ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2008-013

October 9, 2008

EDMONTON POLICE SERVICE

Case File Number 3890

Office URL: www.oipc.ab.ca

Summary: The Edmonton Police Service (the "Public Body") objected to the jurisdiction of the Commissioner or his delegate to conduct an inquiry under the *Freedom of Information and Protection of Privacy Act* (the "Act"). It based its objection on alleged non-compliance with section 69(6) of the Act, which requires an inquiry to be completed within 90 days unless the Commissioner notifies the parties that the period is being extended, and provides an anticipated date for the completion of the review.

The Adjudicator found that two separate letters sent to the Public Body notified it that the period for completing an inquiry was being extended, and provided an anticipated date for its completion. He also found that it was possible for the extensions to be made outside the initial 90-day period for completing an inquiry. The Adjudicator therefore concluded that the requirements of section 69(6) of the Act had been met.

The Adjudicator further concluded that, even if section 69(6) had not been met, he nonetheless had jurisdiction to complete the inquiry because the provision is directory rather than mandatory. He further concluded that, even if section 69(6) is mandatory and had not been met, the Legislature would not have intended that a loss of jurisdiction should result in the circumstances of the case. These circumstances were, among others, that there was no alternative remedy for the Applicant in order to access the requested records, the Public Body had not been prejudiced, the Applicant would suffer prejudice if there were a loss of jurisdiction, and any possible breach of section 69(6) was not serious.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 2(a), 3(a), 3(c), 3(d), 17, 17(5)(a), 68, 69(1), 69(6), 69(6)(a), 69(6)(b), 70 and 70(b); *Personal Information Protection Act*, S.C. 2003, c. P-6.5, ss. 24(1)(a) and 50(5); *Police Act*, R.S.A. 2000, c. P-17.

Authorities Cited: AB: Orders 99-011 and F2006-031; *Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner)*, 2007 ABQB 499. **CAN:** *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Society Promoting Environmental Conservation v. Canada (Attorney General)* (2003), 228 D.L.R. (4th) 693 (F.C.A.). **YK:** *Ivik Enterprises Ltd. v. Whitehorse (City)*, [1986] Y.J. No. 62 (QL).

I. BACKGROUND

[para 1] In a request to access information under the *Freedom of Information and Protection of Privacy Act* (the "Act" or the "*FOIP Act*"), dated October 17, 2006, the Applicant asked the Edmonton Police Service (the "Public Body") for the following:

> *We want all records in relation to the attached story in the Edmonton Sun about a man being assaulted by Edmonton Police Service officers at the Hope Mission and the related Criminal Code and Police Act investigations.*

[para 2] In an e-mail dated October 20, 2006, the Applicant narrowed the access request to include only a final report of the Public Body's internal affairs section, which had investigated the matter, and a copy of a surveillance video that captured the events outside the Hope Mission.

[para 3] By letter dated November 21, 2006, the Public Body refused to give the Applicant access to the report and video, relying on the exception to disclosure set out in section 17 of the Act (disclosure harmful to a third party's personal privacy).

[para 4] By fax dated November 24, 2006, the Applicant requested that this Office review the Public Body's decision to refuse access to the requested information. Mediation was authorized but was not successful. The matter was therefore set down for a written inquiry. The Notice of Inquiry, dated February 12, 2008, set out the issue of whether section 17 of the Act applies to the records/information.

[para 5] The Public Body subsequently challenged the Commissioner's jurisdiction to hear this matter. It based its objection on alleged non-compliance with section 69(6) of the Act, which requires an inquiry to be completed within 90 days unless the Commissioner notifies the parties that the period is being extended, and provides an anticipated date for the completion of the review. By letter dated March 18, 2008, the Public Body asked that this jurisdictional issue be added to the inquiry. As the Commissioner's delegate, this is my decision as to whether I have jurisdiction to complete this inquiry.

II. RECORDS AT ISSUE

[para 6] As this decision addresses a jurisdictional issue, there are no records directly at issue for the purpose of the decision. By way of background, however, the Applicant has requested a final report of the Public Body's internal affairs major case section dated September 21, 2006 (the "report"), and a video capturing surveillance outside the entrance of the Hope Mission on December 31, 2004 (the "video").

III. ISSUE

[para 7] By letter dated April 11, 2008, this Office amended the Notice of Inquiry by adding the following issue:

> Did the Commissioner or his delegate lose jurisdiction on the basis of alleged non-compliance with section 69(6) of the Act?

IV. DISCUSSION OF THE ISSUE

[para 8] Subsections 69(1) and (6) of the Act read as follows:

> *69(1) Unless section 70 applies, if a matter is not settled under section 68, the Commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.*
> *...*
>
> *(6) An inquiry under this section must be completed within 90 days after receiving the request for the review unless the Commissioner*
>
> *(a) notifies the person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review that the Commissioner is extending that period, and*
>
> *(b) provides an anticipated date for the completion of the review.*

[para 9] Section 70 of the Act, under which the Commissioner may refuse to conduct an inquiry, is not applicable to this matter. Further, this matter was not settled under section 68. Subsections 69(1) and (6) of the Act therefore apply.

[para 10] At the outset, I note that my interpretation of the relevant legislation below is consistent with that of the Commissioner in Order F2006-031. Both that Order and this one deal with a challenge to this Office's jurisdiction based on an alleged failure to comply with section 69(6) of the Act. Further, both inquiries involve the same Applicant and Public Body. As a result, I am often responding to the same or very similar arguments as those addressed in Order F2006-031. Where that is the case, I intend, for convenience, to incorporate by reference some of the reasoning of the Commissioner in the earlier Order. Although Order F2006-031 was issued subsequent to the parties'

submissions in this inquiry, I did not consider it necessary to solicit any comments on the Commissioner's decision from the Public Body or Applicant. Both the earlier Order and this one are responding to the same legal points.

[para 11] Having said this, I respond below to arguments with respect to the interpretation of section 69(6) where they are unique to this inquiry. For instance, I consider whether the Legislature intended for jurisdiction to be lost in this particular case by considering the relevant facts and circumstances. Moreover, it goes without saying that because the facts of this case are specific to it, I determine those facts and apply the legislation to them independently.

A. The relevant facts in this particular case

[para 12] The Applicant's request for review was dated November 24, 2006 and was faxed to and received by this Office that same date.

[para 13] By letter dated November 28, 2006, the Commissioner advised the Public Body that he was authorizing a portfolio officer to investigate and try to settle the matter. The Commissioner further advised as follows:

> *It is anticipated that this review will be completed by February 22, 2007; however I may extend this period if additional time is needed. I will notify you in writing if the date is extended.*

I note that the date of February 22, 2007 was exactly 90 days from the date that this Office received the request for review on November 24, 2006.

[para 14] The November 28, 2006 letter to the Public Body indicated that a copy of this Office's review procedures was included as an enclosure. The review procedures (revised version of May 2006) summarize the requirements under section 69(6) of the Act, and indicate two ways in which the Commissioner might give notice of an extension. Specifically, they state:

> *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 the parties accordingly. The Commissioner's practice is to extend the timeline by sending:*
>
> - *Notices of extensions to parties during mediation; or*
> - *A Notice of Inquiry to the parties when the applicant has requested that the matter proceed to inquiry.*

[para 15] I point out the inclusion of the review procedures because they show that this Office acknowledged the requirements of section 69(6) and made the Public Body aware of the provision. As expressed in the November 28, 2006 letter itself, there was an understanding that the matter would be completed within 90 days, but that there was a possibility of an extension. Although the review procedures set out the practice of how extensions are normally made, this does not preclude the possibility of extending a review in other ways.

[para 16] The portfolio officer authorized to try to settle this matter wrote to the Applicant by letter dated January 16, 2007, sending a copy of the same letter to the Public Body. While the letter is not included with the Public Body's submissions, I have no reason to believe that the Public Body did not receive it. A disclosure analyst representing the Public Body indicates in his affidavit that the Public Body was aware that the portfolio officer's investigation was concluded on January 16, 2007, which corresponds to the date of the letter.

[para 17] In the letter, the portfolio officer advised that the Applicant could ask the Commissioner for an inquiry. The portfolio officer also indicated that if he received no response by February 9, 2007, he would close the file. However, the date of February 9, 2007 was only for the portfolio officer's own purposes in relation to the mediation file. There is no deadline under the Act for an applicant to request that a matter proceed to an inquiry – although a delay in doing so may result in the Commissioner concluding that the circumstances warrant refusing to conduct an inquiry under section 70(b) of the Act.

[para 18] The Applicant requested an inquiry in a fax received by this Office on February 19, 2007. While outside the deadline proposed by the portfolio officer, the Applicant's request for the matter to proceed to an inquiry was within a reasonable period and I therefore place no significance on its timing. However, it does not appear that a copy of the Applicant's fax was provided to the Public Body, whether by the Applicant or this Office.

[para 19] By letter dated May 1, 2007, a representative of this Office advised the Public Body as follows:

> *This file, in which your organization is the respondent, has been received by the Adjudication Division. If a decision is made to hold an inquiry in this matter, it will be scheduled. Inquiries are currently being scheduled in the winter months of 2007.*
>
> *In the usual course, the file is transferred to the Inquiries Clerk within 4 weeks of the date of this letter. She may be contacted thereafter with any questions you may have. […]*
>
> *A Notice of Inquiry is, in the usual course, sent to the parties to the inquiry approximately two-and-a-half to three months before the date the inquiry*

is held. This document will set out the issues for the inquiry, and the dates submissions are required from the parties.

[para 20] By letter dated August 3, 2007, a representative of this Office advised the Public Body as follows:

> *Further to our last correspondence … dated May 1, 2007, as provided by section 69(6) of the Freedom of Information and Protection of Privacy Act, the Commissioner has authorized me to notify you that he is extending the time for completing the review in this case. The anticipated date for completion of the review is February 1, 2009.*

B. Were the requirements of section 69(6) of the Act met?

[para 21] In order for section 69(6) of the Act to be met, the Commissioner or someone acting on his behalf is required – in accordance with section 69(6)(a) – to advise that the period for completing an inquiry is being extended, and is required – in accordance with section 69(6)(b) – to provide an anticipated date for the completion of the review.

[para 22] The letter of November 28, 2006 anticipated the completion of the review by February 22, 2007. This date was exactly 90 days from the date that this Office received the request for review on November 24, 2006. The Public Body would have been able to ascertain this, as the letter of November 28, 2006 enclosed the Applicant's request for review, which showed that it was both faxed and received on November 24, 2006. As the date of February 22, 2007 was within the initial 90-day period for completion of an inquiry, I do not find that the November 28, 2006 letter constituted an extension under section 69(6) of the Act. Rather, it advised the Public Body that this Office would endeavor to complete the review within 90 days, and that the Commissioner would give subsequent notice of any extensions.

[para 23] As it did not indicate that the review was being extended, the portfolio officer's letter of January 16, 2007 did not constitute an extension under section 69(6) of the Act. It did, however, advise the Public Body of the current status of the matter. The letter indicated to the Public Body that the mediation phase of the review had been completed, and that the review might continue if the Applicant requested an inquiry.

[para 24] Because it indicated that the file had proceeded to this Office's adjudication division – in other words that the file was still open – I find that the letter of May 1, 2007 notified the Public Body that the period for completing the review was being extended, and therefore complied with section 69(6)(a) of the Act. The Commissioner can notify parties that time is extended by a communication to the parties made on his behalf that makes it clear to the parties that the process will continue beyond 90 days (Order F2006-031 at para. 39). The letter of May 1, 2007 made it clear to the Public Body that the review was still in progress, despite the 90-day timeframe.

[para 25] The May 1, 2007 letter stated that inquiries were being scheduled "in the winter months of 2007". Given the date of the letter, this would be understood to be the following winter. In other words, the letter indicated that inquiries were being scheduled in the months of December 2007 and January, February and March 2008. The stated timeframe for the scheduling of an inquiry was also a timeframe for the "completion of the review" within the meaning of section 69(6)(b). "Completion of the review" is synonymous with "completion of the inquiry" (Order F2006-031 at para. 34). In turn, to "complete an inquiry" is to have heard all of the evidence and arguments of the parties, and to be in a position to dispose of the questions of fact and law by making an order that will be final (Order F2006-031 at para. 30). By anticipating that an inquiry would be scheduled in the following winter months, the May 1, 2007 letter anticipated that an inquiry would be held, and all evidence and arguments would be received, by the end of that period.

[para 26] I considered whether the reference to "the winter months of 2007" was an anticipated "date" within the meaning of section 69(6)(b) of the Act, as one might argue that a date should include a day, month and year. In my view, the May 1, 2007 letter *implied* a date, as the parties would understand that the anticipated date for completion of the review was no later than the end of the following winter, or approximately March 21, 2008. In other words, a sufficiently precise date could be inferred from the context. I find that this meets the requirement under section 69(6)(b), as the intention of the section is to provide a party with an expectation of when the review or inquiry might be completed. The indication that an inquiry was anticipated to be scheduled in the following winter no less anticipates its completion by a particular time.

[para 27] In some ways, the May 1, 2007 letter exceeded the requirement of section 69(6)(b), in that it provided a *set of dates* within which the review was anticipated to be completed (i.e., the start and end of winter) – rather than only the anticipated latest date. The Commissioner has noted that this Office's "best guess" as to what specific date an inquiry will be completed is often meaningless because it is inaccurate (Order F2006-031 at para. 123). In my view, a range of dates may actually be more useful to the parties. I conclude that the May 1, 2007 letter provided an anticipated date for the completion of an inquiry, and therefore complied with section 69(6)(b) of the Act.

[para 28] The letter of August 3, 2007 expressly notified the Public Body that the period for completing the review was being extended, and therefore complied with section 69(6)(a) of the Act. It provided an anticipated date for completion of the review, being February 1, 2009, and therefore also complied with section 69(6)(b). The Public Body agrees that the August 3, 2007 letter complied with section 69(6) to the extent that it extended the review and provided an anticipated date for its completion.

[para 29] However, the Public Body argues that the August 3, 2007 letter still fell short of the requirements of section 69(6) of the Act because it was issued after expiry of the original 90-day period for completion of an inquiry. I note that the May 1, 2007 letter was also sent to the Public Body outside the 90-day period. Despite this, I still find that both letters complied with section 69(6). Section 69(6) allows the Commissioner or his

delegate to extend the 90-day period and provide an anticipated date for completion of the review, and notify the parties accordingly, after the 90 days have expired (Order F2006-031 at para. 70).

[para 30] I note that, if I am wrong that the May 1, 2007 letter extended the review and provided an anticipated date for its completion, the August 3, 2007 letter complied with section 69(6) in any event. The Public Body does not dispute that the second letter extended the review and provided an anticipated date for its completion, and as just discussed, an extension may be made outside the initial 90-day period. In other words, even if the May 1, 2007 letter did not meet the requirements of section 69(6), the August 3, 2007 letter did.

[para 31] Given the foregoing, I conclude that section 69(6) of the Act was met in this particular case.

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

[para 32] Even if the letters of May 1 and August 3, 2007 failed to comply with section 69(6) of the Act, there is no loss of jurisdiction if the section is merely directory. Although the Public Body argues in this inquiry that section 69(6) is mandatory, the Commissioner has concluded in another inquiry – also involving the Public Body – that section 69(6) is directory (Order F2006-031 at para. 133). A previous Order of this Office also found that the section is directory (Order 99-011 at para. 27).

[para 33] I likewise find that section 69(6) of the Act is directory. In doing so, I adopt the Commissioner's reasoning in Order F2006-031 (at paras. 118 to 133), regarding the traditional analysis of whether a statutory provision is mandatory or directory. In that Order (at paras. 97 to 105), the Commissioner distinguished *Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner)*, 2007 ABQB 499, which analyzed the extension of the time to complete an inquiry under section 50(5) of the *Personal Information Protection Act*. I also distinguish the other cases and orders that the Public Body has cited in this inquiry, in support of its view that section 69(6) is mandatory, in the same way that the Commissioner distinguished them in Order F2006-031 (at paras. 129 to 132).

[para 34] In his analysis of whether section 69(6) of the *FOIP Act* is directory rather than mandatory, the Commissioner reviewed the purpose and scheme of the Act, its emphasis on the rights of individuals, the public interest in ensuring that public bodies comply with the Act, the wording and context of section 69(6), and the intention of the Legislature (Order F2006-031 at paras. 106 to 127). Although the particular matter before him involved a complaint about the collection, use and/or disclosure of personal information under Part 2 of the Act, the Commissioner's analysis equally contemplated an access request under Part 1 – which is the subject of the present inquiry. The Commissioner noted the Act's purpose, under section 2(a), of allowing individuals a right of access to records held by public bodies subject to limited and specific exceptions (at para. 110); he stated that the emphasis on the rights of individuals also applies to access

(at para. 120); and he referred to "the other purposes of section 2" in finding that it would be contrary to the public interest if section 69(6) were mandatory and if non-compliance accordingly resulted in a loss of jurisdiction (at para. 127).

[para 35] I conclude that, if I am wrong that section 69(6) of the Act was met on the facts of this case, I have not lost jurisdiction over the inquiry, as the provision is directory rather than mandatory.

D. Was a loss of jurisdiction intended to result in this particular case?

[para 36] In the event that I am both wrong that section 69(6) of the Act was met in this case, and wrong that it is directory rather than mandatory, I adopt the Commissioner's view in Order F2006-031 (at paras. 141 to 149) that the law regarding the mandatory/directory analysis has evolved. Under the evolved analysis, if a statutory provision is obligatory (mandatory), one must go on to decide whether actions taken in breach of the obligation should be invalidated as a result of legislative intent regarding the consequences of non-compliance, in light of all the circumstances of the particular case (Order F2006-031 at para. 150).

[para 37] Assuming then that section 69(6) is mandatory and that it was breached, I will accordingly consider whether the Legislature intended that jurisdiction should be lost as a result of non-compliance in this case. In Order F2006-031 (at paras. 151 to 184), the Commissioner identified some of the circumstances to consider.

[para 38] One of the circumstances to consider is whether there are alternative remedies (Order F2006-031 at para. 157). Here, I am not aware of any other means by which the Applicant may seek to obtain access to the report prepared by the Public Body. With respect to the video, the Applicant may possibly obtain a copy informally from the Hope Mission, the private organization that operated the video camera, but the Applicant has no legal remedy by way of a request under the *Personal Information Protection Act*, as the video does not contain the Applicant's personal information in accordance with section 24(1)(a) of that Act. Furthermore, if the Hope Mission no longer has a copy of the video, the Applicant would appear to have no other means to obtain the video other than through a request to the Public Body under the *FOIP Act*.

[para 39] With respect to gaining access to both the report and the video, the Public Body argues that, if I have lost jurisdiction over this matter, the Applicant has an alternative remedy by way of another access request to the Public Body. I do not believe that this is what is meant by an alternative remedy. 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]. In *Harelkin v. University of Regina* (at p. 588), the Supreme Court evaluated whether there was an alternate remedy before a senate committee rather than a court – in other words two different bodies. In doing so, it considered the composition of the other tribunal, the powers of that tribunal,

the probable exercise of its power, and questions such as expeditiousness and costs. 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. It is this same Office that would review any refusal to grant access.

[para 40] Given the foregoing, I conclude that the circumstance regarding alternative remedies does not suggest that the Legislature would have intended a loss of jurisdiction to result in this particular case.

[para 41] Another circumstance to consider, in determining whether there would be an intended loss of jurisdiction, is the degree of prejudice to the parties (Order F2006-031 at para. 162). The Public Body argues that there is a detrimental impact on it if the timelines for an inquiry are not met because of: (a) uncertainty as to whether an inquiry will be proceeding; (b) uncertainty as to the timing of written submissions and difficulty allocating resources to prepare them; (c) uncertainty as to whether the Public Body has correctly administered the Act and when it might receive guidance regarding its policies and procedures; (d) stress and uncertainty for members of the Public Body who are the subject of an allegation of inappropriate use or disclosure of personal information; and (e) a delay of parallel proceedings where a member of the public has also made a complaint under the *Police Act*. Although the Public Body does not purport to apply all of the five foregoing factors to the present matter, I will nonetheless review them.

[para 42] On the Public Body's first point, I believe that it may have experienced uncertainty as to whether this particular inquiry would be proceeding. On receipt of a copy of the January 16, 2007 letter indicating that the Applicant had the option of requesting an inquiry, the Public Body may have understood that if the review were not extended by February 22, 2007, being the end of the original 90-day period, then the file would be closed. It may also have reasonably believed – after February 22, 2007 and before it received the May 1, 2007 letter indicating that the file was with the adjudication division – that the file *had been* closed. Further, the May 1, 2007 letter indicated that an inquiry would be scheduled "if a decision is made to hold an inquiry in this matter", not that an inquiry was necessarily going to be scheduled.

[para 43] Although I believe that there may have been a degree of uncertainty in this case, uncertainty does not necessarily equate to prejudice (Order F2006-031 at para. 167). The Public Body has not explained how it was prejudiced by uncertainty in this particular inquiry. It argues generally that it needs to know how its various matters before this Office are proceeding, so that it may assign personnel and allocate resources – but it has not stated that failure to know the status of the present matter resulted in the assignment of personnel or allocation of resources to its prejudice. The Public Body argues generally that it requires anticipated dates for the completion of reviews so that it may consider whether the timeframe is problematic and request a more expeditious resolution if warranted – but it has not stated that a more expeditious resolution was warranted in this case. In my view, therefore, the Public Body has not established that it was prejudiced by any uncertainty as to whether an inquiry would be proceeding in this particular case.

[para 44] On the Public Body's second point, regarding uncertainty as to the timing of written submissions, a degree of this type of uncertainty occurs in virtually every inquiry before this Office. Until an inquiry is actually scheduled, parties will not know whether and when submissions will actually be due. Prejudice is not caused where the uncertainty would happen in any event [Order F2006-031 at para. 164(ii)]. Moreover, if the deadlines for submissions are inconvenient or result in operational concerns, a party may request an extension.

[para 45] In this particular case, I find that any uncertainty as to the timing of written submissions – as well as the timing of a possible inquiry – was reduced by this Office's letter of May 1, 2007 to the Public Body. That letter indicated when inquiries were being scheduled (the winter of 2007) and also stated how far in advance a Notice of Inquiry setting out the deadlines for submissions is usually sent (two-and-a-half to three months). This Office accordingly conveyed to the Public Body that the submissions were expected to be due sometime in the fall or winter of 2007, depending on whether and when an inquiry was actually scheduled, and that this Office would provide the precise date reasonably in advance. The May 1, 2007 letter also provided contact information so that the Public Body could ask questions. Accordingly, the Public Body was given the opportunity to raise any concerns about the inquiry process, which would include concerns about whether an inquiry was going to be held, the timing of the inquiry, and the timing of submissions. (I note that contact information was also included in the review procedures enclosed with the initial letter of November 28, 2006 to the Public Body, directly below the section on "timelines for review".)

[para 46] On the Public Body's third point, regarding uncertainty as to whether the Public Body has correctly administered the Act or should amend its policies or procedures, this uncertainty occurs in every matter before this Office until the matter is settled or an order is issued. Prejudice is not caused where the uncertainty is simply a function of how long this Office's processes take [Order F2006-031 at para. 164(iii)]. The Commissioner has explained that a public body is generally not prejudiced by a delay in knowing whether it improperly collected, used or disclosed personal information (Order F2006-031 at para. 168). I make a similar finding in this case. The Public Body is not prejudiced by the timing of an order that tells it whether it should or should not have granted access to the information requested by the Applicant. It has already made its decision and is simply waiting to find out if it was right or not.

[para 47] The Public Body's fourth point in relation to possible prejudice refers to stress and uncertainty for members of the Public Body who are the subject of an allegation of inappropriate use or disclosure of personal information. As this inquiry involves an access request, there is no such allegation here. However, I considered the extent to which the members of the Public Body, whose personal information appears in the requested report and video, might experience stress and uncertainty while waiting to know whether the Applicant will obtain access to their personal information. Although they may be experiencing stress and uncertainty, this is again the function of the process generally rather than any alleged failure to project a completion date for the inquiry [Order F2006-031 at para. 164(iv)]. Any third party whose personal information is the

subject of an access request that has proceeded to a review by this Office – and indeed any person who may be affected by a request for review – must wait until the review is concluded.

[para 48] Although I do not find that any of the types of uncertainty in the present matter equate to prejudice to the Public Body or its members, I do not preclude the possibility that uncertainty may be prejudicial in a different case where a party does not know whether or how a review or inquiry is proceeding. In this case, any uncertainty as to whether the file was open or closed – between February 22 and May 1, 2007 – lasted for only about ten weeks. After the Public Body received the May 1, 2007 letter from this Office, it was aware that the file was still open, and the August 3, 2007 letter provided a further update regarding the status of the matter. The Notice of Inquiry was subsequently issued on February 12, 2008. In short, I do not find that the Public Body has shown that it was prejudiced by any uncertainty or delay in this particular case.

[para 49] The last of the five points raised by the Public Body, regarding prejudice or a detrimental impact, relates to a delay of parallel proceedings under the *Police Act*. Although proceedings were initiated under the *Police Act* as a result of the events that also gave rise to the Applicant's access request, those proceedings appear to be concluded. Furthermore, sections 3(a), 3(c) and 3(d) of the *FOIP Act* make it clear that the *FOIP Act* does not affect what information is available in the context of other proceedings [Order F2006-031 at para. 164(v)]. I therefore do not find that the fifth factor raised by the Public Body suggests that it has been prejudiced by any failure to meet the requirements of section 69(6) of the Act.

[para 50] I conclude that the circumstance regarding prejudice to the Public Body does not suggest that the Legislature would have intended a loss of jurisdiction to result in this particular case. Conversely, I believe that a finding that I have no jurisdiction would prejudice the Applicant. A ruling that I have no jurisdiction as a result of non-compliance with section 69(6) of the Act will work serious general inconvenience or injustice to the Applicant, who has no control over this Office's review process (Order 99-011 at para. 27; Order F2006-031 at para. 171).

[para 51] Another circumstance to consider, in deciding whether the Legislature would have intended for non-compliance with section 69(6) to result in a loss of jurisdiction, is the operational impact on the *FOIP Act* (Order F2006-031 at para. 173). The Commissioner has concluded that there would be a significant negative operational impact, in respect of matters before this Office generally, if non-compliance with section 69(6) means that this Office did not or does not have jurisdiction over many of its reviews (Order F2006-031 at para. 174). He has also specifically referred to a potential loss of rights on the part of both complainants with concerns about their personal information, and applicants requesting access to information (also at para. 174). In this particular case, I believe that there would be a negative operational impact if I were to find a lack of jurisdiction, as the Applicant might either lose a right to access information – in which case the operation of the *FOIP Act* has been hindered – or the Applicant might

re-initiate the access request to the Public Body – in which case the efforts of this Office and the parties in the context of this review would likely be repeated unnecessarily.

[para 52] I conclude that the circumstance regarding operational impact does not suggest that the Legislature would have intended a loss of jurisdiction to result in this particular case.

[para 53] The public interest is another circumstance to consider in the analysis of whether non-compliance with section 69(6) would be intended to result in a loss of jurisdiction (Order F2006-031 at para. 176). The Commissioner has found that a loss of jurisdiction would, in fact, be contrary to the public interest because his role goes beyond providing remedies to complainants, and extends to ensuring that the purposes of the *FOIP Act* are achieved (Order F2006-031 at para. 178). I apply this reasoning to the present matter, as a review of the Public Body's response to the Applicant's access request likewise involves a determination of whether the purposes of the *FOIP Act* are being achieved. As stated elsewhere in Order F2006-031 (at para. 117), the Legislature's intention in enacting access to information legislation is to enable individuals to participate meaningfully in the democratic process and to hold government to account. As the Applicant's access request concerns the conduct of police officers, this inquiry raises, in particular, the possibility of disclosure being in the interest of public scrutiny under section 17(5)(a) of the Act.

[para 54] I conclude that the circumstance regarding public interest does not suggest that the Legislature would have intended a loss of jurisdiction to result in this particular case.

[para 55] A final circumstance to consider is the degree of seriousness of the breach of section 69(6) of the Act in the particular case. With respect to the May 1, 2007 letter, the possible breach was that it did not more clearly indicate that the review was being extended or provide an anticipated "date" for completion of the inquiry, as it merely stated that any inquiry would be scheduled the following winter. In my view, the letter nonetheless attempted to meet the spirit of section 69(6). The purpose of the section is to ensure that reviews are conducted in a timely way, and that parties are kept aware of the timing of the process so they may participate and plan their affairs accordingly (Order F2006-031 at para. 57). The May 1, 2007 letter achieved this purpose to a reasonable extent, in that it indicated that the file had progressed to the adjudication division, and provided a timeline for when an inquiry might be scheduled and a Notice of Inquiry issued. It also gave contact information so that the Public Body could participate in the process and raise concerns in relation to the planning of its affairs. I therefore find that any failure to more clearly meet the requirements of section 69(6) was technical or trivial.

[para 56] If I am wrong that an extension may be made under section 69(6) outside the initial 90-day period for completing an inquiry, both the May 1 and August 3, 2007 letters failed to comply with the section. In my view, however, any breach with respect to the timing of the extensions was not serious. The delay between February 22, 2007

(being the end of the initial 90-day period) and the letter of May 1, 2007 was approximately ten weeks. I do not find this delay to be so lengthy as to be intended to result in a loss of jurisdiction. Ten weeks is not a significant period when compared to the overall amount of time that it typically takes for a review to be completed by this Office. As discussed earlier, I do not believe that the Public Body was prejudiced by any uncertainty or delay with respect to this inquiry.

[para 57] If I am wrong that the May 1, 2007 letter extended the inquiry and provided an anticipated date for its completion, it nonetheless advised the Public Body of the status of the file. Accordingly, when the August 3, 2007 letter was sent to the Public Body, it was already aware that the inquiry process was underway. The Public Body agrees that, except for its timing, the August 3, 2007 letter met the requirements of section 69(6) of the Act. Because of the intervening letter of May 1, 2007, I find no serious breach of section 69(6) as a result of the period of approximately five months that elapsed between the end of the initial 90-day period and the August 3, 2007 letter. In other words, because this Office was in periodic contact with the Public Body from the time of the Applicant's request for review, I find no serious breach of section 69(6) with respect to the timing of any extension.

[para 58] Moreover, there was no "flouting" of section 69(6) of the Act, which is relevant in determining the seriousness of a breach [*Society Promoting Environmental Conservation v. Canada (Attorney General)* (2003), 228 D.L.R. (4th) 693 (F.C.A.) at para. 35(4)(ii), cited in Order F2006-031 at para. 148]. This Office had every intention of complying with section 69(6) from the very start of the review, as it acknowledged the requirements of the provision in the letter of November 28, 2006 to the Public Body and in the copy of the review procedures enclosed with it. Those pieces of correspondence specifically indicated that an extension of the review was possible, and that the Commissioner would give notice of such an extension. It would appear that any failure on the part of this Office to more clearly extend the review, or do so in a more timely manner, was the result of its reasonably held view that section 69(6) is merely directory. Even if section 69(6) is, in fact, mandatory and requires a review to be extended within the initial 90-day period, this Office was attempting to properly apply the provision.

[para 59] As there was no flouting of section 69(6) and any possible non-compliance with it was technical or trivial, I conclude that the circumstance regarding the seriousness of the breach does not suggest that the Legislature would have intended a loss of jurisdiction to result in this particular case.

[para 60] On review of the circumstances that have been considered in the more recently evolved analysis of whether jurisdiction is lost in cases comparable to this one, I conclude that the Legislature would not have intended for non-compliance with section 69(6) of the Act, in this particular case, to result in a loss of jurisdiction.

E. Conclusion

[para 61] I conclude that I have jurisdiction to proceed with this inquiry. This is so, regardless of whether I find that section 69(6) of the Act was met on the facts of this case, I apply the traditional mandatory/directory analysis thereby finding that the provision is merely directory, or I apply the alternate analysis thereby finding that the Legislature would not have intended for a loss of jurisdiction to result in light of the circumstances surrounding possible non-compliance with section 69(6) in this particular case.

[para 62] Because I have found that I have not lost jurisdiction, and the Commissioner has distinguished the decision in *Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner)* from decisions involving section 69(6) of the *FOIP Act*, it is not necessary for me decide whether that case has a retrospective or retroactive effect.

V. DECISION AND ORDER

[para 63] I find that I have not lost jurisdiction in this inquiry on the basis of alleged non-compliance with section 69(6) of the Act. I will therefore continue this inquiry.

Wade Riordan Raaflaub
Adjudicator