ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2008-003

December 12, 2008

EDMONTON POLICE SERVICE

Case File Number F4044

Office URL: www.oipc.ab.ca

Summary:

The Applicant requested copies of records and audio communication records relating to a traffic ticket issued to her client by the Public Body, the Edmonton Police Service ("EPS"). Initially the EPS refused access to the records as the traffic ticket was still a matter before the Courts. As a result of the refusal, the Applicant wrote to the Office of the Information and Privacy Commissioner, requesting a review.

The matter was referred to mediation. During the course of mediation, the charges were withdrawn in Court. The Applicant again requested access to the records but was informed by the EPS that there were no responsive records.

The Applicant requested the Office of the Information and Privacy Commissioner ("this Office") hold an inquiry, stating that she did not accept that there were no responsive records relating to her request.

The EPS argued that the Information and Privacy Commissioner had lost jurisdiction over this matter by operation of section 69(6) of the *Freedom of Information and Protection of Privacy Act* ("FOIP Act" or "the Act").

The Adjudicator found that the Information and Privacy Commissioner, and the Adjudicator as his delegate, had not lost jurisdiction by operation of section 69(6) of the Act.

The Adjudicator found that she did not have jurisdiction to review the decision of the EPS raised in the Applicant's initial request for review, as the records requested fell within section 4(i)(k) of the Act.

The Adjudicator found that Applicant's second request occurred after the prosecution of the traffic ticket had concluded and therefore, this Office could hear the matter. The Adjudicator further found that the EPS failed to fulfill its duty under section 10 of the Act when it did not find or disclose the record titled, "Event Chronology -- 05285315" following the Applicant's request. However, other than that record, which the EPS disclosed to the Applicant as part of this inquiry, the Adjudicator found that the EPS had fulfilled its duty under section 10 of the Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4(1)(k), 10, 11, 12, 66, 69, 72; *Personal Information Protection Act* S.A. 2003, c. P-6.5, s. 50(5); *Provincial Offences Procedure Act* R.S.A. 2000 c. P-34 ss. 2, 3; *Traffic Safety Act* R.S.A. 2000 c. T-6, ss. 5(3), 125; *Use of the Highway and Rules of the Road* Regulation Alberta Regulations 304/2002, s. 2(1)(a); **Canada:** *Criminal Code* R.S.C. 1985 c. C-46.

Authorities Cited: AB: Orders 97-017, F2006-031, F2007-029, F2008-009, F2008-013; *Black's Law Dictionary*, 8th ed., s.v. "prosecution".

Cases Cited: *Ivik Enterprises Ltd. v. Whitehorse (City)*, [1986] Y.J. No. 62 (QL), citing *Harelkin v. University of Regina,* [1979] 2 S.C.R. 561; *Bridgeland-Riverside Community Association v. City of Calgary*, [1982] A.J. No. 692 (C.A.); *Petherbridge v. City of Lethbridge*, [2000] A.J. No. 1187 (Q.B.); *Rahman v. Alberta College and Assn. of Respiratory Therapy*, [2001] A.J. No. 343 (Q.B.); *Alberta (Attorney General) v. Krushell*, [2003] ABQB No. 252; *R v. Waselenchuk*, [2005] ABQB No. 182; *Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner)*, [2007] ABQB 499, [2008] ABCA 384.

I. BACKGROUND

[para 1] On January 30, 2007, the Edmonton Police Service ("EPS") received a request from the Applicant for, "… any and all records, investigative file (*sic*), particularly the audio communication records, concerning the above captioned matter." The "above captioned matter" referred to by the Applicant was an alleged *Traffic Safety Act* violation apparently resulting in ticket number A02767553F ("the ticket") which was issued to the Applicant's client.

[para 2] On February 9, 2007, the EPS responded to the access request stating, "As this request relates to matters that are currently before the courts, no records can be provided at this time pursuant to section 4(1)(k) of the FOIPP Act…"

[para 3] On April 10, 2007, the Applicant requested a review by this Office of the EPS' decision to withhold the audio communication records requested by the Applicant on January 30, 2007. The Applicant stated:

> We understand from discussions with the Crown Prosecutor's Office that the Edmonton Police Service is refusing to disclose the audio communication records requested in our letter dated January 30, 2007 as disclosure in the prosecution of [the Applicant's client] on the basis that it is "irrelevant" to the prosecution.

[para 4] The Applicant also provided this Office with a copy of her letter to the Crown Prosecutor's Office, dated February 20, 2007, which stated:

> I understand that by telephone conversation on January 4, 2007, you advised [a lawyer at the Applicant's office] that the EPS was refusing to disclose any additional records because they were "irrelevant" to the prosecution of this matter.

[para 5] On April 11, 2007, after the Applicant's request for review, the EPS' Disclosure Analyst for the *Freedom of Information and Protection of Privacy Act* performed a search within the EPS for audio communication records and notes that may have been taken by the EPS member who issued the ticket. He was advised that there were no audio communication records of the call, and that this was not unusual as it was an "onview complaint". He was also advised that the only notes that may exist would be on the back of the ticket, which is the standard practice of the EPS member who issued the ticket.

[para 6] On April 12, 2007, a Portfolio Officer from this Office was assigned to investigate and try to mediate this matter. A letter was sent by this Office to the parties indicating this. The letter also stated that the anticipated date of completion of the review was July 9, 2007 and the parties would be notified if more time was needed.

[para 7] On April 26, 2007, the Applicant wrote to the EPS and advised that the charge relating to the ticket was withdrawn in Court that day and requested, "…all records and, in particular, the audio communication records, requested in our correspondence received by your office on January 30, 2007."

[para 8] On April 27, 2007, the EPS responded stating, "…the Edmonton Police Service has no responsive records." The EPS later found that a record titled "Event Chronology -- 05285315" relating to this matter was in its custody and control but had not been disclosed. The EPS disclosed the Event Chronology to the Applicant in the course of this inquiry.

[para 9] On July 9, 2007, the Portfolio Officer sent a letter to the parties indicating his findings.

[para 10] On July 31, 2007, the Applicant requested that this Office conduct an inquiry. In her request, the Applicant stated, "We do not accept that the Edmonton Police Service does not keep any records relating to a prosecution initiated by its members and, further, we do not accept that there were no audio communication records relating to the issuance of the violation ticket."

[para 11] On August 8, 2007, the Director of Adjudication advised, by way of letter to all parties, that the Applicant's request for inquiry had been received by the Adjudication Unit and the anticipated date of completion of the review is June 30, 2009.

[para 12] On March 7, 2008, the EPS wrote to this Office and advised of its position that this Office has lost jurisdiction over this matter pursuant to section 69 of the Act.

[para 13] On July 4, 2008, a Notice of Inquiry was sent to the parties by this Office. The EPS provided submissions but the Applicant did not.

II. RECORDS AT ISSUE

[para 14] This is a complaint regarding the adequacy of the EPS' search and response to the Applicant's request and therefore there are no records directly at issue, but I note that the Applicant raised the question of whether audio communication records exist.

III. ISSUES

[para 15] According to the Notice of Inquiry dated, July 4, 2008, the issues in this Inquiry are as follows:

Issue A:

Did the Commissioner or his delegate lose jurisdiction on the basis of alleged non-compliance with section 69(6) of the *Freedom of Information and Protection of Privacy Act* (the Act)?

Issue B:

Did the Public Body comply with Part 1 of the Act in responding to the Applicant's access request?

IV. DISCUSSION OF ISSUES

Issue A:

Did the Commissioner or his delegate lose jurisdiction on the basis of alleged non-compliance with section 69(6) of the *Freedom of Information and Protection of Privacy Act* (the Act)?

[para 16] Section 69(6) of the FOIP Act reads:

> *69(6) An inquiry under this section must be completed within 90 days after receiving the request for the review unless the Commissioner*
>
> *(a) notifies the person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review that the Commissioner is extending that period, and*
>
> *(b) provides an anticipated date for the completion of the review.*

[para 17] Based primarily on the finding of Justice Belzil in *Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner)*, [2007] ABQB 499 ("*KBR*"), the EPS argues that this Office has lost jurisdiction. Justice Belzil's decision in *KBR* was appealed to the Alberta Court of Appeal. The Court found the appeal was moot as the Applicant had passed away, and it did not make a finding on the merits of the appeal (*Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner)*, [2008] ABCA 384).

[para 18] In his decision, Justice Belzil was considering if this Office had lost jurisdiction by operation of section 50(5) of the *Personal Information Protection Act* ("PIPA"), which states:

> *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 the completion of the review.*

[para 19] The EPS raised this jurisdictional issue in several inquiries before this Office. On September 22, 2008, the Commissioner issued Order F2006-031, in which the EPS, as the Public Body, was arguing a loss of jurisdiction on the basis of non-compliance with section 69(6) of the FOIP Act. Therefore, many of the arguments raised by the EPS in Order F2006-031 are similar to those it raised in this matter. As a result, I

will be referring to the reasoning of the Commissioner in Order F2006-031 where appropriate, while taking into consideration the specific facts of this matter.

Was there a Breach of Section 69(6) of the FOIP Act?

[para 20] Under section 69(6) of the FOIP Act, the Commissioner must complete a review within the 90 days following receipt of the request for review. However, this time can be extended by the Commissioner if he gives notice of the extension to the parties and provides the parties with an anticipated date for completion of the review.

[para 21] The initial request for review by the Applicant was received by this Office April 10, 2007, which means the initial 90 day timeline expired on July 9, 2007.

[para 22] In this matter, the investigation was completed by July 9, 2007; however, this did not resolve the matter. On July 31, 2007, the Applicant sent a letter to this Office requesting an inquiry into this matter.

[para 23] When the 90 day timeline had been reached on July 9, 2007, this Office was unaware if the Applicant wished to proceed with an inquiry into this matter. It was only after the 90 day limitation that the Applicant informed this Office she wished to proceed to inquiry. Until this request was received, there was no indication that an inquiry would need to be scheduled and no reason to extend the timelines under section 69(6) of the FOIP Act.

[para 24] On August 8, 2007, this Office sent a letter to the EPS stating:

> This file…has been received by the Adjudication Unit. If a decision is made to hold an inquiry in this matter, it will be scheduled. Inquires are currently being scheduled at the end of 2007 or the beginning of 2008.

[para 25] This letter went on to give the EPS an outline of the procedures that would be followed, and stated that the anticipated date of completion of the review is June 30, 2009.

[para 26] The EPS concedes that the form of the August 8, 2007 letter meets the requirements of section 69(6) of the FOIP Act. However, the EPS argues that since this letter was sent after the initial 90 day time period had expired, it does not meet the requirements under section 69(6) of the FOIP Act.

[para 27] It is true that the letter dated August 8, 2007 was sent to the parties outside 90 days from the date the request for review was received by this Office. However, there is no requirement in section 69(6) of the FOIP Act that an extension notification be sent prior to the expiry of the 90 day timeline. This issue was not dealt with by Justice Belzil in *KBR*.

[para 28] As the FOIP Act contains no requirement to extend the timeline before the 90 day timeline is concluded, it follows that the timeline can be extended later. Indeed, the facts in this matter highlight why it is logical that the Commissioner would be allowed to extend the timeline in section 69(6) of the FOIP Act after its expiry. The process of making, investigating, mediating and adjudicating a complaint under the FOIP Act or PIPA is usually a party driven process. The 90 day timeline expired in this matter after the investigation and mediation had been concluded and the Applicant had not advised this Office or the EPS if she wished to proceed to inquiry. Therefore, there was no indication that the section 69(6) timeline needed to be extended by the Commissioner until nearly a month following its expiry.

[para 29] This issue was addressed by the Commissioner in Order F2006-031 where he found that, based on his interpretation of section 69(6) of the FOIP Act, the timeline could be extended outside of the original 90 day limitation. He stated:

> 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.
>
> (Order F2006-031 at paragraph 54)

[para 30] I adopt the reasoning of the Commissioner in Order F2006-031 and find that the letter of August 8, 2007 properly extended the timeline under section 69(6) of the FOIP Act.

Is Section 69(6) of the FOIP Act Mandatory or Directory?

[para 31] In the alternative, if I am incorrect in my findings regarding the August 8, 2007 letter, it is necessary to examine whether section 69(6) of the FOIP Act is mandatory or directory.

[para 32] In its submissions, the EPS relied heavily on the findings of Justice Belzil in *KBR*. As I mentioned above, the Court in *KBR* was dealing with PIPA and not the FOIP Act. As the Commissioner decided in Order F2006-031, the analysis of the purpose provision in the FOIP Act leads to an interpretation of section 69(6) of the FOIP Act that is different from Justice Belzil's interpretation of section 50(5) of PIPA.

[para 33] The Commissioner closely examined section 69(6) of the FOIP Act in Order F2006-031. He stated:

> …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.
>
> (Order 2006-031 at paragraph 120)

[para 34] The Commissioner then went on to state:

> …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.
>
> (Order 2006-031 at paragraph 124)

[para 35] Based on the purpose and scheme of the Act, as well as the wording and context section 69 of the FOIP Act in particular, he found that section 69(6) of the FOIP Act is a directory provision and not a mandatory one (Order F2006-031 at paragraphs 106-127 and Order F2008-013 at paragraph 34).

[para 36] I adopt this reasoning and find that even if there was a breach of section 69(6) of the FOIP Act by this Office, the breach did not result in this Office losing jurisdiction.

Application of KBR:

[para 37] In Order F2006-031 the Commissioner noted that the law in relation to whether jurisdiction is lost when a statutory provision is not met has evolved such that it is necessary to examine if the Legislature intended a loss of jurisdiction to result from a breach of a mandatory requirement (Order F2006-031 at paragraphs 151-184). The Alberta Court of Appeal has noted this evolution in *Bridgeland-Riverside Community Association v. City of Calgary*, [1982] A.J. No. 692 (C.A.) ("*Bridgeland*"), and subsequent decisions following that decision. In *Bridgeland*, the Court said:

> In my view, no concept is more sterile than that which says that a proceeding is a nullity for failure of compliance with a procedural rule and without regard to the effect of the failure. …

> I would put aside the debate over void or voidable, irregularity or nullity, mandatory or directory, preliminary or collateral. These are only ways to express the question shall or shall not a procedural defect (whether mandated by statute or common law) vitiate a proceeding. In my view, absent an express statutory statement of effect, no defect should vitiate a proceeding unless, as a result of it, some real possibility of prejudice to the attacking party is shown, or unless the procedure was so dramatically devoid of the appearance of fairness that the administration of justice is brought into disrepute.
>
> (*Bridgeland* at paragraphs 27 and 28)

[para 38] More recently, the Alberta Court of Queen's Benchl revisited this analysis in *Petherbridge v. City of Lethbridge*, [2000] A.J. No. 1187 (Q.B.), and stated:

> [*Bridgeland*] provides, at 368, that a procedural defect, whether contrary to statute or common law, does not vitiate a proceeding unless:
>
> (a) a statute prescribes such an effect;
> (b) a real possibility of prejudice to the attacking party is shown; or
> (c) the procedure was so dramatically devoid of the appearance of fairness that the administration of justice is brought into disrepute.
>
> (*Petherbridge v. City of Lethbridge*, [2000] A.J. No. 1187 (Q.B.) at paragraph 24)

[para 39] Therefore, in the event that my finding that section 69(6) of the FOIP Act was met on the facts and my finding that section 69(6) of the FOIP Act is directory and not mandatory are both wrong, I will consider the specific facts of this matter by reference to the factors considered by Justice Belzil in *KBR*, and the factors considered in *Bridgeland*, in order to determine if, given these facts, the Legislature intended there to be a loss of jurisdiction.

Wording and Context of the Legislation:

[para 40] Justice Belzil began his analysis by reviewing the purpose of PIPA and the specific wording of section 50(5) of PIPA. He concluded that the legislative intent of PIPA was to balance the rights of the individuals and organizations and to encourage timely resolution of complaints while maintaining a level of flexibility for the Commissioner in dealing with matters before him. This analysis led Justice Belzil to the conclusion that section 50(5) of PIPA is mandatory.

[para 41] I have already found that section 69(6) of the FOIP Act is directory and not mandatory. However, for the purposes of discussion, I will proceed under the assumption that the wording of section 69(6) of the FOIP Act makes the provision obligatory, and examine if the remaining factors cited in *KBR* lead to the conclusion that the Legislature

intended this Office to lose jurisdiction if section 69(6) of the FOIP Act was breached in this matter (Order F2006-031 at paragraph 150).

O*perational Impact:*

[para 42] The second factor considered by the Court was the impact a particular finding would have on the operation of PIPA. Justice Belzil found that compliance with section 50(5) PIPA could easily be achieved by the Commissioner and would, therefore, not result in a negative operational impact on PIPA.

[para 43] In Order F2006-031, the Commissioner described the operational impact that a finding that section 69(6) of the FOIP was mandatory as follows:

> 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.
>
> (Order F2006-031 at paragraph 174)

[para 44] Therefore, I find that the negative operational impact that a finding that section 69(6) is mandatory would have is indeed significant. I find that the negative operational impact weighs in favour of a finding that the Legislature would not have intended a loss of jurisdiction to result from a breach of section 69(6) of the FOIP Act.

Impact on the Complainant and Affected Organizations:

[para 45] The Court next considered the impact on the parties. In examining this factor, Justice Belzil looked at the possible prejudice to both parties. The Court acknowledged that if section 50(5) of PIPA is mandatory, this would negatively impact the Complainant as he would be denied an inquiry under PIPA, through no fault of his own. The Court also found that if section 50(5) of PIPA were found to be directory, organizations would not have any means to force a timely resolution of a complaint. Therefore, "…the result is neutral in terms of prejudice between the complainant and affected organization…" (*KBR* paragraph 75).

[para 46] The EPS argues that it would suffer prejudice if section 69(6) of the FOIP Act were directory and not mandatory and gives specific examples of prejudice that may or may not be applicable to this matter.

[para 47] The EPS also made this argument, using the same examples of prejudice, in Order F2006-031. I disagree with the EPS' argument that the factors mentioned cause actual prejudice in this matter, particularly given that this inquiry arises as the result of an access request and not a complaint. I do not believe that the EPS has proven that delay, stress and uncertainty of result caused actual prejudice in this matter. The EPS was kept

apprised of the timelines, and procedural steps to be taken, in a timely manner (Order F2006-031 at paragraph 166-167).

[para 48] The fact that, unlike Order F2006-031, this matter deals with a complaint related to an access request gives rise to different considerations related to prejudice. An access request can be made at any time, so the Applicant can start the process over again with a new FOIP request. It could be argued that should this Office lose jurisdiction over this matter, there would also be no prejudice suffered by the Applicant. This would cost the Applicant, the EPS and this Office time and money but these costs of re-starting the matter would be borne by both parties.

[para 49] However, if a breach of section 69(6) of the FOIP Act were found to not result in a loss of jurisdiction, the EPS would be in the same position as the respondent was in *KBR*, having no way to enforce a timely resolution of the matter. That being said, while the Applicant made no argument to this effect, her request may be time-sensitive. Therefore, while the EPS will simply have to start a process that it does routinely over again, the Applicant may suffer actual prejudice at having to wait for another access request to be processed.

Alternative Remedies Available to the Complainant:

[para 50] Given the specific facts in *KBR*, Justice Belzil decided that there were alternate remedies available to the Complainant, specifically, a human rights complaint or a grievance through his union.

[para 51] The EPS argues that this factor should not be considered because it has nothing to do with legislative intent. However, I believe it is appropriate to apply the factors outlined by Justice Belzil in their totality to this matter, and find that this factor must be considered by me in order to determine legislative intent.

[para 52] In the alternative, the EPS also argues that the Applicant has an alternative remedy in that she can simply request access to the records again and start the whole process over.

[para 53] This was the same argument put forward by the EPS in Order F2008-013. The Adjudicator in that matter stated:

> It has been stated that a Supreme Court of Canada decision "makes it clear that the test for an adequate alternative remedy involves consideration of any alternate procedure before another tribunal" [*Ivik Enterprises Ltd. v. Whitehorse (City),* [1986] Y.J. No. 62 (QL), citing *Harelkin v. University of Regina,* [1979] 2 S.C.R. 561]…Given the Supreme Court's evaluation of a remedy before *another* tribunal, I do not find that the Applicant's ability to re-initiate the access request under the *FOIP Act* constitutes an

> alternative remedy. Rather, it would be the same remedy, sought a second time.
>
> (Order F2008-013 at paragraph 39)

[para 54] Starting the same process over again, under the same act, to obtain the same result is not an "alternative" remedy. It is the same remedy exercised at a different time. It is also inconsistent with the EPS' submission that it suffered prejudice by virtue of a delay, as the alternative remedy for the Applicant that it is putting forward would involve even more delay.

[para 55] I was provided with no further evidence of an alternate remedy available to the Applicant. Indeed, I find that there is not another way for the Applicant to obtain an order regarding the adequacy of a search or the ability to obtain records in the possession of the EPS in a matter that is no longer in the process of prosecution. This weighs in favour of the Legislature not intending that this Office lose jurisdiction for a breach of section 69(6) of the FOIP Act in this matter.

Public Interest:

[para 56] The final factor considered by Justice Belzil was whether finding that section 50(5) of PIPA is mandatory is in the public interest. The Court found that it was in the public interest to promote timely complaint resolution. As well, the Court found that allowing section 50(5) of PIPA to be directory would undermine the public's confidence in PIPA.

[para 57] In Order F2006-031, the Commissioner considered whether *Rahman v. Alberta College and Assn. of Respiratory Therapy*, [2001] A.J. No. 343 (Q.B.) ("*Rahman*") applied. The Court in *Rahman* interpreted a provision requiring a disciplinary hearing to be held within 90 days as directory. This case had been distinguished by the Court in *KBR* because the Court in *Rahman* had found that there was no prejudice to the respondent resulting from the delay, and because there was no ability under the statute in *Rahman* to extend time.

[para 58] However, in Order F2006-031, the Commissioner held that *Rahman* applied. He took into account the fact that in the case before him, the balance of prejudice favoured continuing the inquiry. As well, he referenced his earlier point that because completion dates were not accurately predictable, the ability to extend the time under section 69(6) did not make compliance with the statute more easily achievable. Therefore, the Commissioner relied on the principle in *Rahman* that the public interest is best served where a decision maker, whose role includes performing a public duty, fulfills that role. I adopt the Commissioner's reasoning on the "public interest" factor, and find it weighs in favour of retaining jurisdiction in this matter.

Seriousness of the Breach:

[para 59] In Order F2006-031, the Commissioner considered the seriousness of the breach as a factor in addition to those factors examined by Justice Belzil in *KBR*. In Order F2006-031, the Commissioner found that the breach was trivial or technical. I also find that the breach in this matter is trivial or technical.

[para 60] As detailed above, the EPS was aware of how the review was proceeding. It was advised within two days of this Office receiving the initial request for review that this matter was being referred to investigation. This Office then advised that the review would be concluded by July 9, 2007. On that date, the parties were sent information by the Portfolio Officer, as the mediation was concluded. The Applicant then requested an inquiry into this matter on July 31, 2007. Prior to this time, it does not appear as though this Office was aware of the Applicant's desire to proceed with an inquiry.

[para 61] This Office responded to the Applicant's request by referring the matter to the Adjudication Unit. Within days, a letter was sent to the parties from the Director of Adjudication advising of approximate dates and who to contact with questions regarding the process. As well, the parties were informed that the anticipated date of completion of the review is June 30, 2009.

[para 62] There were no substantial delays in this matter. It has been and continues to be dealt with in a timely manner. This Office has been and continues to be in contact with and available to the parties during the entire review process and therefore, there is compliance with the intention of section 69(6) of the FOIP Act.

[para 63] Given what I have outlined above, I do not believe that the Legislature intended to have such a trivial breach lead to the loss of jurisdiction of this Office over this matter.

The factors set out in the Bridgeland:

[para 64] The Alberta Court of Appeal considered the following factors, outlined in *Bridgeland*, when determining if non-compliance with a procedural provision will have a vitiating effect:

i. a statute prescribes such an effect;
ii. a real possibility of prejudice to the attacking party is shown; or
iii. the procedure was so dramatically devoid of the appearance of fairness that the administration of justice is brought into disrepute.

[para 65] The FOIP Act does not prescribe the consequence that the Commissioner's decision should be vitiated by virtue of non-compliance with section 69(6) of the FOIP Act. As noted above, I do not think there would be a real possibility that the EPS would suffer prejudice. Finally, as I detailed above, any breach of section 69(6) of the FOIP

Act, was not so serious as to deprive the procedure of the appearance of fairness and bring the administration of justice into disrepute.

[para 66] On the basis of the factors set out in the *KBR* and *Bridgeland*, I also find that any failure to meet the terms of section 69(6) should not be held to vitiate these proceedings.

Conclusion on Jurisdiction:

[para 67] I find that there was no breach of section 69(6) of the Act in this matter. In the alternative, if there was a breach, I find that section 69(6) of the Act is directory and therefore the breach did not lead to a loss of jurisdiction by this Office. Finally, in the alternative, if there was a breach and section 69(6) of the Act is mandatory, I find that it would be contrary to legislative intent for this Office to lose jurisdiction in the circumstances of this matter.

Issue B:

Did the Public Body comply with Part 1 of the Act in responding to the Applicant's access request?

[para 68] The Applicant's original request for review followed the EPS' response that it was denying access to the records requested pursuant to section 4(1)(k) of the FOIP Act. The reason for the denial was that the requested records related to an ongoing prosecution.

[para 69] The Applicant also provided a letter to this Office dated February 20, 2007, that the Applicant wrote to the Crown Prosecutor's Office, which states, "I understand that by telephone conversation on January 4, 2007, you advised [a lawyer at the Applicant's office] that the EPS was refusing to disclose any additional records because they were "irrelevant" to the prosecution of this matter."

[para 70] The Applicant's letter to the Crown Prosecutor goes on to state, "I suggest to you that in light of the position of the EPS that all materials requested in our letter dated January 26, 2007 "relate" to this prosecution and therefore cannot be provided through FOIP, they must be sufficiently relevant to come within the police obligations pursuant to *R v. Stinchombe*."

[para 71] I gather from these letters that the Applicant is under the impression that there are records which were not disclosed in the course of either the prosecution of her client, or her FOIP request.

[para 72] In any event, the prosecution of the violation ticket concluded and the Applicant again asked for all responsive records relating to the violation ticket issued to her client, including audio communications. She was advised that there were no such responsive records.

[para 73] In the request for inquiry submitted to this Office on July 31, 2007, the Applicant stated:

> We do not accept that the Edmonton Police Service does not keep any records relating to a prosecution initiated by its members and, further, we do not accept that there were no audio communication records relating to the issuance of the violation ticket.

[para 74] I did not receive submissions from the Applicant. So, the few letters that she provided to this Office in the course of this inquiry are all I have to determine what issue the Applicant is concerned with in relation to this complaint.

Preliminary Issue:

[para 75] The EPS raises an issue that should be dealt with prior to an examination of the adequacy of the search it conducted. The EPS states that this Office has no jurisdiction over this matter, as the initial request for review was regarding its decision to withhold records pursuant to section 4(1)(k) of the Act, which states:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> *…*
>
> *(k) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;*
>
> …

[para 76] As stated in Order F2008-009:

> Section 4(1)(k) of the Act is intended to apply to records in a prosecution up until the time that the prosecution is completed; the purpose of the exclusion is to insulate Crown counsel from requests for access until a prosecution is complete.
>
> (Order F2008-009 at paragraph 16)

[para 77] The EPS argues that the records requested by the Applicant fit within the records contemplated by section 4(1)(k) of the Act. Therefore, the EPS states that this Office does not have jurisdiction over the records requested on January 30, 2007, nor does this Office have a right to review the EPS' decision to refuse access to the records.

[para 78] In support of this argument, the EPS cites Order 97-017 which deals with documents which the Public Body felt fit under section 4 of the Act as they were "…records created by or for…the office of a Member of the Legislative Assembly that is in the custody or control of the Legislative Assembly Office". The former Commissioner found that he did not have jurisdiction under the Act:

> …to review a refusal by a public body to disclose a record which fits within section 4. The Legislature has defined what fits within section 4 and I do not have any discretion to deviate from those definitions, although I do have the authority to determine whether a particular record fits within those provisions.
>
> (Order 97-017 at paragraph 10)

[para 79] As well, in the Court of Queen's Bench decision of *Alberta (Attorney General) v. Krushell*, [2003] ABQB No. 252, the Court found that the matter did not have to be referred back to the Information and Privacy Commissioner. Justice Bielby found that the records in question fell under section 4 of the Act, and thus the records were not within the Commissioner's jurisdiction (*Alberta (Attorney General) v. Krushell*, [2003] ABQB No. 252 at paragraph 54).

[para 80] Finally, it appears as though the Applicant was attempting to get the requested records from both the EPS and the Crown Prosecutor's Office, as she felt that they were relevant to the prosecution of her client and therefore ought to have been provided to her by the Crown Prosecutor. This also indicates that even the Applicant felt that any records she requested were related to an ongoing prosecution.

[para 81] I have the jurisdiction to determine if the records in question fit under section 4(1)(k) of the Act. If I find that they do, I do not have jurisdiction to review the decision of the EPS and its refusal to release any responsive records from the Applicant.

[para 82] The term "prosecution" is not defined in the Act. *Black's Law Dictionary*, 8th ed. defines prosecution as, "A criminal proceeding in which an accused person is tried." The Applicant's client was charged under the *Traffic Safety Act*, not the *Criminal Code*. However, by operation of section 3 of the *Provincial Offences Procedure Act*, the *Criminal Code* applies to *Traffic Safety Act* offences. Sections 2 and 3 of the *Provincial Offences Procedure Act* state:

> *2 Subject to any express provision in another Act, this Act applies to every case in which a person commits or is suspected of having committed an offence under an enactment for which that person may be liable to imprisonment, fine, penalty or other punishment.*
>
> *3 Except to the extent that they are inconsistent with this Act and subject to the regulations, all provisions of the Criminal Code (Canada), including the provisions in Part XV respecting search*

> *warrants, that are applicable in any manner to summary convictions and related proceedings apply in respect of every matter to which this Act applies.*

[para 83] Based on the information I have, the Applicant's client was charged under section 2(1)(a) of the *Use of the Highway and Rules of the Road* Regulation of the *Traffic Safety Act*. If he were found in violation of this section, the Applicant's client could have been fined or penalized. In the past, Courts have also found that sentencing principles outlined in section 719 of the *Criminal Code* apply to the *Traffic Safety Act* by operation of the *Provincial Offences Procedure Act* (see *R v. Waselenchuk*, [2005] ABQB No.182). As well, throughout the *Traffic Safety Act*, the term "prosecution" is used to describe how someone charged with an offence under the *Traffic Safety Act* is to be dealt with. For example, section 5(3) and section 125 of the *Traffic Safety Act* uses this language. Therefore, I find that offences under the *Traffic Safety Act* are prosecutions as that term is used in section 4(1)(k) of the Act.

[para 84] According to the information that I have before me, the *Traffic Safety Act* violation ticket was issued on October 31, 2005 and was not concluded until April 26, 2007, when the charge was withdrawn in Court.

[para 85] I find that at the time of the Applicant's first FOIP request, received by the EPS on January 30, 2007, the records requested related to a prosecution in which all of the proceedings were not completed. Given this finding, I do not have jurisdiction to review the EPS' refusal, dated February 9, 2007, to provide those records to the Applicant. This would include any audio communication records relating to the violation ticket, if these records exist.

Section 10 of the Act:

[para 86] The prosecution was concluded on April 26, 2007 and on the day that it was completed, the Applicant again requested, "…a copy of all records and, in particular, the audio communication records, requested in our correspondence received by your office on January 30, 2007."

[para 87] On April 27, 2007, the EPS advised the Applicant that it was not in custody or control of any responsive records. I was provided with evidence of the steps which the EPS' Disclosure Analyst took in order to search for responsive records. Interestingly, these steps were taken prior to the April 26th, 2007 request, on April 11th and 12th, 2007, after the Applicant sent her April 10th, 2007 request for review into this Office.

[para 88] In any event, the Applicant did request an inquiry on July 31, 2007, following the receipt of the Portfolio Officer's finding. In her letter, the Applicant stated that she did not accept that the EPS did not have any responsive records.

[para 89] I find, given the wording of the letter, that the Applicant's July 31, 2007 letter was in fact a request for review of the EPS' response to the Applicant's second

access request. This request was received over 60 days after the EPS' response to her FOIP request of April 26, 2007 and is beyond the timelines set out in section 66(2)(a)(i) of the Act which states:

> *66(1) To ask for a review under this Division, a written request must be delivered to the Commissioner.*
>
> *(2) A request for a review of a decision of the head of a public body must be delivered to the Commissioner*
>
> *(a) if the request is pursuant to section 65(1), (3) or (4), within*
>
> *(i) 60 days after the person asking for the review is notified of the decision, or*
>
> *(ii) any longer period allowed by the Commissioner,*

[para 90] However, section 66(2)(a)(ii) allows the Commissioner to extend this timeline. I note that the EPS did not take issue with timing of the Applicant's second request in relation to her request for review or inquiry. I find the Commissioner implicitly extended this timeline, by setting this matter down for inquiry.

[para 91] Based on my findings, I will decide if the EPS has fulfilled its duties under section 10 of the Act in relation to the Applicant's access request of April 26, 2007.

[para 92] Pursuant to section 10 of the Act, the EPS has a duty to assist an applicant making a FOIP request. This duty includes performing an adequate search for responsive records so that it can provide an applicant with an open, accurate and complete response. Section 11 of the Act establishes a timeline for the response and section 12 of the Act dictates the form the response must take. The onus of proof that an adequate search was performed rests with the EPS (Order F2007-029).

[para 93] Order F2007-029 sets out evidence which a public body ought to provide in order to meet its onus of proof under section 10(1) of the Act and prove that it made every reasonable effort to search for responsive records. EPS should provide information regarding:

1. The specific steps taken by EPS to identify and locate records responsive to the Applicant's access request;
2. The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.;
3. The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.;
4. Who did the search;
5. Why the EPS believes no more responsive records exist than what has been found or produced.

[para 94] The evidence provided to me by the EPS touches on all the points mentioned above. The EPS provided me with an Affidavit from the EPS' Disclosure Analyst which attaches e-mails and forms sent by the Disclosure Analyst to various departments in order to determine if there were responsive records. At some point after the EPS' response to the Applicant, and before it provided its written submissions to this office, the Disclosure Analyst was able to find a record titled "Event Chronology – 05285315", which is clearly a responsive record, but was not disclosed to the Applicant until the Applicant was provided with a copy of the EPS' written submissions for this inquiry. In order to fully fulfill its obligations under section 10 of the Act, the EPS ought to have provided the Applicant this record following her second access request. The EPS did disclose this record as a part of its submissions and explained that the error in not providing it earlier was inadvertent. Still, I find it was a breach of the EPS' duty to assist under section 10(1) of the Act.

[para 95] Although the Applicant did not provide submissions, it seems clear from her correspondence to both the EPS and this Office that she is under the impression that there are audio communication records and notes which are in the custody and control of the EPS but were not provided. In its submissions, the EPS explained that original violation tickets are sent to Alberta Justice for prosecution and, except in unusual circumstances, copies are not kept. EPS also stated that the only notes kept are generally on the back of the violation ticket and nowhere else. The EPS member who issued the violation ticket explained to the EPS' Disclosure Analyst that it is his standard practice to write notes only on the back of a violation ticket. As well, a member of the EPS Communications section explained to the EPS Disclosure Analyst that there were no audio recordings taken for this matter as it was an "onview complaint". E-mails to the EPS' Disclosure Analyst from the Communications section and the EPS member who issued the ticket were attached as exhibits to the Affidavit provided to me by the EPS.

[para 96] The evidence the EPS provided in its submissions suggests that the Applicant has now been provided with all the responsive records relating to her requests. The Applicant did not provide any evidence that supports her apparent belief that the EPS is in custody and control of responsive records that were not provided. Therefore, I find, that with the exception of the Event Chronology record discussed above, the EPS has fulfilled its duty to the Applicant under section 10 of the Act.

V. ORDER

[para 97] I make this Order under section 72 of the Act.

[para 98] I find that this Office has not lost jurisdiction over this matter pursuant to section 69(6) of the Act.

[para 99] I find that I do not have jurisdiction to review the decision of EPS to refuse access to any possible records responsive to the Applicant's January 30, 2007 request, pursuant to section 4(1)(k) of the Act.

[para 100] I find the EPS failed to fulfill its duty to the Applicant under section 10 of the Act by not disclosing the record "Event Chronology—05285315"; however, the EPS has already remedied this failure by providing the record to the Applicant. Apart from this defect, I find the EPS met its duty under section 10 of the Act.

_____

Keri H. Ridley
Adjudicator