ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2008-005

December 23, 2008

EDMONTON POLICE SERVICE

Case File Number F3998

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request on behalf of his client for information regarding a possible wiretap on his client's telephone and information as to who was performing that wiretap. The Public Body ("EPS") refused to confirm or deny the existence of the wiretap pursuant to section 12(2) of the *Freedom of Information and Protection of Privacy Act* ("FOIP Act"). It argued that unless it were allowed to use section 12(2) of the FOIP Act in all cases of requests for wiretap information, the application of the FOIP Act would result in a direct conflict with the *Criminal Code*, which is paramount over provincial legislation. In the alternative, the Public Body argued that it had properly applied section 12(2) of the FOIP Act.

The Public Body also argued that the Information and Privacy Commissioner ("the Commissioner"), and the Adjudicator as his delegate, had lost jurisdiction over this matter by operation of section 69(6) of the FOIP Act.

The Adjudicator found that the Commissioner, and the Adjudicator as his delegate, had complied with section 69(6) of the FOIP Act and had not lost jurisdiction.

She found that the paramountcy argument involved a constitutional question, and she did not have jurisdiction to deal with constitutional questions by virtue of section 11 of the *Administrative Procedures and Jurisdiction Act*.

The Adjudicator explained her decision regarding section 12(2) of the FOIP Act partially in this Order, and partially in an Addendum to this Order that was provided to the Public Body only. This was to avoid disclosing if a record was in existence or not, which was necessary in order to comply with section 59(3) of the FOIP Act

The Adjudicator found that the Public Body had properly applied section 12(2) of the FOIP Act to the Applicant's request. However, she cautioned against applying a blanket policy to requests for wiretaps that did not take into consideration the individual circumstances of an applicant's request.

Statutes Cited: AB: *Administrative Procedures and Jurisdiction Act* RSA 2000 c. A-3 ss. 10(d), 11; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 12(2), 18, 20(1)(a), 20(1)(c), 20(1)(d), 20(1)(e), 20(1)(f), 20(1)(k), 59(3), 69(6), 72; *Interpretation Act* R.S.A. 2000 c. I-8 ss. 22(4), 22(7); *Personal Information Protection Act* S.A. 2003, c. P-6.5 s. 50(5); **CANADA:** *Criminal Code* R.S.C. 1985 c. C-46 s. 193(1), 193(2); **ONT:** *Freedom of Information and Protection of Privacy Act* R.S.O. 1990 c. F 31 s. 14(3).

Authorities Cited: AB: Orders 98-009, 2000-004, 2000-016, F2006-012, F2006-013, F2006-031, **ONT:** Order P-344

Cases Cited: *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.); *Ivik Enterprises Ltd. v. Whitehorse (City)*, [1986] Y.J. No. 62 (QL); *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.); *Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner)*, 2007 ABQB 499, 2008 ABCA 384.

I. BACKGROUND

[para 1] On February 2, 2007, the Applicant, a lawyer, made a request of the Edmonton Police Service ("EPS"), on behalf of his client, for information about whether his client's telephone had been under surveillance, and if so, for the names of the persons responsible for carrying out the telephone surveillance ("wiretap").

[para 2] On February 22, 2007, the EPS responded by advising the Applicant that his request was not a request for records under the *Freedom of Information and Protection of Privacy Act* ("FOIP Act"). The EPS advised that in any event, due to the nature of the information requested, it would not confirm or deny the existence of the records, pursuant to section 12(2) of the FOIP Act. The EPS did provide the Applicant with a printout of a summary of EPS files involving his client.

[para 3] On February 27, 2007, the Applicant wrote to the Office of the Information and Privacy Commissioner ("this Office") and requested that the decision of the EPS to invoke section 12(2) of the FOIP Act be reviewed. This letter was received by this Office on March 2, 2007.

[para 4] By way of letter dated March 6, 2007, this Office advised the EPS and the Applicant that this matter would be referred to mediation. The letter further stated that the anticipated date for the review to be completed was June 1, 2007, though this period could be extended if necessary.

[para 5] On March 22, 2007, the Portfolio Officer assigned to the mediation of this matter advised the parties of his opinion on the matter. On April 12, 2007, the Applicant requested a hearing before the Commissioner.

[para 6] The Applicant wrote this Office on June 13, 2007 and July 20, 2007 to inquire about the status of this matter.

[para 7] On August 2, 2007, this Office wrote to the EPS and the Applicant and advised that the file had been received by the Adjudication Unit and that if an inquiry was set, the parties would receive a Notice of Inquiry two and a half to three months before the date the inquiry would be held. This letter also stated that orders were issued approximately 6 to 12 months following the inquiry. The letter further advised that the anticipated date for completion of the review of this matter was February 1, 2009.

[para 8] On April 1, 2008, this Office received a letter from the EPS stating that it wished to have the issue of whether this Office had lost jurisdiction by operation of section 69(6) of the FOIP Act considered as part of the inquiry into this matter.

[para 9] On April 16, 2008, the Notice of Inquiry was sent to the parties. They were advised that the matter was to proceed to a written inquiry and that I would deal with both the jurisdictional issue, and whether the EPS had properly applied section 12(2) of the FOIP Act. Initial briefs were due on June 3, 2008.

[para 10] On June 2, 2008, the EPS sent this Office written submissions to be exchanged between the parties ("open submissions") and *in camera* submissions, which were not exchanged ("closed submissions" or "*in camera* submissions"). The *in camera* submissions dealt only with the section 12(2) issue. The Applicant provided no submissions.

II. RECORDS AT ISSUE

[para 11] The issues in this inquiry are whether this Office has lost jurisdiction, and if the EPS properly used section 12(2) of the FOIP Act when it refused to either confirm or deny the existence of a record. Therefore, whether or not there were responsive records to the Applicant's request, there are no records directly at issue in this Order.

III. ISSUES

Issue A:

[para 12] **Did the Commissioner or his delegate lose jurisdiction on the basis of alleged non-compliance with section 69(6) of the FOIP Act?**

Issue B:

[para 13] **Did the EPS properly refuse to confirm or deny the existence of a record, as authorized by section 12(2) of the Act?**

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 FOIP Act?

[para 14] The first issue to be dealt with in this Inquiry is whether the Commissioner, and I as his delegate, lost jurisdiction pursuant to section 69(6) of the FOIP Act, which 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 15] The EPS argues that this Office has lost jurisdiction. The EPS primarily bases its argument on the finding of Justice Belzil in *Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner),* 2007 ABQB 499, 2008 ABCA 384 ("*KBR*").

[para 16] In *KBR*, Justice Belzil was asked to consider if this Office had lost jurisdiction over a complaint by virtue of this Office's alleged non-compliance with section 50(5) of the *Personal Information Protection Act* ("PIPA"). Section 50(5) of PIPA has similar wording to section 69(6) of the FOIP Act, and 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 17] This Office appealed the Court of Queen's Bench decision in *KBR* to the Alberta Court of Appeal. The Court of Appeal did not make a decision on the merits of the appeal as the Applicant had passed away, making the appeal moot.

[para 18] The EPS has requested that the jurisdictional issue be addressed in several cases currently before the Commissioner. On September 22, 2008, the Commissioner issued Order F2006-031, which involved similar arguments by the EPS to the ones it made in this case. I will, therefore, be applying the Commissioner's reasoning to this matter, as I agree with it and it is directly on point.

Was there a breach of section 69(6) of the FOIP Act?

[para 19] Under section 69(6) of the FOIP Act, the Commissioner must complete a review within 90 days following receipt of the request for review. However, this time can be extended by the Commissioner if he notifies the parties of the extension and provides them with an anticipated date for completion of the review.

[para 20] Given the wording of section 69(6) of the FOIP Act, and by operation of section 22(4) and 22(7) of the *Interpretation Act* R.S.A. 2000 c. I-8, the day that the request was received would not count towards the 90 days. Therefore, in this matter, the 90 day period would begin on March 3, 2007, the day after this Office received the Applicant's request for review. So, this means that the 90 day period expired on May 31, 2007.

[para 21] On March 6, 2007, a letter from this Office was sent to the parties stating that this matter had been referred to a Portfolio Officer for investigation and that the anticipated date of completion of the review was June 1, 2007. While the investigation of the matter was complete by May 31, 2007, the inquiry was not.

[para 22] The EPS argues that the March 6, 2007 letter from this Office does not comply with section 69(6) of the FOIP Act because it does not purport to extend the 90 day time period, but instead confirms that the review will be completed within 90 days. I disagree with the EPS' argument in this regard on two points.

[para 23] First, section 69(9) of the FOIP Act does not include language that must be used by the Commissioner to extend the timeline. He must simply notify the parties that the timeline is extended.

[para 24] Second, the date given, June 1, 2007, is outside of the 90 day timeline. It follows that by giving the parties an anticipated date of completion outside the 90 day

timeline, the Commissioner is advising the parties that the timeline is extended. As the Commissioner stated in Order F2006-031:

> 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. …
>
> 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.
>
> (Order F2006-031 at paragraph 38-39)

[para 25] The March 6, 2007 extension was done in writing, within the 90 day time period, and gave an anticipated date of completion outside the 90 day period. Therefore, even on the most strict interpretation of section 69(6) of the FOIP Act, the Commissioner has fulfilled the necessary procedural steps to comply with section 69(6) of the FOIP Act.

[para 26] If I am incorrect and the 90 day timeline was not properly extended by the letter from this Office dated March 6, 2007, I still find that this Office complied with section 69(6) of the FOIP Act.

[para 27] On August 2, 2007, this Office sent a letter to the EPS stating that the anticipated date of completion of the review was February 1, 2009. The EPS concedes that this letter would meet the requirements of section 69(6) of the FOIP Act, but argues that since the letter was sent to the parties after the initial 90 day time period had expired, it does not meet the requirements under section 69(6) of the FOIP Act.

[para 28] While it is true that the letter dated August 2, 2007 was sent to the parties outside of 90 days from the date the initial request for review was received by this Office, there is no requirement in section 69(6) of the FOIP Act that the extension be done prior to the expiry of the 90 day timeline. This was not an issue addressed by Justice Belzil in *KBR*. As there is no stated requirement in section 69(6) of the FOIP Act to extend the timeline before the initial 90 day timeline is concluded, it follows that the timeline can be extended later.

[para 29] This issue was addressed by the Commissioner in Order F2006-031 where 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)
>
> …
>
> 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.
>
> (Order F2006-031 at paragraph 63)

[para 30] The Commissioner concluded that, based on his interpretation of section 69(6) of the FOIP Act, the time line could be extended after the original 90 day timeline has passed. I adopt the reasoning of the Commissioner in Order F2006-031, and find that the letter of August 2, 2007 properly extended the timeline under section 69(6) of the FOIP Act.

[para 31] Consequently, by virtue of the letter from this Office of March 6, 2007 and the letter of August 2, 2007, I find that the timeline for completion of this matter was properly extended in accordance with section 69(6) of the FOIP Act.

Is section 69(6) of the FOIP Act mandatory or directory?

[para 32] As I previously stated, the EPS bases its jurisdictional argument primarily on the application of the Court's interpretation of section 50(5) of PIPA in *KBR* to section 69(6) of 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. For these reasons, and in the event that I am incorrect in finding the Commissioner complied with section 69(6) of the FOIP Act, it is necessary to determine if section 69(6) of the FOIP Act is mandatory or directory.

[para 33] In Order F2006-031, in making this determination, the Commissioner noted that the FOIP Act imposes a duty on him to conduct an inquiry. He stated:

> 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.
> (Order F2006-031 at paragraph 119)

[para 34] The Commissioner went on to state:

> …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 F2006-031 at paragraph 120)

[para 35] The Commissioner then finally concluded that:

> …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 F2006-031 at paragraph 124)

[para 36] The Commissioner found that section 69(6) of the FOIP Act is not mandatory but directory. I agree with and adopt the reasoning of the Commissioner in Order 2006-031. Even if my finding that section 69(6) was not breached is incorrect, I find that there was no loss of jurisdiction, as section 69(6) of the FOIP Act is directory, and therefore, a breach would not lead to a loss of jurisdiction.

Application of KBR:

[para 37] The Court in *KBR* considered a number of factors to find that section 50(5) of PIPA is mandatory. While some of the factors related only to the wording, context and purpose of PIPA, other factors required the application of the specific facts in *KBR*. The EPS argues that the conclusion in *KBR* should be applied to section 69(6) of the FOIP Act to find the section mandatory without any application to the facts of this matter of the factors outlined in *KBR*. If I am to apply *KBR*, I must consider the same factors to Court considered, including the case specific ones.

[para 38] As well, as the Commissioner found in Order F2006-031, the law surrounding the mandatory/directory analysis has now evolved. Therefore, even if a provision contains mandatory language it is necessary to determine if the legislature intended non-compliance with the provision to result in a loss of jurisdiction (Order F2006-031 at paragraphs 151-184).

[para 39] 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 40] More recently, the Alberta Court of Queen's Bench 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 41] Therefore, in the event that I am incorrect in my findings above, I will review all the factors considered in *KBR* and *Bridgeland* to determine if the legislature intended the Commissioner to lose jurisdiction.

Wording and context of the legislation:

[para 42] To begin, the Court in *KBR* examined the wording and context of section 50(5) of PIPA. As stated above, I adopted the finding of the Commissioner in Order F2006-031 that section 69(6) of the FOIP Act is directory and not mandatory. However, for the purposes of discussion, I will continue my analysis on the assumption that the wording of section 69(6) of the FOIP Act indicates that the provision is obligatory. I will proceed to determine if the remaining factors cited in KBR lead to the conclusion that the legislature intended this Office to lose jurisdiction should section 69(6) of the FOIP Act be breached (Order F2006-031 at paragraph 150).

Operational impact:

[para 43] The second factor considered by the Court was whether finding that section 50(5) of *PIPA* was mandatory would have a negative operational impact on *PIPA*. The Court found that compliance with section 50(5) *PIPA* could easily be achieved by the Commissioner and therefore there would not be a negative operational impact on *PIPA*.

[para 44] 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 45] I agree with the Commissioner and find that the negative operational impact that would result from a finding that section 69(6) is mandatory weighs in favour of a finding that the legislature did not intend 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 46] Next, the Court in KBR considered the impact on the complainant and affected organization depending on whether section 50(5) of PIPA was found to be mandatory. The Court considered the prejudice to the Organization should section 50(5) of PIPA be directory, and to the complainant should section 50(5) of PIPA be mandatory, and found that the result would be neutral.

[para 47] The EPS argues that it would suffer prejudice if section 69(6) of the FOIP Act were not mandatory. The EPS gave specific examples but states they may not all be applicable to this matter. I am not certain which ones it thinks would be applicable.

However, most deal with uncertainty on when submissions would be required, and stress. These factors mentioned by the EPS may be inconvenient but they do not constitute prejudice. I reject the argument that the prejudice that the EPS purports to have suffered as the result of delays is actually prejudicial, just as the Commissioner did in Order F2006-031, when presented with the same argument and factors (Order F2006-031 at paragraphs 166-167).

[para 48] I acknowledge that because this matter deals with an access request, which can be made at any time, it could be argued that should this Office lose jurisdiction over this matter, there is also no prejudice suffered by the Applicant, as the Applicant could start the process over again with a new access request. This will cost the Applicant, the EPS and this Office time and money but, ultimately, these costs would be borne by all parties.

[para 49] That being said, while the Applicant made no argument to this effect, his 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] This fourth factor is an extension of the third but was examined by the Court as a separate factor to be considered. Given the specific facts in *KBR*, the Court determined that there were alternate remedies available to the complainant such as a human rights complaint or a grievance through his labour union.

[para 51] In the alternative to arguing that this factor should not be considered at all, the EPS argues that the Applicant has an alternate remedy, in that the Applicant can simply request access to the records again and start the whole process over.

[para 52] I do not find that starting the same process over again, under the same Act, to try to obtain the same result, is an "alternate" remedy. That would be the same remedy, just exercised at a different time. The Supreme Court of Canada has commented on this situation in another context and determined that an alternative remedy involves an alternative procedure before an alternative tribunal (*Ivik Enterprises Ltd. v. Whitehorse (City)*, [1986] Y.J. No. 62 (QL) discussing, *Harelkin v. University of Regina* [1979] 2 S.C.R. 561).

[para 53] As well, this argument is inconsistent with the EPS' submission that it suffered prejudice by virtue of a delay. What it puts forward as an alternative remedy available to the Applicant would cause a further delay

[para 54] Other than the point about making another access request under the FOIP Act, which is not an "alternate" remedy, I was provided with no other suggestion or evidence of an alternate remedy available to the Applicant. Indeed, I do not believe that there is another means within the power of the Applicant by which he may obtain copies

of telephone surveillance records. It is my understanding that the *Criminal Code* does require an individual to be advised of the existence of surveillance, but the subject of the surveillance will be given copies of the surveillance records only if the matter proceeds to trial and the Crown wishes to enter the surveillance as evidence.

[para 55] Therefore, I find that there is no remedy available to the Applicant to get the records that he has requested on behalf of his client, other than making a request under the FOIP Act to obtain them. This weighs in favour of the legislature not intending for this Office to lose jurisdiction for a breach of section 69(6) of the FOIP Act in this matter.

Public interest:

[para 56] The last factor the Court considered was whether finding section 50(5) of PIPA mandatory would be contrary to the public interest. The Court found that it would not, as 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. In that case, the Court interpreted as directory a provision requiring a disciplinary hearing to be held within 90 days. This case was 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] In Order F2006-031, the Commissioner held that *Rahman* applied. He took into account that the balance of prejudice favoured the Complainant given the facts before him. As well, 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 assess the balance of prejudice in this case in a manner similar to that in Order F2006-031, and 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 one additional factor that the Court in *KBR* did not consider, the seriousness of the breach. In that Order, the Commissioner found that the breach was trivial or technical. Given the timeline outlined earlier in this Order and below, I find the same in this matter.

[para 60] The Applicant's request for review was received by this Office on March 2, 2007. This Office advised the EPS on March 6, 2007 that a request for review had been

received and that an investigation would proceed, and that the review would be completed by June 1, 2007, unless more time was needed. This Office also provided the EPS with a copy of the procedures that this Office follows in conducting a review. Included in this document is the following section:

> Timelines for review
>
> An inquiry must be completed within 90 days after the request for review is received by the Commissioner. The Commissioner has the authority to extend the timeline for completion of the inquiry (section 69(6)). Notification of extensions will be issued to parties accordingly. The Commissioner's practice is to extend the timeline by sending:
>
> - Notices of extensions to the parties during mediation; or
> - A Notice of Inquiry to the parties when the applicant has requested that the matter proceed to inquiry.

[para 61] The Portfolio Officer from this Office completed the investigation and review and advised the EPS of the results on March 22, 2007. The matter was not resolved and this Office received a request for an inquiry from the Applicant on April 12, 2007. This matter was sent to the Adjudication Unit of this Office and on August 2, 2007 the EPS was advised that this matter was being considered for an inquiry. The letter advised of:

- Approximate timelines for the procedural steps required to complete an inquiry;
- The name of a contact person at this Office for any questions; and
- The anticipated date for completion of this review of February 1, 2009.

[para 62] This Office sent the Notice of Inquiry to the parties April 16, 2008. This is the longest delay in the entire process, but is still well within the timelines of which the EPS was advised in the August 2, 2007 letter. This Office also kept the EPS informed of timelines, contact numbers. The EPS was also engaged in the investigation and inquiry process.

The factors set out in the Bridgeland:

[para 63] In *Bridgeland,* the Alberta Court of Appeal considered the following factors, when determining if non-compliance with a procedural provision will have a vitiating effect:

- a statute prescribes such an effect;
- a real possibility of prejudice to the attacking party is shown; or

- the procedure was so dramatically devoid of the appearance of fairness that the administration of justice is brought into disrepute.

[para 64] 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. 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 65] On the basis of the factors set out in the *KBR* and *Bridgeland*, I would also find that any failure to meet the terms of section 69(6) of the FOIP Act should not be held to vitiate these proceedings.

Conclusion on jurisdiction:

[para 66] I find that this Office has not lost jurisdiction over this matter. I find that on the facts of this case, this Office complied with section 69(6) of the FOIP Act.

[para 67] In the alternative, I find that section 69(6) of the FOIP Act is directory and not mandatory, such that, if there was a breach of section 69(6), it did not result in this Office losing jurisdiction over this case.

[para 68] In the further alternative, if this Office did not comply with section 69(6) of the FOIP Act and section 69(6) is in fact mandatory, I still find that the legislature did not intend for this Office to lose jurisdiction in this matter in the circumstances of this case.

Issue B: Did the EPS properly refuse to confirm or deny the existence of a record, as authorized by section 12(2) of the Act?

[para 69] As I have decided that jurisdiction was not lost in this matter, I will now turn to the second issue in this inquiry, whether the EPS properly applied section 12(2) of the FOIP Act.

[para 70] Section 12(2) of the FOIP Act states:

> *12(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of*
>
> > *(a) a record containing information described in section 18 or 20, or*
> >
> > *(b) a record containing personal information about a third party if disclosing the existence of the information would be an unreasonable invasion of the third party's personal privacy.*

[para 71] As the EPS has used section 12(2) of the FOIP Act to refuse to confirm or deny the existence of the records requested, I am bound by section 59(3) of the FOIP Act, which prohibits me from disclosing whether the records requested exist or not. Section 59(3) states:

> *59(3) In conducting an investigation or inquiry under this Act and in a report under this Act, the Commissioner and anyone acting for or under the direction of the Commissioner must take every reasonable precaution to avoid disclosing and must not disclose*
>
> > *(a) any information the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under section 7(1), or*
> >
> > *(b) whether information exists, if the head of a public body in refusing to provide access does not indicate whether the information exists.*

[para 72] As noted above, the EPS provided *in camera* submissions, which have not been provided to the Applicant. While the open submissions contain the bulk of the EPS' arguments in support of its use of section 12(2) for requests relating to wiretapping, it has also made several critical arguments in this regard in its *in camera* submissions.

[para 73] Therefore, to comply with section 59(3) of the FOIP Act, I will comment on the arguments raised in the open submissions in this Order. I will also address the specific arguments raised by the EPS in its *in camera* submissions, but will do so as an Addendum to this Order. The Addendum will be provided only to the EPS and will not be published. Should this matter proceed to judicial review, I will also provide a copy of the Addendum to the Court.

Open submissions of the EPS on paramountcy:

[para 74] In its open submissions, the EPS argued that it had properly applied section 12(2) of the FOIP Act. At the core of the EPS' arguments is the theory that if it cannot use section 12(2) of the FOIP Act in each instance where information about a wiretap is requested, it would be implying the existence of a wiretap in cases where section 12(2) was used. That is, applicants could determine a pattern that would "permit accurate inferences to be drawn", and essentially the EPS would be disclosing the existence of a wiretap, depending on the response it gives.

[para 75] Relying on this theory, the EPS goes on to state that allowing this pattern to potentially be discerned is in contravention of the *Criminal Code*, a federal statute that makes it an offence to disclose if there is this type of surveillance in place. The portions of section 193 of the *Criminal Code* relevant to this matter state:

193 (1) Where a private communication has been intercepted by means of an electro-magnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully

> *(*a*) uses or discloses the private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or*
>
> *(*b*) discloses the existence thereof,*

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication

> *(*a*) in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person may be required to give evidence on oath;*
>
> *…*

[para 76] The EPS argues that there is a direct conflict between the *Criminal Code* and disclosure of the wiretap information under the FOIP Act because, "…section 193(1) prohibits the disclosure of the existence of wiretaps in response to such a request." However, it says this conflict can be avoided if the EPS uses section 12(2) of the FOIP Act when wiretap information is requested. It argues that if this is done, no pattern can be established by applicants. If the EPS cannot do this, it argues, it will of necessity be violating the *Criminal Code.* By operation of the principle of paramountcy, the *Criminal Code* provision prevails. The EPS argues that for this reason it may not disclose the existence of the wiretap.

[para 77] It is not clear from EPS' evidence or arguments how disclosing the existence of a wiretap discloses the existence of particular communications, but for the purposes of the discussion below, I will accept this argument.

Discussion on paramountcy argument:

[para 78] Section 11 of the *Administrative Procedures and Jurisdiction Act* RSA 2000 c. A-3 ("*Administrative Procedures and Jurisdiction Act*") states:

11 Notwithstanding any other enactment, a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so.

[para 79] There is no regulation conferring jurisdiction on the Commissioner to decide questions of constitutional law. Further, section 10(d) of the *Administrative Procedures and Jurisdiction Act* defines question of constitutional law as follows:

10(d) "question of constitutional law" means

(i) any challenge, by virtue of the Constitution of Canada or the Alberta Bill of Rights, to the applicability or validity of an enactment of the Parliament of Canada or an enactment of the Legislature of Alberta, or

(ii) a determination of any right under the Constitution of Canada or the Alberta Bill of Rights.

[para 80] The constitutional doctrine of federal paramountcy was developed by the Courts as a way to deal with conflicting federal and provincial laws according to the jurisdiction over these laws that is set out in the Constitution of Canada. Therefore, raising a question of the validity of the FOIP Act on the basis that it conflicts with the *Criminal Code*, which is paramount, is raising a question of constitutional law. This is not an issue that I have jurisdiction to decide.

EPS argument on use of section 12(2):

[para 81] In the alternative to the paramountcy argument, the EPS argues that it should be allowed to use section 12(2) of the FOIP Act in instances of access requests for wiretap records, by applying the principles in section 12(2) of the FOIP Act that have been articulated by this Office in the past. That is, the EPS says that it may apply the provision if it has done the following:

a. Searched for the records;
b. Determined if there were responsive records;
c. Determined if one of the three circumstances in section 12(2) exist; and
d. If one of the three circumstances in section 12(2) exists and the EPS decided to exercise its discretion to neither confirm nor deny the existence of the records requested, the EPS must provide evidence to the Commissioner that it considered the object and purpose of the FOIP Act, including access principles.

(Orders 98-009 at paragraph 9, 2000-004 at paragraph 45, 2000-016 at paragraph 35)

[para 82] The EPS states that it fulfilled its obligations under (a) and (b) above and has provided evidence of this in its open submissions. I agree that the EPS has done this.

[para 83] As for the third requirement (c), the EPS argues that its use of section 12(2)(a) of the FOIP Act is justified under several subsections of section 20 of the FOIP Act relating to disclosure harmful to law enforcement. Specifically, the EPS cites:

- section 20(1)(a), harm to a specific law enforcement matter;
- section 20(1)(c), harm to the effectiveness of investigative techniques and procedures currently used or likely to be used;
- section 20(1)(d), could reveal the identity of a confidential source of law enforcement information;
- section 20(1)(e), could reveal criminal intelligence that has a reasonable connection with the detection, prevention or suppression of organized criminal activities or of serious repetitive criminal activities;
- section 20(1)(f), could interfere with an ongoing or unsolved law enforcement investigation; and
- section 20(1)(k), could facilitate the commission of an unlawful act or hamper the control of crime.

[para 84] The EPS provides detailed arguments regarding how revealing the existence of a wiretap has a potential to cause harm to law enforcement under the particular subsections of section 20(1) of the FOIP Act cited above. The EPS even gives examples of how disclosing that there is not a wiretap in existence could cause harm to law enforcement. As I will explain below, I do not feel that it is necessary to go into any detailed explanation of the EPS' arguments in this regard, as all of its arguments are based on the same premise-that unless it is able to use section 12(2) of the FOIP Act for every request for wiretap information, it will disclose the existence of wiretaps. As well, it is not clear if any of the EPS arguments relate to the Applicant's specific case, an issue I find particularly important and will address in more detail below.

Discussion on section 12(2) of the FOIP Act:

[para 85] Section 12(2) of the FOIP Act should be used sparingly. It is an extraordinary provision that allows a public body to use its discretion not only to refuse access to a record, as it would under sections 18 and 20 of the FOIP Act, but to deny its very existence.

[para 86] The Ontario Assistant Privacy Commissioner has rejected the idea that this provision should be applied as a blanket policy when dealing with access requests for particular types of information. In Ontario Order P-344, the Assistant Commissioner of Ontario dealt with the issue of an access request for surveillance information in which the Public Body exercised section 14(3) of the Ontario FOIP Act, which is equivalent to section 12(2) of the Alberta FOIP Act. He stated:

> In my view, taking a "blanket" approach to the application of section 14(3) in all cases involving a particular type of record would represent an improper exercise of discretion. Although it may be proper for a decision maker to adopt a policy under which decisions are made, it is not proper to apply this policy inflexibly to all cases. In order to preserve the discretionary aspect of a decision under sections 14(3) and 49(a), the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the Act.
>
> (Ontario Order P-344 at page 6)

[para 87] I agree with the comments made by the Assistant Commissioner. I also believe that the blanket use of section 12(2) of the FOIP Act is inappropriate and consideration of the facts of each individual access request must be given. I do not mean to say that applying section 12(2) of the FOIP Act in most cases involving records of a particular nature, for example requests for wiretap records, is incorrect. I mean only to state that the EPS' discretion cannot be exercised without taking into consideration the individual circumstances surrounding a request, which may or may not lead to the conclusion that it is appropriate to use its discretion under section 12(2) of the FOIP Act.

[para 88] Therefore, the EPS must take a number of factors, which I will discuss below and in the Addendum to this Order, into consideration when determining if it should use its discretion to apply section 12(2) of the FOIP Act. It is not enough for the EPS to simply apply section 12(2) of the FOIP Act to each case involving a request for records regarding wiretapping. In each case, the EPS must consider the factors unique to the individual case.

[para 89] Further, in Order F2006-012, the Commissioner interpreted section 12(2)(a) of the FOIP Act to import the same conditions found in section 12(2)(b) of the FOIP Act. He stated:

> In my view, in order to rely on section 12(2)(a) to refuse to say whether information exists that falls into a particular subsection of section 18 or 20, the Public Body should first consider what interest would be protected by withholding such information under the particular subsection of section 18 or 20, and then ask whether refusing to say if such information exists would, in the particular case, promote or protect the same interest.
>
> (Order F2006-012 at paragraph 18)

[para 90] Under the provisions of section 12(2) of the FOIP Act, and subsequent Orders that have interpreted that section, the EPS must assess each individual access request for wiretap records before it and, in deciding to use section 12(2) of the FOIP Act, it must not only establish that revealing the existence or non-existence of a record would fall within one of the sub-sections of section 20 of the FOIP Act, but must also consider

whether relying on the provision would meet the objectives of section 20 of the FOIP Act.

[para 91] The wide breath of the EPS' open submissions in this regard is not supported by any specific evidence. I assume that this is partly due to the fact that it made its open submissions in such a way as to not reveal the existence or non-existence of the records requested. However, this could also indicate that the EPS was arguing that generally, in all cases where wiretap records are requested, it ought to be permitted to use section 12(2) of the FOIP Act for reasons related to sections 20(1)(a), (c), (d), (e), (f) and/or (k).

[para 92] For reasons that I will explain further in the Addendum to this Order, I believe that the EPS' use of section 12(2) in this matter was justified, though, if it is using a blanket policy for all cases where wiretap records are requested, I caution the EPS against that practice.

[para 93] Considering both the open and *in camera* submissions of the EPS, I find that the EPS properly invoked section 12(2) of the FOIP Act in this matter.

V. DECISION/ORDER

[para 94] I make this Order under section 72 of the FOIP Act.

[para 95] I confirm that the Commissioner or his delegate did not lose jurisdiction over this matter by virtue of section 69(6) of the FOIP Act

[para 96] I uphold the EPS' decision to use section 12(2) of the FOIP Act in response to the Applicant's request for records relating to any possible wiretap of which she is the subject.

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Keri H. Ridley
Adjudicator