that section 69(6) permitted extension of the timeline after the 90 days had expired.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 2, 2(b), 2(e), 3(a), 3(c), 3(d), 8(1), 30(1), 30(3), 31(2), 32(3), 32(4), 36(4), 36(7), 37(2), 53(1), 65(3), 66, 68, 69, 69(1), 69(6), 69(6)(a), 69(6)(b), 70, 72, 72(1), 73, 74.3(2), 83, 93(4.1), Part 2; *Personal Information Protection Act* S.A. 2003, c. P-6.5, ss. 3, 36(2)(e), 46(2), 50(5).

Orders Cited: AB: Orders 97-007, 99-011; M2004-001; P2007-010.

Cases Cited: *McBratney v. McBratney* (1919), 59 S.C.R. 550; *Vialoux and Registered Psychiatric Nurses Association of Manitoba* (1983), 2 D.L.R. (4th) 187 (C.A.); *Cameron v. Law Society of British Columbia*, [1991] B.C.J. No. 2283 (C.A.); *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41; *Carlin v. Registered Psychiatric Nurses Assn. of Alberta*, [1996] A.J. No. 606 (Q.B.); *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Woolridge v. Halifax (Regional Municipality) Police Service*, [1999] N.S.J. No. 268; *Doucet v. British Columbia (Adult Forensic Psychiatric Services, Director)*, [2000] B.C.J. No. 586; *Rahman v. Alberta College and Assn. of Respiratory Therapy*, [2001] A.J. No. 343 (Q.B.); *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559; *Society Promoting Environmental Conservation v. Canada (Attorney General)* (2003), 228 D.L.R. (4th) 693 (F.C.A.); *Regina v. Soneji*, [2005] UKHL 49; *Manyfingers v. Calgary (City) Police Service*, [2006] A.J. No. 578 (C.A.); *Kellogg Brown and Root v. Alberta (Information and Privacy Commissioner)*, [2007] A.J. No. 896 (Q.B.); *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44.

Authorities Cited: David Phillip Jones and Anne S. de Villars, *Principles of Administrative Law*, 4th Edition (Scarborough, Ontario: Thomson Canada Limited, 2004); Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th Edition, (Markham, Ontario: Butterworths Canada Ltd., 2002).

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IV. DECISION AND ORDER

I. BACKGROUND

[para 1] I begin by setting out the chronology of events that are relevant to this Order.

[para 2] On May 10, 2005, the Complainant made an access request pursuant to the *Freedom of Information and Protection of Privacy Act*, (the "FOIP Act") to the Edmonton Police Service ("EPS" or the "Public Body"). The Complainant requested access to queries of his name on police databases, in particular, "Any records or reports that confirm or indicate any name checks or other computer queries that may have been done on CPIC or any other EPS computer or device and in this case the proper name of any EPS employee, member or agent who may have conducted that query."

[para 3] On June 23, 2005, the EPS responded, providing the Complainant with a chart detailing when his name had been queried and the names of the EPS members who had performed the queries.

[para 4] On June 30, 2005, the Complainant faxed a letter to the Office of the Information and Privacy Commissioner ("my Office"), complaining that members of the EPS had used the PROBE and CPIC databases to query his name, in contravention of the FOIP Act. (The facts as stated in the initial submission of the EPS say the complaint was dated June 5, 2005, but this is contrary to the records of my Office, and the source of EPS's information is unknown to me.)

[para 5] The same day (June 30, 2005), I sent letters to the Complainant and the EPS, stating that I had received a complaint against the EPS from the Complainant, and that I would be conducting an inquiry pursuant to section 69 of the FOIP Act. The letter also stated that Notices of Inquiry would be issued to the Complainant and to the EPS "in due course".

[para 6] On September 9, 2005, I sent a letter to the Complainant and the EPS advising that my Office had retained an external lawyer to be counsel to the inquiry (the "Inquiry Counsel"). I also advised that, prior to issuance of the Notice of Inquiry, the Inquiry Counsel would be in contact with the Complainant and the EPS to discuss procedural matters relating to the inquiry.

[para 7] On September 26, 2005, the then Inquiries Clerk communicated to the Inquiry Counsel by telephone that I would be available to conduct the inquiry on April 4, 5 and 6, 2006, and that these dates were being held pending confirmation by all parties. On November 24, 2005 the Inquiries Clerk notified the Inquiry Counsel's assistant by phone that the April dates would likely go ahead.

[para 8] On January 17, 2006, my Office sent a Notice of Inquiry to the Complainant and the EPS, setting the complaint down for an oral inquiry on April 4, 5 and 6, 2006. The Notice of Inquiry advised that written submissions were due by March 1, 2006.

[para 9] On February 8, 2006, counsel from a law firm advised that they had been retained to act for the EPS and requested an adjournment of the inquiry until May or June, 2006 as they needed to do further investigations prior to providing their written submissions. By letter dated February 14, 2006, the Complainant opposed this adjournment.

[para 10] On February 15, 2006, my Office requested further details of the matters that required further investigation, and the approximate time it would take to complete the investigation. Counsel for the EPS provided these details by letter dated February 17, 2006.

[para 11] On February 23, 2006, I sent a letter to counsel for the EPS, copied to the Complainant, stating that, "…because of difficulties that were involved in setting the three days for this inquiry, I am unwilling to grant your adjournment request." I did allow counsel for the EPS to provide the bulk of the written submissions by March 16, 2006, and any other necessary submissions regarding the further investigation by March 28, 2006.

[para 12] On March 15, 2006, counsel for the EPS requested a further extension to March 20, 2006. With the consent of all counsel involved, the request was granted on March 15, 2006 by letter from my Office. The Complainant's written submissions were provided on March 14, 2006 and the written submissions of the EPS were provided on March 20, 2006. My Office exchanged copies of the parties' submissions on March 20, 2006.

[para 13] At the request of counsel for the EPS, my Office issued Notices to Attend for various witnesses on March 24, 2006, and these were served shortly thereafter.

[para 14] Although there was a preliminary issue raised by the EPS regarding the requirement of certain witnesses to testify, the first part of the oral inquiry proceeded as scheduled on April 4, 5 and 6, 2006. The preliminary issue was adjourned to be dealt with following the oral inquiry.

[para 15] On April 18, 2006, my Office wrote to counsel for the Complainant asking for his submissions on the preliminary issue. Counsel for the EPS provided a reply to those submissions on May 4, 2006. This reply was forwarded to counsel for the Complainant on May 8, 2006. On May 15, 2006, counsel for the Complainant provided a response to the reply of the EPS.

[para 16] On August 11, 2006, I issued my decision on the preliminary issue. I required the remaining EPS witnesses who had not already appeared to attend at the continuation of the oral inquiry to provide evidence.

[para 17] On December 12, 2006, new dates for continuation of the oral inquiry were scheduled for March 6, 7 and 8, 2007. Notices to Attend were issued on February 6,

2007 and served shortly thereafter. The oral inquiry continued on the dates scheduled, but the inquiry could not be concluded at that time, as there was still evidence to be heard.

[para 18] The dates of May 7 and 9, 2007 were chosen to continue the inquiry to hear the evidence of the remaining EPS witnesses to be examined. Notices to Attend were issued on April 30, 2007 and May 3, 2007, and served shortly thereafter. May 23, 2007 was booked for the examination of the final EPS witness. All of the scheduled hearing dates proceeded as planned.

[para 19] On May 23, 2007, at the request of counsel for the EPS, it was decided that my Office should prepare transcripts of the proceedings from the audio recordings made during the inquiry. New dates for a continuation of the inquiry were to be set once the transcripts were prepared. My Office engaged the services of a contractor to prepare the transcripts.

[para 20] On August 16, 2007, I sent a letter to the parties, extending the time for completing the review of this matter to December 31, 2008. A similar letter extending dates was sent to the parties in all cases currently before my Office. This extension was prompted by a decision of the Court of Queen's Bench in *Kellogg Brown and Root v. Alberta (Information and Privacy Commissioner),* [2007] A.J. No. 896 (Q.B.) ("*Kellogg*"). In that case, the Court held that section 50(5) of the *Personal Information Protection Act* ("PIPA") (which is worded similarly to section 69(6) of the FOIP Act) was to be treated as a mandatory provision, and that I had lost jurisdiction because I did not extend the 90-day timeline and provide an anticipated date for completion of the review, as required by section 50(5).

[para 21] In late October 2007, my Office received the transcripts of the inquiry. The parties requested an electronic version. Since the person who prepared the transcripts could not convert the transcripts from a Word to a PDF document, it became necessary for my Office to do the conversion. The conversion created difficulties in formatting, which had to be resolved before providing the parties with the electronic version of the transcripts. On February 21, 2008, my Office provided the parties with the reformatted electronic version of the transcripts.

[para 22] On March 7, 2008, the EPS raised the objection that I had lost jurisdiction due to alleged non-compliance with the timelines in section 69(6) of the FOIP Act. This objection was based on the decision in *Kellogg*.

[para 23] An amended Notice of Inquiry incorporating the jurisdictional issue under section 69(6) of the FOIP Act was sent to the parties on April 14, 2008. Both parties provided initial submissions. After receiving the initial submissions, I requested further information from the parties with respect to communications between my Office and the parties in relation to the initial setting of dates for the inquiry. I also provided the parties with copies of correspondence, and other related correspondence, pertaining to setting the

dates for the inquiry, and provided the parties with an opportunity to comment on their significance. Both parties provided information, and the EPS provided a submission.

II. ISSUE

[para 24] Did the Commissioner lose jurisdiction on the basis of the alleged non-compliance with section 69(6) of the *Freedom of Information and Protection of Privacy Act*?

DISCUSSION OF THE ISSUE

A. Was section 69(6) of the FOIP Act complied with in this case?

1. What are the requirements of section 69(6)?

[para 25] The relevant parts of section 69 read:

> *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 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 review that the Commissioner is extending that period, and*
> >
> > *(b) provides an anticipated date for the completion of the review.*

[para 26] The initial words of section 69(6) require that there be a "request for review" to my Office and that I "complete an inquiry" within 90 days after receiving the request for review.

[para 27] Under section 65(3) of the FOIP Act, a person who believes that the person's own personal information has been collected, used or disclosed in contravention of Part 2 of the FOIP Act may ask me to review that matter.

[para 28] The Complainant complained that members of the EPS had used the PROBE and CPIC databases to query the Complainant's name, in contravention of the FOIP Act. That is a "request for review" under section 65(3) of the FOIP Act, which I received on June 30, 2005.

[para 29] As provided by section 69(1) of the FOIP Act, an inquiry is a proceeding in which I may decide all questions of fact and law arising in the course of the inquiry. As provided by section 72(1) of the FOIP Act, on completing an inquiry under section 69, I must dispose of the issues by making an order. As provided by section 73 of the FOIP Act, an order made by me is final.

[para 30] Based on these provisions, I interpret "complete an inquiry" to mean the point at which I have heard all the evidence and arguments of the parties, and I am in a position to dispose of the questions of fact and law by making an order that will be final. In this regard, I adopt the reasoning in Order P2007-010 (at paragraph 16), in which Adjudicator Gauk accepted that "completion of an inquiry" under section 50(5) of PIPA includes the close of evidence and submissions, but does not include the resulting decision and order.

[para 31] An oral inquiry into the Complainant's complaint was scheduled for and held on April 4-6, 2006. A preliminary issue was adjourned to be dealt with after April 6, 2006. On August 11, 2006, after reviewing further submissions of the parties, I issued my decision on the preliminary issue. The oral inquiry continued on March 6-8, 2007 and May 7, 9 and 23, 2007. The parties requested transcripts, which my Office retained a person to prepare, and which my Office provided to the parties on February 21, 2008. The EPS brought its application to challenge my jurisdiction on March 7, 2008. Consequently, I have not heard all the evidence and arguments of the parties, and the inquiry has yet to conclude. Therefore, the inquiry was not completed within 90 days after receiving the request for review.

[para 32] Section 69(6)(a) and section 69(6)(b) say that I must complete an inquiry within 90 days after receiving the request for review unless:

a. I "notify" the persons listed (the parties) that I am "extending" "that period", and

b. I provide an "anticipated date" for "completion of the review".

[para 33] I interpret "that period" in section 69(6)(a) to mean the 90 days in which I must complete an inquiry after receiving the request for review. Section 69(6)(a) therefore refers to the extension of the 90 days.

[para 34] To interpret "completion of the review" in section 69(6)(b), I adopt the reasoning set out by Adjudicator Gauk in Order P2007-010 for the equivalent provision of PIPA, namely, that "completion of the review" is synonymous with "completion of the inquiry" (paragraph 17 of Order P2007-010). Since section 69(6) talks about an extension of time for completing the inquiry, it makes sense that the anticipated date for completion in section 69(6)(b) would be the period for which the extension is made, rather than some other period.

[para 35] How should I interpret the requirements in section 69(6)(a) and section 69(6)(b) to "notify" that I am "extending" the 90 days and to provide "an anticipated

date" for completion of the review? To decide these matters, I intend to consider the following:

- What does it mean to "extend" the 90 days and to provide an "anticipated date" for completion of the review?
- What is required to "notify" parties about an extension and anticipated date?
- When are parties to be "notified"?
- Once extended, does the 90 days have to be further extended?

2. What does it mean to "extend" the 90 days and to provide an "anticipated date" for completion of the review?

[para 36] In the context of section 69(6), "extend" in section 69(6)(a) means to provide for a longer period of time to complete the review, if the inquiry is not completed within 90 days after receiving the request for review.

[para 37] In *Kellogg*, the Court said that I merely had to give notice of an anticipated date, and that "…there is no need to set a definite response time but only an anticipated response time..." under section 50(5) of PIPA (paragraph 48). Consequently, to provide an "anticipated date" under section 69(6)(b) of the FOIP Act means that I do not need to set a definite time for completion of the review.

3. What is required to "notify" parties about an extension and anticipated date?

[para 38] Section 69(6) does not specify the precise wording for notifying the parties about an extension of time and providing an anticipated date for completion of the review. The section simply uses the word "notifies". Thus it is not necessary to notify using words such as "I hereby extend the time" or "the anticipated completion date will be…", or to have a notification that is specifically dedicated to extending the time and providing an anticipated date for completion of the review.

[para 39] Therefore, I can notify that time is extended by a communication to the parties made by me or on my behalf, which makes it clear to the parties that the process will continue beyond 90 days. For example, providing notification of the dates for an oral inquiry can satisfy the requirement for notifying that I am extending the time and providing an anticipated date for completion of the review.

[para 40] Similarly, section 69(6) can be met in a situation in which I have granted one of the parties an extension or adjournment, or rescheduled the matter. Section 69(6) does not require me to then send a separate notification to the parties that the review will be completed on that same date.

[para 41] As to the manner of notifying, section 83 of the FOIP Act reads:

> *83(1) Where this Act requires any notice or other document to be given to a person, it is to be given*

(a) by sending it to that person by prepaid mail to the last known address of that person,

(b) by personal service,

(c) by substitutional service if so authorized by the Commissioner,

(d) by facsimile telecommunication, or

(e) in electronic form other than facsimile telecommunication if the person to whom the notice or document is to be given has consented to accept the notice or document in that form.

(2) For the purposes of subsection (1)(e), whether a person has consented may be determined in accordance with section 8(2) of the Electronic Transactions Act.

[para 42] It is not clear that "notice" in section 83 governs the requirement to "notify" under section 69(6), for the following reasons.

[para 43] Section 83 refers to "notice or other document". The wording and context of section 83 imply that there will be some *written* record that is required to be sent in the manner set out by section 83.

[para 44] The word "notice" in the FOIP Act appears as "notice in writing", "give written notice" or "written notice" (see, for example, sections 8(1), 30(1), 30(3), 31(2), 32(4), 36(7), 93(4.1)). "Notify", on the other hand, does not appear with the word "written" or "in writing" (see, for example, sections 32(3), 36(4), 37(2)). By this difference in wording, I presume that the Legislature intended that "notify" was not confined to "written notice", and that "notify" could include an oral notification. I therefore find that section 83 does not govern section 69(6).

[para 45] As previously stated, I received the Complainant's request for review on June 30, 2005. On that same date, I informed the parties by letter that there would be an inquiry.

[para 46] I anticipated that the inquiry was going to be procedurally complex. I therefore decided to appoint an Inquiry Counsel from outside my Office to assist in the inquiry process. On September 9, 2005, seventy-one days after receiving the request for review, I wrote to the parties indicating that an Inquiry Counsel would be appointed, and that before the Notices of Inquiry would be issued, the Inquiry Counsel would contact the parties to discuss procedural matters relating to the inquiry. This added a procedural step, and made it clear that not only would the inquiry not be completed within 90 days, but that in all likelihood the Notices of Inquiry would not even be issued by that date. Thus the September 9, 2005 letter made the parties aware that the inquiry would not be

completed within 90 days, and that steps in the inquiry process would be taken beyond that date.

[para 47] I find that the September 9, 2005 letter notified the parties that the time would be extended for completion of the review. The process for setting the anticipated date for completion (the date of the inquiry) was consensual, and therefore the anticipated date for completion was that date for the inquiry agreed to by the parties after the Inquiry Counsel had canvassed the parties about procedural matters related to the inquiry. This notification was given before the 90 days expired under section 69(6). Therefore, I find that section 69(6) was complied with in this case.

[para 48] However, if I am wrong in my finding that the September 9, 2005 letter complied with section 69(6), I will assess whether notification was otherwise provided to the parties.

[para 49] The correspondence on the inquiry file in my Office, as well as records in the office of the Inquiry Counsel, show that on September 26, 2005 (eighty-eight days after receiving the request for review), the Inquiries Clerk informed the Inquiry Counsel that April 4, 5 and 6, 2006, were available for the oral inquiry and that these dates were being held, pending confirmation by all parties. I find that the last of these dates was an anticipated date for completion of the review within the meaning of section 69(6).

[para 50] However, there is no written record in my Office as to when the Inquiries Clerk canvassed the parties on the reserved dates. Such communications must have taken place, since mutually-agreed dates were set, but written records were either not made or not kept by the Inquiries Clerk. Neither of the parties to this proceeding was able to assist with this question. A record of a phone call on November 24, 2005, shows that on that date the Inquiries Clerk notified the Inquiry Counsel's assistant that the April dates would likely go ahead. I infer from this that by that time the other parties had been informed of the reserved dates in April 2006 and had at least tentatively agreed to them.

[para 51] Thus I find that all of the following met the requirements for notification under section 69(6)(a) and section 69(6)(b) because all those communications notified the parties that I was extending the 90-day period and provided an anticipated date for completion of the review, being the next step in the inquiry process:

- The communication by the Inquiries Clerk that the dates set aside for the inquiry were April 4-6, 2006.
- The January 17, 2006 Notice of Inquiry to the Complainant and the EPS, setting the complaint down for an oral inquiry on April 4-6, 2006.
- The December 12, 2006 letter setting new dates for continuation of the oral inquiry on March 6-8, 2007.
- The August 16, 2007 letter to the Complainant and the EPS, extending the time for completing the review to December 31, 2008.

[para 52] The written communications listed above, and possibly also the oral one, provided notification after the 90-day period expired. Consequently, I will next consider whether section 69(6) of the FOIP Act can be interpreted as allowing me to notify the parties under section 69(6)(a) and section 69(6)(b) after the 90 days has expired.

4. When are parties to be notified?

[para 53] Section 69(6) does not expressly state whether I must notify the parties that I am extending the 90 days and provide an anticipated date for completion of the review before the 90-day period expires. Placing the phrase "within 90 days" at the beginning of the provision makes it unclear whether the phrase is meant to refer to (i) the duty to complete the inquiry, as set out in the beginning of the provision, or (ii) the power in section 69(6)(a) and section 69(6)(b) to extend the 90-day period.

[para 54] In my view, the placement of the phrase "within 90 days" indicates that the 90 days refers only to my duty to complete the inquiry, and does not refer to my power to extend the 90-day period in section 69(6)(a) and section 69(6)(b). To the extent that there is any ambiguity, by interpreting section 69(6) purposively as I will do below, the provision allows me to extend the time after the 90-day period expires.

[para 55] In Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th Edition, (Markham, Ontario: Butterworths Canada Ltd., 2002), the author quotes Duff C.J. in *McBratney v. McBratney* (1919), 59 S.C.R. 550. Duff, C.J. set out the principles that govern judicial reliance on purpose in interpretation, in order to resolve ambiguity. The first of these principles set out by Ruth Sullivan at page 219 is:

> If the ordinary meaning of legislation is ambiguous, the interpretation that best accords with the purpose of the legislation should be adopted.

[para 56] In Order 97-007, the former Commissioner also relied on this principle. Therefore, an interpretation of the provision that takes into account the purpose of the FOIP Act and the place of the provision in the context of this broader purpose is in order.

[para 57] One of the purposes of the FOIP Act, as stated in section 2(b), is to provide a mechanism for controlling the collection, use and disclosure of personal information by public bodies. The FOIP Act does this by giving me the power to review the collection, use and disclosure of personal information. Within that broader purpose, the purpose of section 69(6) is to ensure that such reviews are conducted in a timely way, and also that parties are kept aware of the timing of the process so they may participate and plan their affairs accordingly. Do the purposes of the FOIP Act and of section 69(6) demand that the provisions be treated as requiring time to be extended within the 90-day period?

[para 58] In most cases that advance to inquiry, including this one, at the time the 90-day period expires, the inquiry process has been fully engaged and is progressing with the participation of the parties. Because they are involved, the parties are fully aware that the process will continue beyond 90 days. I do not believe that the goal of a timely

resolution of issues, and of keeping the parties informed, would be advanced by requiring me to formally communicate to the parties within 90 days something they already know: that the matter will not be completed within 90 days.

[para 59] Section 69(6)(b) says that an anticipated completion date should be given. The scheme of the FOIP Act is that upon receipt of a request for review, I may authorize mediation (section 68). Mediation would consume some part of the 90 day period. Depending on the issues raised, the number of records involved, and the ability of the public body and the mediator to address outstanding issues, the entire 90 day period may elapse. In the 2006-2007 Annual Report of my Office, I reported that 91% of cases before my Office were resolved by mediation/investigation. In those cases where mediation is not successful or mediation is not authorized, the matter moves to inquiry.

[para 60] When a matter moves to inquiry, the chance of completion within whatever remains of the 90 days is remote. Adjudication in my Office requires that the rules of procedural fairness come to the fore. Parties will often have counsel. Mutually acceptable dates for hearings must be found. Within reason, schedules must be accommodated so as not to prejudice any party. As in this case, there may be requests for adjournment before the proceedings even begin or before they are concluded.

[para 61] Once the proceedings do begin, there may be requests for further evidence, thereby occasioning requests for adjournments to review and make submissions on the new evidence. As a decision maker, I must not deprive any party of the right to procedural fairness.

[para 62] Indeed, the parties, as much as I, have carriage of the matter. The time within which the matter will be completed is largely determined by their actions, schedules and the issues they raise. The decisive point is that, once the inquiry is underway and the dates are set, the parties know how the matter is proceeding and what stage it is at. It is my opinion that once the inquiry begins, each subsequent setting of a new date or a next step both notifies the parties that the 90-day period is extended and provides an anticipated date for completion, namely, the date of the next step. This can be done before or after the 90 days expires, either of which satisfies the requirements of section 69(6).

[para 63] In my opinion, neither the purpose of the FOIP Act in general nor section 69(6) in particular is advanced by interpreting the provision as creating an absolute "deadline", beyond which a proceeding that is underway cannot continue unless I have, before the 90 days expires, expressly stated that the matter will continue beyond 90 days, and projected a new final date for completion.

[para 64] In support of the contrary view, the EPS cites *Cameron v. Law Society of British Columbia,* [1991] B.C.J. No. 2283 (C.A.). In that case, the British Columbia Court of Appeal held that the time period for issuing and serving a citation for a disciplinary action against a lawyer could not be extended after the 90-day period set for taking such action had expired. However, I note that the Court adverted to the principle

that "whether a power to enlarge a statutory time period includes the jurisdiction to do so retroactively depends entirely on the proper construction to be given to the enabling legislation". The Court also quoted the reference of the court below to the principle that

> …statutes dealing with jurisdiction and procedure are, if they relate to the infliction of penalties, strictly construed: compliance with procedural provisions will be stringently exacted from those proceeding against the person liable to be penalized… . This is so even if it may enable him to escape on a technicality.

[para 65] The *Cameron* case involved a disciplinary proceeding against a lawyer, with the attendant risk to his livelihood that could result from the sanction or penalties that could be imposed. It does not afford a useful parallel for the present proceeding, which is the review of a complaint into improper use of personal information by a public body. Under the FOIP Act, a public body is accountable for the actions of its employees, and orders are directed to public bodies, and not to their employees.

[para 66] I would also distinguish the *Cameron* decision on the basis that the time frame in that case related to when the proceeding could be commenced rather than to the completion of a process that has already been engaged. It is only in the former case that it is important to provide a limit to the period within which certain individuals remain vulnerable to having proceedings taken against them. It is only in the latter case that it is useful to provide a mechanism for me to manage the review process as required.

[para 67] I note as well that the Alberta Court of Appeal has reached a conclusion opposite to *Cameron* with respect to retroactive extension of a time limit for the laying of a disciplinary charge (against a police officer by the Police Commission) in *Manyfingers v. Calgary (City) Police Service,* [2006] A.J. No. 578 (C.A.). The Court found that the Police Commission was not barred from considering whether to extend the time limit simply because the time limit had expired.

[para 68] The EPS asserted, in part D(a)(i) of its initial submission, that the Commissioner did not extend the time and provide an anticipated date for completion under section 69(6) until August 16, 2007. That letter is the only correspondence that explicitly used the words of section 69(6). However, as I have said above, other correspondence sent by my Office operated to extend the time. In any event, in my opinion, time extensions can be done and anticipated completion dates be given after 90 days where the circumstances dictate that this be done.

[para 69] In its rebuttal submission, the EPS also argued that the August 16, 2007 letter is inconsistent with the proposition that an extension had been issued previously. That letter was sent after the decision in *Kellogg.* It seemed prudent, in light of that decision and the hundreds of cases in my Office that could be affected by the decision, to immediately extend every case. In my opinion, this cannot be seen as a concession or acknowledgement that specific cases had not been extended as I have found in this Order.

[para 70] In conclusion, I am resolving any ambiguity in section 69(6) of the FOIP Act in favour of an interpretation that best accords with the purpose of the legislation, as

discussed in the case law. That purpose is set out in section 2(b) of the FOIP Act. I find that section 69(6) allows me to extend the 90-day period and provide an anticipated date for completion of the review, and notify the parties accordingly, after the 90 days have expired.

5. Once extended, does the 90 days have to be further extended?

[para 71] Section 69(6) does not speak to multiple notifications. I find that the provision is not ambiguous and requires only one notification of an extended time for completion.

[para 72] Consequently, it must be the case that if I notify that I am extending the 90 days and provide an anticipated date for completing the review, but do not meet that anticipated date for any reason, that I have still complied with the provision and no further extension is required under section 69(6).

[para 73] If I am wrong and section 69(6) requires more than one extension, it is my opinion that each extension, adjournment and rescheduling agreed to by the parties, as well as by me, constituted notification of a further extension and the agreed date for the next step became the anticipated date for completion for the purposes of section 69(6). I am aware that, realistically, with respect to certain extensions, the parties all knew that additional time would be needed beyond the next scheduled date. But the next scheduled date must reasonably be seen as the anticipated date for completion.

[para 74] Since the *Kellogg* decision, when a matter moves to inquiry, my Office immediately notifies of an extension and typically sets an anticipated date that reflects the length of time it takes to complete the average inquiry process, which is approximately 18 months. Ideally, it would be better to do as I have done in this case, namely, to keep the parties informed at each step of the process that the matter is progressing, what the next step will be, and when or approximately when that step will be taken.

6. Conclusion

[para 75] I find that I complied with section 69(6) on the facts of this case.

B. If I am incorrect in my finding that section 69(6) was complied with on the facts in this case, do I lose jurisdiction?

1. Basis for the argument that jurisdiction was lost: the *Kellogg* decision

[para 76] As noted, the challenge to my jurisdiction in this case has been brought on the basis of the decision in *Kellogg Brown and Root v. Alberta (Information and Privacy Commissioner)*. *Kellogg* was decided under PIPA rather than the FOIP Act.

[para 77] The Court in *Kellogg* asked itself the following question: "Is section 50(5) of PIPA mandatory or directory?" Section 50(5) of PIPA reads:

> *50(5) An inquiry into a matter that is the subject of a written request referred to in section 47 must be completed within 90 days from the day that the written request was received by the Commissioner unless the Commissioner*
>
> *(a) notifies the person who made the written request, the organization concerned and any other person given a copy of the written request that the Commissioner is extending that period, and*
>
> *(b) provides an anticipated date for completion of the review.*

[para 78] The Court found that section 50(5) of PIPA was mandatory and that I had lost jurisdiction when I did not comply with it. The EPS argues that *Kellogg* applies to section 69(6) of the FOIP Act because the wording of section 69(6) and section 50(5) of PIPA are virtually identical. On the basis of *Kellogg*, the EPS argues that I lost jurisdiction when I did not comply with section 69(6) of the FOIP Act.

2. The basis of the *Kellogg* decision: What the Court considered in conducting the mandatory/directory analysis

[para 79] As stated above, the Court in *Kellogg* asked whether section 50(5) of PIPA was mandatory or directory. After reviewing *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41 and David Phillip Jones and Anne S. de Villars, *Principles of Administrative Law*, 4th Edition (Scarborough, Ontario: Thomson Canada Limited, 2004), the Court concluded, at paragraph 43:

> [43] Thus what emerges is that there is no uniform test to determine whether legislation is mandatory or directory, but, rather, one must consider all of the circumstances in deciding this issue.

[para 80] The Court in *Kellogg* then considered the following matters:

- The wording and context of the legislation
- Would a finding that s. 50(5) is mandatory have a negative operational impact on PIPA?
- Impact on the Complainant and Affected Organizations
- Are there alternative remedies available to the Complainant and Affected Organizations?
- Would a finding that s. 50(5) is mandatory be contrary to the public interest?

[para 81] The Court concluded, at paragraphs 82 and 83:

> [82] In the result, having considered all of the foregoing, I have concluded that s. 50(5) of PIPA is a mandatory legislative provision. While accepting that this result will cause some inconvenience, I do not accept that serious inconvenience will result.

> [83] Having concluded that s. 50(5) is mandatory, the Commissioner lost jurisdiction by failing to conduct this inquiry in accordance with that provision.

[para 82] As discussed more fully below, the Court's question about whether section 50(5) of PIPA was mandatory or directory is a traditional analysis that has to some extent been superseded by an evolution in the related law. However, because the Court viewed the question in traditional terms, I will also consider it in these terms, and ask the same question about section 69(6) of the FOIP Act: Under the traditional analysis, is section 69(6) mandatory or directory?

3. The analysis of the "wording and context of the legislation"

a. The wording and context of section 50(5) of PIPA

[para 83] The mandatory/directory analysis under the "wording and context of the legislation" heading in *Kellogg* presents some problems that should be addressed in order to determine how to apply the reasoning in *Kellogg* to the question of whether section 69(6) of the FOIP Act is mandatory or directory. The problems concern the Court's analysis of the wording and context of section 50(5) of PIPA, relative to the purpose provision of PIPA.

[para 84] In analyzing the wording and context of section 50(5), the Court in *Kellogg* cited the contemporary standard for statutory interpretation set out in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, as follows:

> …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.

[para 85] The Court's view was that the Legislature chose to enact a provision that promoted the timely resolution of complaints, while maintaining maximum flexibility for the Commissioner to extend the time, which militated in favour of section 50(5) of PIPA being interpreted as mandatory rather than directory (paragraphs 53 and 54).

[para 86] The Court then considered the purpose of PIPA as set out in section 3 of PIPA, which reads:

> *3 The purpose of this Act is to govern the collection , use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need to organizations to collect, use or disclose personal information for purposes that are reasonable.*

[para 87] The Court said, at paragraphs 61-63:

> [61] It is significant that PIPA does not subordinate the rights of organizations to those of the complainant, but, rather, PIPA recognizes both individuals and organizations have rights under the legislation, and moreover, organizations have obligations imposed on them.
>
> [62] It makes no sense for the Legislature, on the one had, to expressly recognize this balancing of rights and yet ignore the impact delay in completing inquiries would have on affected organizations as well as the individual complainants. PIPA was drafted to allow the Commissioner maximum flexibility while ensuring that inquiries would proceed in a timely fashion.
>
> [63] To hold that s. 50(5) is merely directory would seriously skew the carefully crafted legislative balance which was designed to balance rights between individuals and affected organizations.

[para 88] These statements indicate that the Court thought that there is to be an equal balancing under PIPA as between the rights of individuals and the rights of organizations dealing with individuals, and that the statute does not subordinate the rights of organizations to the rights of individuals. This assessment was key to the Court's conclusion that the impact of delay on the rights of organizations was as significant as the impact that loss of jurisdiction in cases of delay would have on the rights of individuals. Therefore, the Court did not treat as a decisive factor the negative impact on an individual that would come from a loss of jurisdiction.

[para 89] In my view, the Court's interpretation that section 50(5) of PIPA is mandatory is problematic because of its interpretation of the purpose of PIPA and its analysis of the scheme of PIPA.

[para 90] Prior to the enactment of PIPA, organizations in Alberta were free to collect, use and disclose personal information of individuals in whatever manner suited them. PIPA was enacted to change that position: in the words of section 3 of PIPA, to "govern the collection, use and disclosure of personal information by organizations".

[para 91] The scheme of PIPA is that the Legislature has determined what are allowable collections, uses and disclosures of personal information. An organization may collect, use and disclose personal information only if it meets the following requirements: it has the individual's consent to collect, use and disclose personal information, or it meets one of a list of specific, limited circumstances in which collection, use or disclosure of personal information is authorized in the absence of the individual's consent; in addition, the collection, use and disclosure of personal information must be for purposes that are reasonable; and personal information must be collected, used or disclosed only to the extent necessary to meet those reasonable purposes.

[para 92] Thus whatever "needs" an organization may have to collect, use or disclose personal information, it must now comply with the requirements set out in the scheme of PIPA. Those requirements reflect the purpose of PIPA: to "govern the collection, use and disclosure of personal information by organizations".

[para 93] Section 3 of PIPA also recognizes the "right" of an individual to have his or her personal information protected. The scheme of PIPA is designed to protect personal information by specifying what is an authorized collection, use or disclosure of personal information, and making any other collection, use or disclosure of personal information a contravention of PIPA.

[para 94] The Legislature uses the word "right" in relation to an individual in section 3, and uses the word "needs" in relation to an organization. Those words, on their ordinary meaning, interpreted in the entire context of PIPA and in the scheme of PIPA that I have described above, do not have the same meaning.

[para 95] Had the Court in *Kellogg* recognized that "needs" and "rights" are not the same, and that the purpose of PIPA is to govern the collection, use and disclosure of personal information by organizations and thereby protect individuals' personal information, it would have realized that PIPA does not balance "rights" of individuals and organizations.

[para 96] Equally, when I conduct a review under section 46(2) and section 36(2)(e) of PIPA as to whether an organization's collection, use and disclosure of personal information is in contravention of PIPA, it is not a case of my balancing two competing rights as between the individual and the organization. Rather, it is a case of deciding whether an organization met the requirements of PIPA and therefore had the authority under PIPA to collect, use and disclose personal information.

[para 97] My task in interpreting section 69(6) of the FOIP Act by reference to the wording and context of the FOIP Act requires me to also consider the purpose provision of the FOIP Act. That provision makes it quite clear that with respect to the way in which public bodies deal with personal information, the purpose of the FOIP Act is also to *control* the manner of collection, use and disclosure of personal information.

[para 98] Section 2(b) of the FOIP Act states:

> *2 The purposes of this Act are*
>
> …
>
> *(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,…*

[para 99] It is clear that the rights of individuals to have their personal information protected is primary; there is no corresponding reference to the *rights* of public bodies. As is the case under PIPA, public bodies must meet the requirements of the FOIP Act in order to have the authority to collect, use and disclose personal information, so that they are not in contravention of the FOIP Act.

[para 100] Section 69(6) of the FOIP Act is a provision that is very similar in wording to one which the Court has already interpreted under section 50(5) of PIPA, relative to which the Court reached the conclusion that section 50(5) of PIPA was mandatory. In my view, if all of the elements of the purpose provision of PIPA are taken into account, it may be seen that the purpose provision of PIPA does emphasize the rights of individuals and does subordinate the *needs* of organizations to these rights, as is also the case for the comparable provision in the FOIP Act. "Rights" versus "needs" are precisely the words used in the purpose provision of PIPA.

[para 101] Therefore, in interpreting section 69(6) of the FOIP Act, I find that I cannot be guided by the Court's interpretation of section 50(5) of PIPA, which was based on its assessment of the purpose provision of PIPA.

[para 102] The same observations apply to two other matters considered by the Court in *Kellogg*.

[para 103] With regard to the "Impact on the Complainant and Affected Organizations", the Court engaged in an even balancing as between complainants and organizations, resulting in what was in its view a neutral result in terms of prejudice. Again, this conclusion also seems to overlook that the primary purpose of the legislation is to protect personal information, and consequently, I cannot take this part of the Court's analysis into account in interpreting section 69(6) of the FOIP Act.

[para 104] As to the Court's consideration of whether a finding that section 50(5) of PIPA is mandatory would be contrary to the public interest, the Court's analysis again depended on the fact that it did not accord primacy to my role of protecting those who deal with organizations by ensuring that organizations deal with personal information in the restricted way prescribed by PIPA. Again, as section 69(6) of the FOIP Act gives primacy to the rights of individuals to have their personal information protected, I cannot analyze it in the same way that the Court analyzed section 50(5) under the "public interest" heading.

[para 105] Thus, despite the conclusion about section 50(5) of PIPA that the Court in *Kellogg* reached when it took these matters into account, I will interpret section 69(6) of the FOIP Act independently of this part of the Court's analysis.

a. The wording and context of section 69(6) of the FOIP Act

[para 106] As stated by the Court in *Kellogg* and also set out by Ruth Sullivan in *Sullivan and Driedger on the Construction of Statutes*, 4th Edition, at page 1, the proper approach to statutory interpretation is that:

> …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.

i. The existing interpretation of section 69(6)

[para 107] In Order 99-011, the former Commissioner had the following to say about what is now section 69(6) of the FOIP Act:

> [para 21.] Section 66(6) of the Act says that an inquiry "must" be completed within ninety days after receiving the request for review, unless the Commissioner extends that period. In this case, the ninety-day period was extended once, but was not extended again before it expired on October 30, 1998.
>
> [para 22.] Section 25(2)(c.1) of the *Interpretation Act*, R.S.A. 1980, c.I-7, says that "must" is to be interpreted as imperative, that is, as a command or compulsory. A "must" provision is also referred to as a "mandatory" provision.
>
> [para 23.] On the wording alone, section 66(6) of the Act is a mandatory ("must") provision. However, the Act does not say what happens if there is non-compliance with this legislative requirement.
>
> [para 24.] In *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344 (S.C.C.), the Supreme Court of Canada has said that, regardless of the mandatory wording of a statutory provision, the Court may nevertheless interpret the provision as directory in its effect (that is, as a "may" provision) if certain factors are present. The Court quoted *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170 (P.C.) as the case that summarized those factors:
>
> > When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provision to be directory only…
>
> [para 25.] The Court then went on to say:
>
> > This Court has since held that the object of the statute and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory: *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41.
>
> [para 26.] In this case, one of the objects of the Act is "to provide for independent reviews of decisions made by public bodies under this Act": see section 2(e). I agree with the British Columbia Information and Privacy Commissioner when, in British Columbia Order 291-1999, he said:
>
> > …[T]he ninety-day period…is not intended to create a technical barrier which robs applicants, public bodies or third parties of my Office's independent review of decisions made under the Act. The ninety-day period is intended to benefit the independent review process by requiring that inquiries proceed in a timely way, but without creating a structure of strict compliance which would be, in itself, counterproductive to the delivery of a fair yet flexible review process to those who are affected by decisions under the Act.
>
> [para 27.] The effect of ruling that my non-compliance with section 66(6) ends my jurisdiction over the Applicant's request for review would work serious general

> inconvenience or injustice to the Applicant, who has no control over my review process. The Applicant would lose the right to have the Public Body's decision reviewed. Therefore, I interpret section 66(6) as directory only ("may").
>
> [para 28] I did not lose jurisdiction over this case (the Applicant's request for review) by not extending the ninety-day deadline for completing the review, as provided by section 66(6) of the Act.

[para 108] The significance of Order 99-011 is reinforced by the fact that it was never the subject of a judicial review, and has been treated as the correct statement of the law on the interpretation of section 69(6) in the intervening years.

ii. The words of section 69(6) in their entire context

[para 109] Section 69(6) appears within the context of section 69 of the FOIP Act and must be interpreted in that context. Under section 69(1) of the FOIP Act, I "must" conduct an inquiry unless section 70 applies (section 70 does not apply in this case). By using the word "must", the Legislature has imposed on me a duty to conduct an inquiry.

iii. The purpose of the FOIP Act

[para 110] Section 2 explains the Legislature's full purposes in enacting the FOIP Act. It states:

> *2 The purposes of this Act are*
>
> *(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.*

[para 111] Section 2 establishes that the FOIP Act is intended to give rights of access to information, including personal information, and rights to have personal information

protected by controlling the collection, use and disclosure of personal information. It also establishes that the FOIP Act is intended to provide independent reviews of decisions and resolutions of complaints. The former Commissioner considered the importance of independent reviews of decisions of public bodies in Order 99-011.

iv. The scheme of the FOIP Act

[para 112] As discussed earlier in this Order, the scheme of the FOIP Act is similar to the scheme of PIPA. A primary purpose of the FOIP Act is to control the collection, use and disclosure of personal information by public bodies, in order to protect personal information. Therefore, public bodies must establish that they have the authority to collect, use and disclose personal information. I have the authority and, under section 69(1) of the FOIP Act, the duty, to review whether a public body has the authority to collect, use and disclose personal information.

v. The intention of the Legislature

[para 113] The intention of the Legislature in enacting the FOIP Act is partly reflected in the purposes set out in section 2 of the FOIP Act. However, I believe that the Legislature's intention in enacting the FOIP Act goes beyond the purposes expressly set out in this purpose provision.

[para 114] In *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403, La Forest J., with whom the majority agreed on these points, explained the purpose of legislatures in enacting access to information and protection of privacy legislation. He wrote:

> As society has become more complex, governments have developed increasingly elaborate bureaucratic structures to deal with social problems. The more governmental power becomes diffused through administrative agencies, however, the less traditional forms of political accountability, such as elections and the principle of ministerial responsibility, are able to ensure that citizens retain effective control over those that govern them; see David J. Mullan, "Access to Information and Rule-Making", in John D. McCamus, ed., Freedom of Information: Canadian Perspectives (1981), at p. 54.
>
> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 Can. J. of Econ. and Pol. Sci. 479, at p. 480:
>
> > Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.

[para 115] As to privacy protection legislation, LaForest J. said:

> The protection of privacy is a fundamental value in modern, democratic states; see Alan F. Westin, *Privacy and Freedom* (1970), at pp. 349-50. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy -- the freedom to engage in

> one's own thoughts, actions and decisions; see *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 427, per La Forest J.; see also Joel Feinberg, "Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?" (1982), 58 *Notre Dame L. Rev*. 445.
>
> Privacy is also recognized in Canada as worthy of constitutional protection, at least in so far as it is encompassed by the right to be free from unreasonable searches and seizures under s. 8 of the *Canadian Charter of Rights and Freedoms*; see *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145. Certain privacy interests may also inhere in the s. 7 right to life, liberty and security of the person; see *R. v. Hebert*, [1990] 2 S.C.R. 151, and *R. v. Broyles*, [1991] 3 S.C.R. 595.

[para 116] In *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, the Supreme Court of Canada has recently referred to the protection of privacy, as follows:

> [13] Individuals are often unaware of the nature and extent of information about themselves being collected and stored by numerous private organizations, including employers. Some of this information is quite inaccurate…Accordingly, Parliament recognized that a corollary to the protection of privacy is the right of individuals to access information about themselves held by others in order to verify its accuracy.

[para 117] In my view, the Legislature's intention in enacting access to information legislation is to enable individuals to participate meaningfully in the democratic process and to hold government to account, and that protection of privacy legislation is equally fundamental to the preservation of democracy.

vi. My interpretation of section 69(6)

[para 118] Following the approach to statutory interpretation that the Court in *Kellogg* set out above, I find that the significance of the purposes of the FOIP Act is reflected in the Legislature's requirement that I conduct an inquiry under section 69(1). The duty to do so corresponds with section 2(b) of the FOIP Act (controlling the collection, use and disclosure of personal information) and section 2(e) (providing for independent reviews of decisions made by public bodies and the resolution of complaints).

[para 119] If the effect of section 69(6) is to deprive me of jurisdiction if I do not complete an inquiry within 90 days and do not extend the time, I can avoid my duty by failing to do those things. A duty to conduct an inquiry becomes potentially meaningless if it can be defeated by the decision maker simply failing to conduct the inquiry or failing to extend the time. This leads to the conclusion that my duty to conduct an inquiry under the FOIP Act remains, whether or not the time limit in section 69(6) has been exceeded.

[para 120] Furthermore, when section 69(6) is considered independently of the Court's interpretation of section 50(5) of PIPA, the emphasis on the rights of individuals for both aspects of the FOIP Act (personal information protection as well as access) leads to the conclusion that section 69(6) should not be interpreted so as to allow the frustration of these central purposes – protecting the rights of individuals – by a failure to meet timelines.

[para 121] Rather, if section 69(6) is to be interpreted to accord with the purposes of the FOIP Act, it should be interpreted as requiring the parties and me to resolve the dispute as quickly as possible to ensure that the fundamental democratic values protected by the legislation are not undermined by delay, and granting me the authority to extend the time to complete the inquiry when necessary.

[para 122] I turn finally to the idea that it is a simple matter for me to extend timelines and provide anticipated completion dates (*Kellogg*, at paragraph 65), and thereby comply with the FOIP Act and meet the FOIP Act's important purposes in all cases. To some extent, this idea seems to have influenced the Court in *Kellogg* to reach its conclusion that I lost jurisdiction when I did not provide an anticipated completion date.

[para 123] My answer is that, while in some cases it is a relatively simple matter to provide an anticipated completion date, in many other cases it is virtually impossible. In such cases, all I can do is extend the timeline beyond the 90 days and then give a "best guess" about when the inquiry will be completed, which is practically meaningless because it is inaccurate. It is not reasonable to interpret section 69(6) of the FOIP Act as requiring me to do either that which is impossible (to accurately anticipate a date for completion) or that which is meaningless (to give a "best guess" that is inaccurate and therefore not useful), nor to conclude that my failure to do either of these can cause the whole process to fail.

[para 124] Therefore, the meaning that I assign and have historically assigned to section 69(6) is that it permits me to take control of the process and move the matter forward. Section 69(6) sets up an initial short time frame within which, should the matter be concluded, there is no need for the process to be managed in terms of its timing. If the 90 days is likely to expire before completion, or has expired and the matter has not been completed, it is then up to me to take steps to ensure that the process moves forward by setting dates for further required steps. The purpose and terms of the provision are fulfilled so long as I apprise the parties of developments and the steps they are to take in an ongoing way.

[para 125] This interpretation of section 69(6) also deals with the view in *Kellogg* that interpreting the timeline as directory would render it meaningless and run contrary to the presumption against tautology (*Kellogg*, at paragraph 55). The provision is meaningful in directing me as to the steps I am to take to ensure that a matter moves forward.

[para 126] This interpretation also recognizes that timelines may be exceeded by no fault of the parties or the decision maker: the process may take longer than anticipated because of the efforts of the parties to mediate; the request for review may require clarification as to the issues; the parties may choose to be represented by counsel, who may then require instruction or time to prepare; parties may change addresses; affected parties may be identified and require notice and the opportunity to make representations;

administrative errors may be made; parties may raise additional issues; the inquiry may involve complex issues or be procedurally complex; or the tribunal may have a number of other cases that also require adjudication.

[para 127] The Legislature has entrusted me with the authority to protect those who deal with public bodies by ensuring that public bodies comply with the FOIP Act. There is a public interest at stake, as demonstrated by the stated objective of section 2(b) and the other objectives set out in section 2 of the FOIP Act. A decision that renders me without jurisdiction as a result of a breach of a technical timing requirement frustrates much of the intended purpose of the FOIP Act. It is difficult to imagine how the Legislature could have intended such a result. In my view, it would be contrary to the public interest to allow the purpose in section 2(b) and the other purposes in section 2 to be defeated by finding that section 69(6) is mandatory and that I lose jurisdiction if I do not comply with it.

[para 128] Furthermore, although the Supreme Court of Canada in *Dagg* has not yet elevated the protection of privacy to constitutional status, the Supreme Court of Canada has recognized that it is worthy of constitutional protection (see above). In my view, it would be contrary to the public interest on this ground as well to allow the protection of privacy to be defeated by a finding that section 69(6) is mandatory.

[para 129] In its submission, the EPS cited a number of cases in support of the position that section 69(6) is mandatory and that failure to meet the timelines in the provision should result in loss of jurisdiction. The first such case is *Woolridge v. Halifax (Regional Municipality) Police Service*, [1999] N.S.J. No. 268. Like *Cameron*, that case dealt with the time within which a proceeding must be initiated, rather than with extending the time in a proceeding that is underway. As well, the Court's finding that the provision at issue was mandatory was based in part on the fact that reasonable grounds had to be shown before the extension could be granted, which is not the case under section 69(6). That decision is therefore distinguishable.

[para 130] Similar points of distinction also apply to *Doucet v. British Columbia (Adult Forensic Psychiatric Services, Director)*, [2000] B.C.J. No. 586, also cited by the EPS. In that case, the legislation contained far more specific and restrictive language. It provided that a Review Board had to hold a hearing within 45 days after a verdict of "not criminally responsible" was rendered, but that the Court could extend the time to a maximum of 90 days if there were "exceptional circumstances" to warrant the extension. I note also that despite this restrictive language, the majority of the Court of Appeal did not agree with the portion of the *Doucet* case (written by Lambert, J.) relied on here by the EPS. The majority held that "Parliament did not intend to have the validity of a delayed hearing, or any order which resulted therefrom, defeated unless the delay resulted in substantial prejudice to the … accused", and that there had not been prejudice to the accused in the case before it.

[para 131] In *Vialoux and Registered Psychiatric Nurses Association of Manitoba* (1983), 2 D.L.R. (4th) 187 (C.A.) the Court considered a professional disciplinary

proceeding. The Court held that the time requirement for commencing the hearing must be strictly observed where an individual's right to practice his profession is at stake. Again, there is no such matter at stake in the present proceeding. The same point applies to *Carlin v. Registered Psychiatric Nurses Assn. of Alberta*, [1996] A.J. No. 606 (Q.B.), which relied on the conclusion in the *Vialoux* case.

[para 132] Finally, section 74.3(2) of the FOIP Act, which, as pointed out by the EPS, was held to be mandatory in Order M2004-001, is also distinguishable on the basis that it relates to a time limit for initiating, rather than concluding, a proceeding. The question was not whether the Adjudicator had failed to meet a timeline, but whether he had the discretion to extend a timeline which the Applicant had failed to meet. The case was decided in part on the basis that as the meeting of the time limit was in the control of the Applicant, not of the Adjudicator, there would be no prejudice to the Applicant in finding that the timeline could not be extended. Among others, a further point of distinction is that the case was based partly on the fact that the provision at issue did not confer a power on the Commissioner to extend the time, in contrast to section 66 of the FOIP Act, which expressly grants such a power.

vii. Conclusion

[para 133] Having considered the wording and context of the legislation, I find that, in terms of the traditional mandatory/directory analysis, section 69(6) of the FOIP Act is directory rather than mandatory.

4. The analysis of "all the circumstances"

a. The circumstances as discussed in *Kellogg*

[para 134] Relying on *Attorney General (British Columbia) v. Attorney General (Canada)* and a passage from *Principles of Administrative Law*, 4th Edition, by Jones and de Villars, the Court in *Kellogg* said at paragraph 43:

> [43] Thus what emerges is that there is no uniform test to determine whether legislation is mandatory or directory, but, rather, one must consider all of the circumstances in deciding this issue.

[para 135] The Court in *Kellogg* then went on to consider all five of the matters it listed, balancing each one to decide whether section 50(5) should be interpreted as mandatory or directory. The Court summarized at paragraph 82 that it had done just that, namely, that it had "considered all of the foregoing" in finding that section 50(5) should be interpreted as mandatory rather than directory.

[para 136] This raises another issue with the Court's reasoning in *Kellogg* that I must address in order to determine how to apply that reasoning. In deciding that section 50(5) of PIPA was mandatory, the Court in *Kellogg* took into account that alternative remedies were available to the complainant in that case. The alternative remedies that the Court

considered to be available (under human rights legislation and labour relations legislation) would clearly not be available to the Complainant here.

[para 137] However, it does not seem to make sense that case-specific considerations should come into play in deciding whether a statutory provision is mandatory or directory. The EPS itself makes this point in its submission, as follows:

> Whether or not there are any alternative remedies available is not a proper factor to consider, since an examination of this factor is not helpful in clarifying legislative intent. Moreover, a consideration of this factor may lead to a situation where a legislative provision is found to be mandatory in one case, and directory in another. The Legislature could surely not have intended such an absurd result. [emphasis added]

[para 138] The *Kellogg* approach of considering case-specific circumstances in deciding whether a provision is mandatory or directory leads to a finding that a provision can be mandatory in the circumstances of one case, but directory in the circumstances of another case. I agree with the EPS that this leads to an absurd result.

[para 139] However, as I have mentioned earlier, the law relating to the mandatory/directory analysis has evolved. As discussed below, the result of that evolution is that all the relevant circumstances are taken into consideration in deciding whether jurisdiction is lost when a statutory provision that is obligatory is not followed.

[para 140] I will first describe the evolution in the law, and then apply the principles from it by considering the circumstances, as the Court did in *Kellogg*.

b. The law as it has evolved relating to circumstances

[para 141] The traditional mandatory/directory analysis has recently been considered by the House of Lords in *Regina v. Soneji*, [2005] UKHL 49. In that case, the House of Lords surveyed recent developments in other Commonwealth jurisdictions. It began at paragraph 21 by quoting from a decision of the Australian High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, as follows:

> In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* in criticizing the continued use of the 'elusive distinction between directory and mandatory requirements' and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of a legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of the statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. …

[para 142] At paragraph 22, the House of Lords continued:

> In Canada there have been developments along similar lines. The starting point is *British Columbia (Attorney General) v Canada (Attorney General)*…The mandatory/directory distinction was strongly criticized. For the majority Iacobucci J observed: "courts tend to ask, simply: would it be seriously inconvenient to regard the performance of some statutory direction as an imperative?" My understanding is that, seven of the Supreme Court Justices were agreed on this point, with Lamer CJ and McLachlin J dissenting. In *Society Promoting Environmental Conservation v Canada (Attorney General)*…this development was taken a stage further by the Federal Court of Appeal. Relying on Lord Hailsham's dictum, Evans JA gave the main judgment for the court with Strayer JA concurring in the result and reasoning on this point, at p 710, para 35:
>
> > "(iv)…the more serious the public inconvenience and injustice likely to be caused by invalidating the resulting administrative action, including the frustration of the purposes of the legislation, public expense and hardship to third parties, the less likely it is that a court will conclude that legislative intent is best implemented by a declaration of invalidity."
>
> I regard the developments in Canada as very similar to those in New Zealand and Australia.

[para 143] The House of Lords went on to conclude at paragraph 23 that "…the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness" and that:

> …the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what ultimately is a question of statutory construction.

[para 144] In *British Columbia (Attorney General) v. Canada (Attorney General),* cited by the House of Lords and considered by the Court in *Kellogg*, the Supreme Court of Canada stated that the object of the statute and the effect of ruling one way or the other, are the most important considerations in determining whether a statutory direction is mandatory or directory. The Supreme Court of Canada said, at paragraphs 147-148:

> …I think it is relevant to note that in *Reference re: Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court commented upon the doctrinal basis of the *Normandin* distinction. The Court stated (at page 741):
>
> > The doctrinal basis of the mandatory/directory distinction is difficult to ascertain. The "serious general inconvenience or injustice" of which Sir Arthur Channell speaks in *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170 (P.C.), appears to lie at the root of the distinction as it is applied by the courts.
> >
> > In other words, courts tend to ask, simply: would it be seriously inconvenient to regard the performance of some statutory direction as an imperative.
> > …
> > Thus, the manipulation of mandate and direction is, for the most part, the manipulation of an end and not a means…This means that the court which decides what is mandatory, and what is directory, brings no special tools to bear upon the decision. The decision is informed by the usual process of statutory interpretation. But the process perhaps evokes a special concern for "inconvenient" effects, both public and private, which will emanate from the interpretive result.

[para 145] In *Society Promoting Environmental Conservation v. Canada (Attorney General)* (2003), 228 D.R.R. (4th) 693 (F.C.A.), the Federal Court of Appeal addressed the matter of whether the particular circumstances of a case are a relevant consideration (something that the House of Lords did not directly address). In that case, the Federal Court of Appeal was dealing with a failure to comply with a statutory provision that required notices to objectors (to expropriation) to be provided within a specified time.

[para 146] The Federal Court of Appeal said that first question is whether compliance with a statutory provision is obligatory or permissive. This is a question of statutory interpretation that does not depend on the facts of any given case, but rather depends on the usual principles of statutory interpretation. The Federal Court of Appeal found that the provision was obligatory rather than permissive.

[para 147] The Federal Court of Appeal then considered the position where compliance with a statutory provision is obligatory and an administrative action has been taken in breach of the duty. It said that, in such a case, the court may declare the action invalid, but whether it is to do so is a matter of legislative intent. It stated that "since the factual circumstances of non-compliance are infinitely variable, legislative intent regarding the consequences of non-compliance must be determined *in light of all the relevant circumstances of the particular case*". [emphasis added]

[para 148] The Federal Court of Appeal went on (at paragraph 35) to set out a non-exhaustive list of circumstances to be considered in determining whether non-compliance with an obligatory provision invalidates administrative action. Among these, the following circumstances are relevant in the present case:

> (ii) The seriousness of the breach of the statutory duty: a technical violation is an indicator that the court should not intervene, while a public authority that flouts the statutory requirement can expect judicial intervention.
> …
> (iv) …, the more serious the public inconvenience and injustice likely to be caused by invalidating the resulting administrative action, including the frustration of the purposes of the legislation, public expense and hardship to third parties, the less likely it is that a court will conclude that legislative intent is best implemented by a declaration of invalidity.

[para 149] In view of these developments in the law, if I am wrong in my conclusions that the requirements of section 69(6) of the FOIP Act were met in this case and that section 69(6) is directory rather than mandatory, I have no hesitation in applying the part of the reasoning in *Kellogg* that the circumstances of the particular case come into play in deciding whether jurisdiction would be lost by reason of a breach of section 69(6). I will, accordingly, analyze the case-specific circumstances, to decide whether the Legislature intended that jurisdiction should be lost by non-compliance in this case.

c. Application of the law as it has evolved relating to circumstances

[para 150] The approach here first requires a consideration of whether a provision is obligatory or permissive, which is strictly a matter of statutory interpretation. Assuming for the purpose of this discussion that the "must" in section 69(6) of the FOIP Act means that the provision is obligatory, then I must decide whether my actions taken in breach of that obligation should be invalidated, based on legislative intent regarding the consequences of non-compliance, in light of all the circumstances of this case.

i. Are there alternative remedies available to the Complainant and the Public Body?

[para 151] The most clearly case-specific circumstance the Court in *Kellogg* took into account was whether there were alternative remedies available to the complainant and affected organizations.

[para 152] The Court's finding in *Kellogg* that alternate remedies were available to the complainant seems to have weighed heavily in favour of its decision that section 50(5) of PIPA is mandatory (see paragraph 82 of *Kellogg*).

[para 153] The Court's view in *Kellogg* was that the complainant in that case could find a remedy relative to the issue in that case (the drug and alcohol testing practices of the respondent) in another forum. The Court said at paragraphs 76 and 77:

> [76] It is also necessary to inquire as to whether alternative remedies are available to the complainant and affected organizations if the provision is interpreted to be mandatory.
>
> [77] While the complainant would lose his right under PIPA to have an inquiry proceed, it must not be overlooked that the complainant originally raised this issue as a human rights complaint, which can still be pursued. Moreover, as a union member, this matter could be pursued through grievance proceedings.

[para 154] In *Kellogg*, the Court was presented with a line of cases holding that a party before a tribunal should not lose its rights in consequence of the fault or omission of a tribunal. The Court seems to have relied on the fact that alternate remedies were available to the complainant when it denied jurisdiction in spite of this line of cases. The reasoning suggests that had the Court thought alternate remedies were not available to the complainant, it may have reached a different conclusion about the loss of jurisdiction.

[para 155] In the present circumstances, I am aware of no alternative means by which the Complainant in this case can have his complaint addressed. The complaint is that the EPS breached the provisions of the FOIP Act with respect to the collection, use or disclosure of his personal information. The only remedies available for that breach are under the FOIP Act. The FOIP Act permits me to order the Public Body to stop collecting, using or disclosing a complainant's personal information in contravention of Part 2 of the FOIP Act, to destroy personal information so collected, and to impose terms and conditions on such an order.

[para 156] The EPS did not suggest that there was an alternative remedy for the Complainant in this case. Indeed, in reviewing the five matters considered by the Court in *Kellogg*, the EPS in its argument states:

> Whether or not there are any alternative remedies available is not a proper factor to consider, since an examination of this factor is not helpful in clarifying legislative intent. Moreover, a consideration of this factor may lead to a situation where a legislative provision is found to be mandatory in one case, and directory in another. The Legislature could surely not have intended such an absurd result.

[para 157] As explained above, there is a sound argument and strong precedents that make it proper for me to take the circumstances of the case into account, and to consider as a relevant circumstance whether alternative remedies are available. The absence of such an alternative remedy in this case means that if I were to lose jurisdiction, the Complainant would be deprived of redress by the fault or omission of my Office. Whether or not a loss of the right to a remedy from the fault of the tribunal is ever an acceptable result, it is clearly unacceptable in circumstances in which there is no alternative remedy.

[para 158] Thus one of the key reasons for the conclusion in *Kellogg* that jurisdiction was lost does not apply in this case.

[para 159] The Court in *Kellogg* also found that there were no alternative remedies for the affected organizations. The Court said that the affected organizations "…must simply wait, not knowing if they are in jeopardy and should be altering polices and procedures or creating them to avoid that jeopardy."

[para 160] In this case, assuming that knowing whether it breached the FOIP Act is a "remedy" for the EPS, there is also no alternative remedy for the EPS as a public body. However, this is a sophisticated public body that knows the requirements of the FOIP Act and its respective obligations under the FOIP Act, having been subject to the legislation for many years and having been before my Office numerous times. Waiting for my decision about whether it had the authority under the FOIP Act to collect, use or disclose the Complainant's personal information in this case does not put the EPS in jeopardy.

[para 161] On this circumstance considered by *Kellogg* and by the case law, I find that my actions under section 69(6) should not be invalidated, based on the legislative intent regarding the consequences of non-compliance with section 69(6).

ii. Impact on the Complainant and the Public Body

[para 162] Another circumstance in the Court's decision in *Kellogg* is what the Court characterized as the degree of prejudice to the parties. It is not entirely clear that the Court approached this as a case-specific circumstance, but it is clear that the EPS's submissions do so. As I am free to address the particular circumstances of the case, I will approach this circumstance as a case-specific one.

[para 163] The EPS has stated in its initial submission, supported by affidavits from its privacy officer and a police officer, that it was prejudiced. It says that the detrimental consequences included:

> (i) Uncertainty regarding whether an inquiry will, in fact, be proceeding once a Request for Review has been received;
>
> (ii) Uncertainty regarding the timing of written submissions, with a corresponding difficulty in allocating resources to comply with the timelines established by my Office if the matter does proceed to a hearing;
>
> (iii) Uncertainty regarding whether the EPS has correctly administered the FOIP Act or whether the EPS needs to amend its policies or procedures to ensure compliance, and uncertainty as to when the EPS can expect further guidance from my Office with respect to the issues raised in the Request for Review;
>
> (iv) Stress and uncertainty for members (sworn and unsworn) of the EPS who are the subject of an allegation of inappropriate use or disclosure of personal information; and
>
> (v) Delay of parallel proceedings where a member of the public has made a complaint pursuant to the *Police Act* arising from the same conduct.

[para 164] The EPS states in its submission that "not all of these factors are applicable in the present case". However, I will address all of them, as follows:

> (i) Uncertainty about whether an inquiry would be held: The fact that there would be an inquiry was made clear in my June 30, 2005 letter to the parties.
>
> (ii) Uncertainty regarding the timing of written submissions: EPS had been told there would be an inquiry. Acceptable dates for the inquiry were proposed and accepted by consensus among the parties. I assume the EPS would not agree to dates which would be to its prejudice. Furthermore, uncertainty is not the same thing as prejudice. Prejudice is not caused where the uncertainty would have happened in any event. Initially, it was anticipated that three hearing days would suffice to deal with the matter. Subsequent events required further submissions and hearing dates. Thus there would have been uncertainty even if time extensions had been made, and an anticipated completion date (of April 6, 2006) had been projected, before 90 days had expired.
>
> (iii) Uncertainty as to whether it is correctly administering the FOIP Act: This uncertainty will continue until the hearing is completed and an order issued – it is simply a function of how long the process takes, and it takes longer in the case of procedurally complex hearings with an oral component, multiple witnesses,

preliminary issues, and in this case, a request from the EPS that my Office create and provide transcripts.

(iv) Stress for members: As for stress for members who are subject to allegations of impropriety, it is unclear to me how police officers, who tend to be experienced in legal proceedings, would suffer stress as a result of this proceeding. If the suggestion relates to the fact that their individual actions are being impugned, this is, again, a function of the complexity of the process and not of my alleged failure to project a completion date due to the complexity.

(v) Delay of parallel proceedings: It is not known to me whether or why parallel proceedings under the *Police Act* have been delayed. Furthermore, section 3(a), section 3(c) and section 3(d) of the FOIP Act make it clear that the FOIP Act does not affect what information is available for other proceedings.

[para 165] Section 69(6) does not speak to subsequent changes to initial time extensions. Therefore, it is not strictly necessary for me to comment on the fact that the process was not completed, as originally anticipated, in the three days initially set for the inquiry. However, I will do so because the EPS complains in its submissions about uncertainties as to the timing throughout the process.

[para 166] As noted earlier, this inquiry has involved procedurally complex matters. It has thus far comprised many stages, many of them added by, or necessitated by the actions of or positions of, the EPS. Many of these steps were not predictable. The EPS was involved and kept apprised of steps in the process throughout.

[para 167] To conclude, I find that, in this case, uncertainties do not equate to prejudice, and that the EPS was not prejudiced by uncertainties.

[para 168] In this case, the adverse outcome for the Public Body in the event it was found to be in contravention of the FOIP Act by improperly collecting, using or disclosing personal information would be an order that it cease doing so under section 72. The timing of such an order presents no prejudice to the Public Body. The Public Body has already done the collection, use or disclosure that gave rise to the complaint and request for review. It is simply waiting to find out if it was right or not. Indeed, the prejudice, if any, accrues to the Complainant whose personal information continues to be held, used or disclosed, possibly in contravention of the FOIP Act.

[para 169] Finally, I want to note again that this inquiry commenced on April 4, 2006. It has involved numerous procedural requests from the parties, including the EPS, as well as procedural steps taken by my Office, necessitated by those requests. All of those requests and steps have delayed completing the inquiry. On March 7, 2008, almost two years into the inquiry and two weeks after having received the transcripts of the inquiry that it requested from my Office, the EPS brought its application to challenge my jurisdiction based on the *Kellogg* decision that had been issued on July 30, 2007. Unlike *Kellogg*, in which the inquiry had not yet commenced, this inquiry is nearing completion

and has involved numerous written and oral submissions from the parties, as well as my hearing the testimony of the witnesses.

[para 170] To now halt the inquiry would mean that the time expended, and the expense incurred, by the parties, as well as my Office, will have been wasted. This will negatively impact both the Complainant and the Public Body, causing prejudice to both.

[para 171] However, I find that the prejudice to the Complainant is greater because a ruling that non-compliance with the provision ends my jurisdiction will work serious general inconvenience or injustice to the Complainant, who has no control over my review process. He will lose the right to have me review his complaint, even though this inquiry is nearing completion.

[para 172] On this circumstance considered by *Kellogg* and by the case law, I find that my actions under section 69(6) should not be invalidated, based on the legislative intent regarding the consequences of non-compliance with section 69(6).

iii. Would a finding that s. 69(6) is mandatory have a negative operational impact on the FOIP Act?

[para 173] Again, I am not certain that the Court in *Kellogg* regarded this as a case-specific circumstance, as the Court's comments seem to focus on the fact that compliance with section 50(5) of PIPA would be easily achieved, presumably on the basis that it would not be onerous to routinely issue time extensions where they are called for. As explained above, if that is what the Court meant, I do not agree. However, I will also consider the case-specific operational impact, which the Court in *Kellogg* did not address.

[para 174] The operational impact of the Court's decision to date has been enormous, with numerous challenges to my jurisdiction under PIPA and the FOIP Act, and many complainants and applicants potentially losing rights. A finding that section 69(6) is mandatory has the potential to leave me without jurisdiction on all FOIP Act cases and inquiries in my Office, and render all FOIP Act orders of my Office a nullity, which would have a significant negative operational impact on the FOIP Act.

[para 175] On this circumstance considered by *Kellogg*, I find that my actions under section 69(6) should not be invalidated, based on the legislative intent regarding the consequences of non-compliance with section 69(6).

iv. Would a finding that s. 69(6) is mandatory be contrary to the public interest?

[para 176] The Court in *Kellogg* said that the finding that the provision was mandatory would support the public interest in having complaints resolved in a timely fashion. The Court cited *Rahman v. Alberta College and Assn. of Respiratory Therapy*, [2001] A.J. No. 343 (Q.B.), but distinguished the result in *Rahman* on the basis that there

was no prejudice accruing from the delay, and also on the basis that there was no equivalent ability to extend the time.

[para 177] The Court in *Rahman* found that the failure to commence a hearing within the prescribed time frame was not fatal to the jurisdiction of the Alberta College and Association of Respiratory Therapy. The Court observed that the purpose of the legislation was to resolve complaints as expeditiously as possible, serving the interests of the health profession, the public and the individual complainant. The committee charged with hearing the dispute was not merely adjudicating a private dispute. It was also responsible for serving and protecting the public interest. Considering the relative prejudices associated with an interpretation of the relevant provision as mandatory versus directory demonstrated no prejudice or at worst minimal prejudice if the provision was deemed directory, but substantial prejudice to the complainant and the public interest if the provision was deemed mandatory, in the Court's view. Accordingly, on balance the provision was to be interpreted as directory.

[para 178] Similarly, my role under the FOIP Act goes beyond providing remedies to complainants. As provided by section 53(1) of the FOIP Act, my role is also to ensure that the purposes of the FOIP Act are achieved, including the purpose set out in section 2(b), which is:

> *2(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,…*

[para 179] I have addressed the balance of prejudice issue above. I have also already addressed the idea that I can avoid any problems by extending timelines and issuing completion dates. Thus, in my view, the conclusion in the *Rahman* case applies.

[para 180] On this circumstance considered by *Kellogg* and by the case law, I find that my actions under section 69(6) should not be invalidated, based on the legislative intent regarding the consequences of non-compliance with section 69(6).

v. Degree of seriousness of the breach

[para 181] A final circumstance, which the Court in *Kellogg* did not take into account but which was put forward by the Federal Court of Appeal in *Society Promoting Environmental Conservation v. Canada (Attorney General),* is the degree of seriousness of the breach.

[para 182] If I am wrong that my September 9, 2005 letter does not comply with section 69(6), I find that any non-compliance was merely technical or trivial. My September 9, 2005 letter made it clear to the parties that the inquiry would not be completed within the 90-day time limit and that steps in the inquiry would be taken after expiry of the period. The information which that letter conveyed to the parties made any

breach of the provision merely technical or trivial. The parties knew the process was ongoing: they were fully involved. Since they knew what was happening, it would be unreasonable to void the whole process because they were not told this again.

[para 183] Finally, the EPS stated in its submission that it did not agree with Adjudicator Gauk's conclusion in Order P2007-010 that the spirit of the provision had been met in the earlier case, because, in the view of the EPS, "[I]t should not be necessary to infer compliance with a statutory provision. Compliance should be clear on the face of the record." I note, however, that Adjudicator Gauk's comments related to events transpiring after the initial time extension was communicated. Her finding was that the requirements of the provision were met for the initial extension beyond 90 days, and that the spirit of the provision was met with regard to events that took place after.

[para 184] On this circumstance considered by the case law, I find that my actions under section 69(6) should not be invalidated, based on the legislative intent regarding the consequences of non-compliance with section 69(6).

5. Conclusion

[para 185] Regardless of whether I apply the traditional mandatory/directory analysis or the analysis that has more recently evolved in the case law, my conclusion is the same. Taking into account either statutory interpretation alone or all the circumstances of the present case, I find that I have not lost jurisdiction.

C. Is the *Kellogg* decision retrospective/retroactive?

[para 186] The jurisdictional challenge relates to events that largely transpired before *Kellogg* was decided (on July 30, 2007). The EPS made representations as to whether the *Kellogg* decision has a retrospective or retroactive effect. It asserted that it does so, noting that acts done without jurisdiction are void *ab initio*. It is not clear to me that this point determines the issue.

[para 187] As discussed, before the *Kellogg* decision, there was an existing decision on the interpretation of section 69(6) in Order 99-011, which found that the provision was directory. There are a number of authorities that deal with the overruling of existing interpretations of the law that would require review and analysis to decide the retrospective/retroactive question. Because I have decided that section 69(6) was met, and that I did not lose jurisdiction even if it had not been met, it is not necessary for me to undertake this review and analysis so as to decide this question.

IV. DECISION AND ORDER

[para 188] On the basis of my conclusion that I have not lost jurisdiction in this case, I will conclude this inquiry and issue a decision relative to the issues as stated in the Notice of Inquiry. Accordingly, I will direct the Registrar of Inquiries to schedule the continuation of this inquiry.

Frank Work, Q.C.
Information and Privacy Commissioner