ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2008-005

December 17, 2008

COLLEGE OF ALBERTA PSYCHOLOGISTS

Case File Number P0353

Office URL: www.oipc.ab.ca

Summary: The Organization raised an objection to the jurisdiction of the Adjudicator on the basis of its allegation that the timelines set out in section 50(5) of the *Personal Information Protection Act* had not been met.

The Adjudicator found that the timelines had been met in this case. She held that even had they not been, in the circumstances of the present case, the legislature would not have intended that a loss of jurisdiction should result. These circumstances were that there would be no alternative remedy which would enable the Applicant to access the records she had requested, any breach of the timelines by the office was merely technical, and the Organization has not been prejudiced by the Adjudicator's failure to precisely anticipate the date of completion.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act,* R.S.A. 2000, c. F-25, s. 69(6); *Personal Information Protection Act* S.A. 2003, c. P-6.5, ss. 48(1), 50, 50(5), 50(5)(a), 50(5)(b), 52.

Cases Cited: *Bridgeland-Riverside Community Association v. City of Calgary* [1982] A.J. No. 692 (ABCA); *Petherbridge v. City of Lethbridge* [2000] A.J. No. 1187 (ABCA); *Society Promoting Environmental Conservation v. Canada (Attorney General)* (2003) 228 DLR (4th) 693 (FCA); *Kellogg Brown and Root v. Alberta (Information and* Privacy Commissioner) [2007] A.J. No. 896 (ABQB), [2008] A.J. No.1252 (ABCA).

I. BACKGROUND

[para 1] The chronology of events relating to the request for review and the setting of dates in this matter is set out in detail in the discussion of the issue, below.

II. ISSUE

Did the Commissioner's Delegate lose jurisdiction on the basis of the alleged non-compliance with section 50(5) of the *Personal Information Protection Act* ("PIPA")?

II. DISCUSSION OF THE ISSUE

A. Was section 50(5) complied with in this case?

[para 2] In my view, section 50(5) does not operate to deprive me of jurisdiction in this case, for the following reasons.

[para 3] First, I believe the requirements of the legislation have been met.

[para 4] Section 50(5) provides:

> *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 5] I turn to the facts. The records of this office reveal the following:

[para 6] The Applicant initially wrote to the Office of the Information and Privacy Commissioner by letter dated November 18, 2005. This letter was received by this office on December 23, 2005. In the letter the Applicant spoke of a "complaint" against her psychologist. She stated that her psychologist had refused to provide to her her personal information that she had requested. She also stated that she had requested the same personal information from the College of Psychologists ("the College" or "CAP"), and that the College had refused to allow her access to the information. She said she had made several previous calls "to OIPC" for assistance and advice on how to proceed (I do not know whether she was referring to this office or to the Office of the Information Commissioner of Canada), and that she was "requesting your assistance in sorting out this matter". As well, she said she needed "complete transparency from both [the psychologist] and CAP".

[para 7] On January 11, 2007, the Applicant wrote a letter to an intake officer of this Office, providing further information about her complaint to the College about the psychologist, information about what she had been told by the College with respect to the psychologist's obligations to provide information to the Applicant, information about her communications with the federal Office of the Privacy Commissioner, information about the requests she had made to the College for information (the last of which was dated December 23, 2005), and information about the College's reply, including an appended reply letter dated January 6, 2006. This reply letter stated:

> In response to your December 23, 2005 letter, please be assured that the College of Alberta Psychologists does take privacy issues very seriously. Once the Office of the Privacy Commissioner has concluded its investigation, we would be open to looking at concerns related to privacy. The College is of the opinion that it would be improper to investigate a matter that has been delegated to, or reported, to another body.
>
> I can inform you that the information we have on file includes: your letter/s of complaint, the psychologist's response and client file, as well as privileged legal correspondence.
>
> I trust that this addresses your concerns. Once [the psychologist] has an opportunity to review your letters of October 28, 2005 and November 21, 2005, and respond, [another named individual] will be in a position to continue with her investigation of this matter.

The Applicant then went on to express her concerns about both the psychologist and the College and the complaint processes of the latter, including what she regarded as their lack of transparency.

[para 8] On January 16, 2006, the Commissioner wrote to both parties advising that he was authorizing a portfolio officer to conduct an investigation and to try to resolve the matter. No anticipated date for completion was set.

[para 9] Mediation efforts were undertaken and continued for some time. During that period, communications took place between the Portfolio Officer from this office assigned to this matter, and the parties.

[para 10] The mediation was not successful. On October 1, 2006, the Portfolio Officer wrote to the College indicating that mediation had failed, that the Applicant had requested an Inquiry, and that the next step in the process would be that the Adjudication Unit would contact the Applicant and the College. A copy of this letter was sent to the Applicant.

[para 11] On October 2, 2006, the file was transferred to the Adjudication Unit.

[para 12] By letter dated January 17, 2007, counsel for the College wrote to the Inquiries Clerk of the Adjudication Unit to inquire as to the status of this matter.

[para 13] On February 7, 2007, a letter was sent from the Adjudication Unit to the Applicant only, indicating that the file had been received by the Unit. It stated that

inquiries were at that time being scheduled approximately six months from the date of the letter, and that orders were normally issued between six to twelve months from the date of the inquiry. This letter was the result of a change in the procedure of this office under which such letters began to be sent routinely by the Adjudication Unit. Through oversight, these letters were for a short period of time sent only to applicants and not to respondent organizations. Consequently, such a letter was not sent to the College in this case at that time.

[para 14] As no reply was apparently received to the College's query of January 17, the College repeated its request on February 14, 2007. The Inquiries Clerk replied by e-mail on February 21, 2007, indicating that the Inquiry had been scheduled for the end of July, 2007.

[para 15] On April 4, 2007, counsel for the Applicant wrote to the Commissioner to request an oral inquiry in both this matter and a related matter, file P0552 (the latter of which involved a request for access to records made to the psychologist about whom the complaint had been made to the College). The letter also asked that both matters be joined or held contemporaneously.

[para 16] On April 13, 2007, I wrote to counsel for the Applicant asking for information as to why it would be important to hold an oral hearing. In view of the fact that the two files were closely related, I also acceded to the request that they be joined or held contemporaneously.

[para 17] On April 25, counsel for the Applicant wrote to this office indicating that he would require further time to complete his response. His response was received on June 26, 2007. On August 15, 2007, counsel for the Applicant was notified that the response would be provided to counsel for the College for comment, unless counsel for the Applicant objected. On August 20, counsel for the Applicant indicated that he had not intended that his submission on the matter of whether to hold an oral inquiry be shared. On August 22, I wrote to counsel for the Applicant indicating that I would not rely on a submission on this issue that could not be shared with the College. I returned the submission without reading it, and asked that he provide a submission that could be shared.

[para 18] On August 27, 2007, I wrote to the Applicant indicating that the Commissioner had authorized me to extend the time for completing the review in this case to December 31, 2008. A similar letter extending dates was sent to the parties in all matters currently at inquiry. It was prompted by a decision of the Court of Queen's Bench in *Kellogg Brown and Root v. Alberta (Information and Privacy Commissioner)* [2007] A.J. No. 896 (the "*Kellogg*" case). In that case, the court held that section 50(5) of the *Personal Information Protection Act* was to be treated as a mandatory provision, and that the Commissioner had lost jurisdiction because section 50(5) had not been met. I also sent a letter on August 27, 2007, containing the same time extension information, to the College. This letter also included some additional information that had, by error, been provided only to the Applicant on February 7, 2007, including the routine phrasing

contained in the standard letters that "if a decision is made to hold an inquiry in this matter, it will be scheduled".

[para 19] Counsel for the Applicant provided a replacement submission regarding the oral-written question on September 4, 2007. This was shared with the College on September 6, 2007.

[para 20] On September 17, 2007, counsel for the College wrote to this office indicating that she was confused as to the status of the matter, as she had been provided with all of the following: correspondence from this office indicating that an inquiry would be held; the submissions of the Applicant on the question of whether the inquiry should be oral in form; as well as the letter from this office referred to in para 18 above, which, by reference to the phrase quoted, created some uncertainty as to whether the inquiry would be held. She stated her position, with reasons, as to why this inquiry should not go forward. She also asked that the issues in P0353 (pertaining to the College) be clearly identified (as distinct from the issues in the related matter (P0552) pertaining to the psychologist), so as to enable her to properly address the oral inquiry question.

[para 21] On October 2, 2007, the Inquiries Clerk sent an e-mail to counsel for the College explaining that the language in the extension letter which raised a question as to whether the inquiry was to be held was routinely included because the Commissioner occasionally decided that inquiries would not be held, but that this was in a small minority of exceptional cases. The October 2 letter also stated that since counsel for the College had stated her position that the inquiry should not proceed, the Commissioner would decide this question. On October 17, 2007, the College was notified of the Commissioner's decision that the inquiry would go forward and advised that his reasons for this decision would issue in due course. The Commissioner's reasons are being provided to the parties contemporaneously with this decision. A list of the issues for the Inquiry in file P0353 was also provided at that time. A reply submission was requested by October 26, 2007. Counsel for the College requested and was granted an extension to November 2, 2007. Both her submission, and additional comments from the counsel for the Applicant relative to the identified issues in file P0353, were received on that date.

[para 22] On December 17, 2007 I issued a decision on whether the inquiry would be held in written or oral form. This decision is attached as an Appendix to this Order.

[para 23] The Notice of Inquiry in this matter was issued on April 14, 2008. On April 25, 2008, counsel for the College sent a letter to this office indicating that it is the position of the College that the Commissioner had lost jurisdiction to proceed with this matter in light of the Commissioner's failure to comply with section 50(5) of PIPA, in accordance with the decision of the Alberta Court of Queen's Bench in *Kellogg Brown and Root v. Alberta (Information and Privacy Commissioner* (*Kellogg*). (This case was appealed but the Appeal Court declared the appeal to be moot and declined to exercise its jurisdiction to hear it. See *Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner)*, [2008] A.J. No.1252 (ABCA).) Counsel asked that this issue be added as an additional issue in the present matter. Further communications took place

with both counsel as to whether this jurisdictional issue should be heard and decided before the remaining issues were dealt with. Based on the submissions of counsel, I decided to hear the jurisdictional issue first and separately. Initial submissions were received from the parties in June 2008 and rebuttal submissions were received in July 2008.

[para 24] Before addressing whether section 50(5) was met on the facts of this case, I will address a number of questions of interpretation relative to this provision.

[para 25] First, on its face, section 50(5) is ambiguous as to whether an order is to issue within the initial time limit. The decision of the Court in the *Kellogg* case does not comment on this question. However, in my view, for the reasons I gave in Order P2007-010, the provision does not require issuance of an order within the time limit. Rather, I take "complete an inquiry" in the context of the opening words of section 50(5) to mean the point at which I have heard all the evidence and arguments of the parties, and am in a position to dispose of the questions of fact and law by making an order. As well, for the reasons given in the same order, I read the final word "review" in section 50(5) as synonymous with the word "inquiry" at the inception of the provision, so that the anticipated date to be given is the date of completion of the inquiry.

[para 26] Second, it would, in my view, be an unduly restrictive interpretation of section 50(5) that particular words must be used to extend time. Thus although my letter of August 27, 2007 was the only correspondence that explicitly used the language of the Act in extending the time, where other correspondence and communications clearly communicated to the parties that the time would be extended and what the anticipated date of completion was, the requirements of the provision were met.

[para 27] Third, in my view, time extensions under section 50(5) can be done after expiry of the 90-day period. The court in *Kellogg* did not address this question. Its decision was premised on the fact that no time extension was ever done (see para 14 of the judgment). The Commissioner decided this question in relation to section 69(6) of the FOIP Act in Order F2006-031. In my view, similar reasoning applies to section 50(5) of PIPA. The placing of the phrase "within 90 days" is such that this modifier refers only to the time within which the inquiry must be completed, rather than to a time within which the extension must be done. If I am wrong in this conclusion, and there is ambiguity, a purposive interpretation of section 50, in the context of the entire Act, leads to the conclusion that the purpose of the Act would be best served if the provision were interpreted as permitting an extension after 90 days. This would permit the Commissioner to fulfill his duty of conducting inquiries under the Act, while providing him with a mechanism to ensure that matters are moved forward, with appropriate notifications to the parties, if they are not completed within the initial window of 90 days.

[para 28] I turn to the suggestion of the Applicant in this case that the 90-day time period does not begin to run until the request for review is "perfected" in the sense that mediation and any preliminary issues are completed. I do not accept this suggestion. As I decided in Order P2007-010, "inquiry" and "review" as they appear in section 50 are to

be read as synonymous, and the time begins to run, according to the plain words of section 50(5), on the day the written request (for review) is received by the Commissioner.

[para 29] Turning to the facts, I must first decide on what date the Applicant's request for review was made. The Applicant's letters that preceded the Commissioner's decision to appoint a mediator complain about various actions and positions taken by the College as well as the psychologist, but neither of them specifically asks the Commissioner to review any decision of the College.

[para 30] I also note that the second letter, of January 11, 2006, is largely referable to the College's response letter of January 6, 2006 (to the Applicant's Dec. 23, 2005 request), and appends that response, and the latter correspondence between the Applicant and the College post-dates the Applicant's initial letter of November 18, 2005. Arguably, given these dates, the second letter could be taken as the document that grounds this review.

[para 31] However, it appears (from the Affidavit of the College's Privacy Officer, paras 8, 9 and 10 and the referenced correspondence) that when the initial letter was sent to this office, the Applicant had already specifically asked for the psychologist's response to the College (on July 8, 2005), and that the College had refused to provide it. As it is this refusal that is the subject of the present inquiry, I conclude that despite the imprecise language, it is appropriate to treat the Applicant's letter of November 18, 2005 as the document by which she requested review of the College's decision to refuse access to the psychologist's response. I believe the psychologist's response was part of what the Applicant was referring to in that letter as her "personal information". While she does not specifically speak in terms of a "request for review", I accept that she was implicitly asking the Commissioner to review, among other things, the College's decision not to provide that document to her when she asked for it.

[para 32] Thus, despite the fact that nearly two months passed before the letter of the Commissioner appointing a mediator was sent (during which time further information about her concerns, and about the involvement of the federal Privacy Commissioner, was sought and obtained from the Applicant), the 90-day period referred to in section 50(5) of the Act expired on February 16, 2006, a month after the mediator was assigned.

[para 33] The letter from the Commissioner to the parties (of January 16, 2006), indicating that a mediator was being assigned to try to resolve the matter, did not meet the requirements of section 50(5). It neither extended the time, nor provided an anticipated date for completion. The Portfolio Officer and the parties were actively engaged in mediation until October 1, 2006, at which time the Portfolio Officer wrote to the parties indicating that mediation had failed. I considered the possibility that there might be communications between the Portfolio Officer and the parties that might be construed as providing an anticipated date for completion of the inquiry, but I dismissed that possibility, since until a mediation concludes, there is no reason for this question to be addressed or for a date to be projected.

[para 34] At the conclusion of the mediation, on October 1, 2006, the Portfolio Officer wrote to the parties indicating that as mediation had failed, the next step in the process would be that the Adjudication Unit would contact the Applicant and the College.

[para 35] The first time that a time extension and anticipated completion date for the inquiry was provided to the College was when the Inquiries Clerk responded to the College's queries as to the status of the inquiry. In an e-mail on February 21, 2007, the Clerk indicated that the inquiry had been scheduled for the end of July, 2007. Though this e-mail was sent by a staff member of this office rather than by the Commissioner, in taking the steps necessary to make this matter proceed, the Inquiries Clerk was acting on the Commissioner's behalf. The question I must answer is whether this communication, which issued 15 months after the request for review was received in this office, met the requirements of section 50(5).

[para 36] As noted in para 27 above, I adopt the Commissioner's reasoning in Order F2006-031 that the extension and indication of a completion date do not have to be within the 90 days under section 69(6) of the FOIP Act. In my view, this reasoning applies to section 50(5) 0f PIPA. The reasonableness of this conclusion is highlighted in this case by the fact that, at the time the 90 days expired, the interviews with the parties had not yet been completed. Indeed, because the mediator was not appointed until after further information had been sought and obtained from the Applicant, the mediation process was only commencing. At that time, it was impossible to know whether there would be a need for an inquiry. It makes no sense to speak of anticipating a date for completion of an inquiry until the inquiry itself can be anticipated in the sense of being expected. While the e-mail of February 21, 2007 (indicating the inquiry would be at the end of July) was sent 15 months after the request for review was received, the mediation commenced two months after the request was received, and then took up eight and a half months of this time. It was only after it became clear that the mediation had failed and the matter would go to inquiry that it became necessary to undertake the next phase.

[para 37] I recognize there was a period of several months, between October 2, 2006 (when the file was received in the Adjudication Unit) and February 21, 2007 (when the approximate date for scheduling the inquiry was communicated to the College), in which this office did not communicate with the College. I acknowledge as well that the College had expressed on a number of occasions that it was anxious to resolve this matter on a timely basis, and that this lapse, which was caused to some degree by an administrative error, is regrettable. However, the parties had, on October 1, 2006, been advised in writing that the matter was proceeding to inquiry. Looking at the process overall, it does not, in my view, justify the conclusion that the February 21 e-mail, advising of the scheduling of the inquiry at the end of July 2007, was invalid as an extension of time because it was provided too late.

[para 38] In view of these considerations, I conclude that the Inquiry Clerk's e-mail of February 21, 2007 met the requirements of both section 50(5)a) and 50(5)(b) of the Act. As well, my letters to the parties on August 27, 2007, further extending the time for

completion of the inquiry and indicating an anticipated completion date of December 31, 2008, also met the terms of these provisions.

B. How does the Kellogg decision apply in this case?

[para 39] I turn next to the applicability of the *Kellogg* case to this fact situation. Had the requirements of section 50(5) not been met in this case, I would still conclude that I have maintained jurisdiction.

[para 40] The reasoning in the *Kellogg* decision makes it clear the court thought that the consequence that is to flow from non-compliance with a statutory requirement *depends on the circumstances of the particular case and the particular applicant and respondent*. In deciding to invalidate the actions of this office, it took into account circumstances that existed in the particular case before it. If I am to apply the *Kellogg* decision, I am also to apply this aspect of its reasoning.

[para 41] The court in *Kellogg* said "there is no uniform test to determine whether legislation is mandatory or directory, but, rather, one must consider all of the circumstances in deciding this issue." Among the questions asked by the court was "what the practical effect of non-compliance is on the complainant or any other person". One of the five circumstances which the court took into account to decide if the provision is mandatory was "Are there alternative remedies available to the Complainant and Affected Organizations?" The court's finding that alternative remedies were available informed its conclusion that the provision is mandatory. (See paragraph 82 of the decision.)

[para 42] Whether alternative remedies are available varies from case to case, depending on the complainant and the nature of the complaint. For many of the complaints made under the legislation, there are no alternative remedies. It is not clear to me how the presence of an alternative remedy can help the court to decide that the provision is mandatory, where, for other complainants under the same legislation, there are no such alternatives.

[para 43] Despite my failure to fully grasp how the Court regarded the particular circumstances of the case as relevant to its conclusion that the provision is mandatory, I will also consider the particular circumstances of this case to decide the issue presently before me. In doing so, I adopt the reasoning of the Commissioner in Order F2006-031 at paras 141 to 149, where he discusses the evolution of the law relative to the question of when failure to comply with a statutory provision can lead to loss of jurisdiction.

[para 44] I note that the 'evolved' analysis just referred to finds strong support in a decision of the Alberta Court of Appeal, *Bridgeland-Riverside Community Association v. City of Calgary* [1982] A.J. No. 9692, and subsequent decisions following that decision. In Bridgeland, the Court said, at paras 27 and 28:

> 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.

In *Petherbridge v. City of Lethbridge* [2000] A.J. No. 1187, the Alberta Court of Appeal described its own earlier judgment in the *Bridgeland* case at para 24 as follows:

> This case [*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.

The court went on to consider the following: that the statute did not prescribe any vitiating effects of procedural fairness; that had the statute in that case been complied with, the plaintiff's position would have been no different; and that "none of the alleged procedural errors caused the overall procedure to be so dramatically devoid of the appearance of fairness that the administration of justice was brought into disrepute". The latter two factors which the court took into account were clearly specific to the case before it.

[para 45] I return to the *Kellogg* decision. After stating that it is necessary to consider all relevant circumstances, one of the five circumstances which the court took into account was, as noted above, "Are there alternative remedies available to the Complainant and Affected Organizations?" In the Court's view, the complainant in that case could find a remedy relative to the issue in that case (the drug and alcohol testing practices of the respondent) in another forum. The Court said:

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

[para 46] I must therefore consider whether there is an alternative remedy for the Applicant in this case should her request to the College for access to the psychologist's

response to the College (relating to the Applicant's complaint against the psychologist) be denied because I have lost jurisdiction.

[para 47] Through her request for review, I have already been advised by the Applicant (as documented by the College's responses to her on which she grounded this request) that it is the position of the College that the Applicant is not entitled to receive copies of the psychologist's response to the College in the context of the disciplinary processes of the College. It seems clear, therefore, that asking the College for this information in the context of such proceedings is not a course the Applicant could fruitfully pursue. Neither do I know whether it would be possible for the Applicant to now bring an application for judicial review with respect to this decision of the College, nor whether, in such a proceeding, the Applicant would have any legal basis for obtaining the remedy that she seeks in this inquiry. I regard an "alternative remedy" in the context of an access request as an alternative legal basis for access to the same information, relative to which there is demonstrably at least a reasonable chance of success. (As well, there should be an equivalent degree of freedom with respect to how the information can be used once accessed.) If that is the case in the present circumstance, the College has not explained to me what this legal basis for access might be. Possibly a court might itself consider whether the entitlement to one's personal information that is created by PIPA could form the basis for overturning the College's decision, but if the Applicant argued this and were given access to the information on this basis, this would be the remedy afforded by PIPA, granted by a different decision-maker, rather than an alternative remedy.

[para 48] I note that the College has argued in its rebuttal submission that the Applicant "has brought concurrent proceedings respecting her concerns surrounding [the psychologist] and [the psychologist's] records". In particular, the College adverts to judicial review of the decision of the College registrar dismissing the Applicant's complaint to the College about the psychologist, which it says are ongoing. I agree that this demonstrates that this is not the only proceeding the Applicant is pursuing. However, again, I have no basis on which to conclude that the proceeding before the courts could or would result in the Applicant obtaining access to the records that she is seeking in this request for review. The correspondence on file indicates that the Applicant's complaint to the College dealt in part with the psychologist's failure to provide the Applicant with information she had requested, but I do not know whether the judicial review of dismissal of the complaint related to the same question, or if it did, whether it related to the particular information at issue in this proceeding. Even if all of these things were true, there is, again, nothing before me that suggests that the court that reviewed dismissal of the complaint against the psychologist would have any basis on which to provide the Applicant with a remedy that involved access to these particular records.

[para 49] In the absence of such evidence and explanations, concluding I have lost jurisdiction would deprive the complainant of the only possible remedy of which I am aware by which she might obtain access to the records she seeks. Thus the factor relating to alternative remedies argues for the opposite conclusion, in the present case, to that reached in *Kellogg*.

[para 50] Another factor relevant in this case, that was suggested by the Federal Court of Appeal in a case quoted by the Commissioner in Order F2006-031 (*Society Promoting Environmental Conservation v. Canada (Attorney General)* (2003), 228 D.L.R. (4th) 693 (F.C.A.)), is the degree of seriousness of the breach. I have noted that there was a gap of a few months in which no steps were taken by this office relative to this file. While the inaction on the file on the part of this office caused some regrettable delay, in view of the fact that at the time the 90 days elapsed the mediation process had commenced just a month prior, the initial failure to formally extend time and provide an anticipated date for completion of the inquiry at that point was, in my view, merely a technical breach, not significant enough to cause me to lose jurisdiction.

[para 51] A third factor relevant to the issue before me, as identified in the *Kellogg* decision, is the degree of prejudice to the parties. As noted in Order F2006-031, the absence of an alternative remedy is really a subset of this consideration, and in this case, the prejudice to the Applicant would be that she would lose whatever rights she has to obtain the information she has requested. The College argues that there is prejudice to it as follows: "The effect of holding that section 50(5) is directory will prejudice the College by precluding a remedy to compel a timely resolution of the Privacy Complaint". It argues that this prejudice consists of the fact that it faces uncertainty as to whether an inquiry will proceed, uncertainty as to how to time the allocation of related resources, continued uncertainty as to whether it is correctly applying the Act, and potential delay of parallel proceedings under the *Health Profession Act*.

[para 52] In my view, the uncertainties mentioned by the College are due in large part to the complexity of the process, rather than any failure on the part of the Commissioner to issue extensions and anticipated dates for completion, which are, if issued far in advance, unlikely to be accurate in any case. As well, the College states that it is important to it to have guidance from this office as to whether it is complying with the Act and whether it needs to amend its policies and procedures. A conclusion that jurisdiction has been lost in this case will impede rather than advance this goal. Further, even if I were to hold that jurisdiction had been lost in this case on the basis that formal extensions and anticipated dates had not been provided, this would at most cause the Commissioner to begin to issue such extensions and try to anticipate dates routinely; this would make more paperwork for the office, but would not compel a resolution more timely than any given proceeding demands. With regard to the matter of delaying parallel proceedings under the *Health Profession Act*, I have no basis on which o reach any conclusions as to how a finding that jurisdiction is not lost in this case would impact any such proceeding. Thus I find that the balance of prejudice in this case favours a finding that jurisdiction should not be lost from any failure to meet the requirements of section 50(5) in this case.

[para 53] My observations as to the balance of prejudice also lead me to conclude that in this case, the public interest is best served by a finding that jurisdiction should not be lost in the present circumstances.

[para 54] As mentioned in order F2006-031, the Court in *Kellogg* also considered the operational effect on this office of a finding that the provision was mandatory. While this

consideration was not treated as a case-specific one by the Court, it does have a case-specific aspect. As the Commissioner explained in Order F2006-031, the operational impact of the finding in *Kellogg* has had serious consequences for this office, having regard to the numerous jurisdictional challenges that have subsequently arisen and the potential loss of the rights of applicants and complainants, as well as the potential impact on the ability of the Commissioner to provide guidance to public bodies and organizations about their information practices. This is another factor against concluding that a loss of jurisdiction should result from any breach of section 50(5).

[para 55] Thus if, contrary to my finding, the terms of section 50(5) were not met, I find that in view of all the circumstances of the present case, I have not lost jurisdiction. A key factor is, in my view, the absence of an alternative remedy by which the Applicant could obtain access to the records at issue in this case. Having regard to this, together with the merely technical nature of the breach of the provision (if any), and the absence of prejudice to a respondent that would arise from my completing this inquiry, it cannot be said that there was a legislative intention that a loss of jurisdiction was to result in these circumstances.

[para 56] I note finally under this heading that the College asserted in its submission that the *Kellogg* decision should be treated as retrospective in its effect. Because I have decided that section 50(5) was met, and that I would not lose jurisdiction even if it had not been met and if the reasoning in the *Kellogg* decision were applied, it is not necessary for me to decide this question

C. The factors in the Bridgeland case

[para 57] As noted above, the Alberta Court has developed and applied another set of factors for determining if jurisdiction should be lost from a procedural defect. These were whether the statute prescribes a vitiating effect; whether a real possibility of prejudice to the attacking party is shown; and whether the procedure was so dramatically devoid of the appearance of fairness that the administration of justice is brought into disrepute.

[para 58] Failure to provide an extension and anticipated date of completion during the course of an ongoing proceeding is, in my view, a procedural defect.

[para 59] In this case the legislation at issue does not prescribe the consequence that jurisdiction should be lost. The parties did not argue, nor would I agree, that the timing of the steps taken in this case give rise to such unfairness as would bring the administration of justice into disrepute. The only effect on the College in this case from any failure to comply with section 50(5) is that it faced some degree of uncertainty as to when the proceeding would conclude. I do not believe this constitutes prejudice. As well, as in the *Petherbridge* case, had the statute in this case (interpreted in the way the College contends) been complied with, the College's position would have been no different relative to any substantive issue or its ability to address any substantive issue. On the basis of the factors set out in the *Bridgeland* case, I do not believe that any failure to meet the terms of section 50(5) should be held to vitiate these proceedings.

[para 60] In its rebuttal submissions the College also raises the fact that it did not receive the letter from the Applicant to this office of November 18, 2005 "initiating the request for review of the College's decision" in a timely way, and did not receive it until June 20, 2008, after it specifically asked for it on noting its existence in the Applicant's submissions. It puts this forward as another example of non-compliance by this office with PIPA (referring to section 48(1)), and another reason why I should find I have lost jurisdiction.

[para 61] I do not know why this letter was not initially provided to the College. I note that it is unclear in terms of what the Commissioner is being asked to review. It is worded as a "complaint" against the psychologist, including that the psychologist had refused to provide her with her own personal information, that the same complaint about the psychologist had been made to the College, and that the College had also refused to accede to her request to get the same information "through CAP". The Applicant in her own words acknowledges confusion about what decision she was asking to have reviewed, stating: "[t]here are many elements to this complaint and I don't quite know how to present it to you." Similarly, in the affidavit of the Privacy Officer of the College, the affiant refers to the Applicant's request for review as a "Privacy Complaint" (see, for example, paras 11 and 33 of her initial affidavit). In view of the confusing choice of language in the letter, and the lack of clarity about what decisions the office was being asked to review, it is possible the letter was not provided because the request for review was initially regarded as a complaint, and there is no obligation under PIPA to provide complaint letters to organizations.

[para 62] I note as well that on February 28, 2006, the Portfolio Officer wrote a letter to the College (which was provided to me as an attachment to the Supplementary Affidavit of the College's Privacy officer) in which the Portfolio Officer set out the details of the matters which she thought required an explanation from the College, including that the College had denied access to the psychologist's response to the Applicant's complaint.

[para 63] In any event, the single issue that came forward for the inquiry after the mediation effort concluded was whether the College was right to refuse to provide the psychologist's response to the complaint. (This specific item of information is not actually mentioned in the initiating letter, but as the Applicant had (on July 8, 2005) requested this from the College, it seems that she regarded this response as her own personal information.) As the substantive question now before me was presumably crystallized during the mediation, which involved the College, I cannot see that the delay in providing the somewhat unfocused initiating letter prejudiced the College. The letter was provided when the College asked for it, and the College has had an opportunity to comment on it for the purpose of the present part of the inquiry. Likewise it has not been precluded from commenting on it should it be relevant to the substantive issues in this case. For this reason, as well as the reasons just given (other than those relating specifically to section 50(5))), I do not accept that this objection, either standing alone or in combination with the timing-related objection discussed above, is sufficient to cause me to lose jurisdiction in this case.

IV. DECISION AND ORDER

[para 39] On the basis of my conclusion that I have not lost jurisdiction in this case, I will conclude this inquiry and issue a decision relative to the issues as stated in the Notice of Inquiry. Accordingly, I ask that the parties provide submissions on the substantive issues in this inquiry, in written form, by **Tuesday, February 17, 2009**.

Christina Gauk, Ph.D.
Director of Adjudication