ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

DECISION F2010-D-001

April 12, 2010

EDMONTON POLICE SERVICE

Case File Number F3341

Office URL: www.oipc.ab.ca

Summary: On February 18, 2010 and February 23, 2010, the Edmonton Police Service objected to the Commissioner's continuing with the inquiry in this matter, on the basis that the time lines set out in the Act had been exceeded, and that the inquiry must be terminated by reference to the test set out in the Court of Appeal's decision in *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)* 2010 ABCA 26 (the ATA decision).

The Commissioner found that the ATA decision did not apply, as the requirements of section 69(6) of the Act had been met on the facts of this case.

The Commissioner found, in the alternative, that if the requirements of the provision had not been met, and the ATA decision was applicable, that the presumption of termination that would have arisen was overcome in this case because the delays had been occasioned by the positions taken by the parties as well as by inevitable operational factors, and that any prejudice to the EPS from continuing in spite of delays would be vastly outweighed by the detriment to the goals of the legislation from terminating it.

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, s. 50(5).

Orders Cited: AB: F2006-031.

Court Cases Cited: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.R. 307, *Kellogg Brown and Root v. Alberta (Information and Privacy Commissioner)*, [2007] A.J. No. 896; *Business Watch International Inc. v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 10; *Edmonton Police Service v.*

Alberta (Information and Privacy Commissioner), 2009 ABQB 268; *Alberta (Employment and Immigration) v. Alberta Federation of Labour*, 2009 ABQB 344; *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)*, 2010 ABCA 26.

I. BACKGROUND

[para 1] On December 11, 2009, under the Commissioner's delegated authority and after the parties' final oral presentations to the Commissioner on November 25 and 27, 2009, the Director of Adjudication extended the anticipated completion date of the inquiry for F3341 to March 31, 2010. On February 18, 2010 and again on February 23, 2010, the Edmonton Police Service (EPS) objected to the Commissioner's continuing with the inquiry, on the basis that the time lines set out in the Act had been exceeded, and that the inquiry was terminated by reference to the test set out in the Court of Appeal's decision in *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)* 2010 ABCA 26 (the ATA decision).

[para 2] This is the second objection to the continuation of this matter that has been based on timing and alleged breach of the timelines set out in the *Freedom of Information and Protection of Privacy Act* (the FOIP Act or the Act). I dealt with the earlier objection on Order F2006-031. In that order, I held that the timelines had been met, and that even had they not been met, in the circumstances of the case, the legislature would not have intended that a loss of jurisdiction should result. The EPS brought an application for judicial review of my decision. However, in November, 2008, the parties entered into a consent agreement relative to this judicial review application, which stated that the application would be adjourned *sine die*, with an agreement that the EPS would be entitled to file a fresh or amended Originating Notice seeking judicial review of Order F2006-031 after the order on the merits had been issued in this matter.

[para 3] The events that transpired between June 30, 2005 (the date the request for review was made to this office) and August 14, 2008 (the date on which I issued the decision relating to the previous objection), are set out in Order F2006-031.

[para 4] The inquiry continued after Order F2006-031 was issued on September 22, 2008.

II. ISSUE

[para 5] The issue is whether the inquiry is to be terminated on the basis of the EPS objection. To address this issue, I will answer the following questions:

1. Were the timing requirements of section 69(6) breached in this case, giving rise to the presumption of termination described in the ATA decision?

2. If the answer to #1 is yes, has the presumption been overcome by reference to the factors set out in the ATA decision?

III. DISCUSSION OF THE ISSUE

[para 6] Before beginning the substantive part of the decision, I note that the Director of Adjudication was involved in this matter insofar as she issued the most recent time extension in this case, and that she requested the submissions from the parties respecting the issue addressed in this order. However, the decision relating to the objections is one that it is proper for me, rather than the Director of Adjudication, to make, for the following reasons. First, I am the decision-maker in this case, and consequently I am the person who must make the decisions of fact and law that arise in accordance with section 69(1) of the Act. The decision as to whether the ATA decision applies, or, if it does, whether there has been substantial consistency with the intention of the time rules such as would overcome the presumption of termination that has arisen from their breach, is such a decision, of mixed fact and law. (In contrast, the extension of time made by the Director of Adjudication, as my delegate, was an administrative rather than a judicial act, made on the basis of practical consideration of how long the matter might take to conclude, rather than on the basis of legal principles.) Second, the Public Body is objecting not just to the most recent time extension made by the Director of Adjudication. Rather, it is objecting to all the time extensions that have been made in this case (some of which were made by me), as well as to the totality of time this matter has taken thus far.

1. Were the timing rules in section 69(6) breached in this case, giving rise to the presumption of termination described in the ATA decision?

[para 7] In Order F2006-031, I considered whether the requirements of section 69(6) of the FOIP Act had been met on the facts of the case. I concluded that they had been met. This conclusion was based in part on my finding that an extension of time need not be explicitly labelled as such if the parties are made aware by this office that the inquiry will take longer than 90 days to complete. I adopt the reasoning from Order F2006-031 where I stated:

> [para 38] Section 69(6) does not specify the precise wording for notifying the parties about an extension of time and providing an anticipated date for completion of the review. The section simply uses the word “notifies”. Thus it is not necessary to notify using words such as “I hereby extend the time” or “the anticipated completion date will be…”, or to have a notification that is specifically dedicated to extending the time and providing an anticipated date for completion of the review.
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> [para 39] Therefore, I can notify that time is extended by a communication to the parties made by me or on my behalf, which makes it clear to the parties that the process will continue beyond 90 days. For example, providing notification of the dates for an oral inquiry can satisfy the requirement for notifying that I am extending the time and providing an anticipated date for completion of the review.

> [para 40] Similarly, section 69(6) can be met in a situation in which I have granted one of the parties an extension or adjournment, or rescheduled the matter. Section 69(6) does not require me to then send a separate notification to the parties that the review will be completed on that same date.
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> …
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> [para 45] As previously stated, I received the Complainant's request for review on June 30, 2005. On that same date, I informed the parties by letter that there would be an inquiry.
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> [para 46] I anticipated that the inquiry was going to be procedurally complex. I therefore decided to appoint an Inquiry Counsel from outside my Office to assist in the inquiry process. On September 9, 2005, seventy-one days after receiving the request for review, I wrote to the parties indicating that an Inquiry Counsel would be appointed, and that before the Notices of Inquiry would be issued, the Inquiry Counsel would contact the parties to discuss procedural matters relating to the inquiry. This added a procedural step, and made it clear that not only would the inquiry not be completed within 90 days, but that in all likelihood the Notices of Inquiry would not even be issued by that date. Thus the September 9, 2005 letter made the parties aware that the inquiry would not be completed within 90 days, and that steps in the inquiry process would be taken beyond that date.
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> [para 47] I find that the September 9, 2005 letter notified the parties that the time would be extended for completion of the review. The process for setting the anticipated date for completion (the date of the inquiry) was consensual, and therefore the anticipated date for completion was that date for the inquiry agreed to by the parties after the Inquiry Counsel had canvassed the parties about procedural matters related to the inquiry. This notification was given before the 90 days expired under section 69(6). Therefore, I find that section 69(6) was complied with in this case.

[para 8] I do not believe the ATA decision conflicts with this conclusion, and I see no reason to depart from this reasoning at the present stage of this inquiry. I also note that the projected dates for the inquiry (April 4, 5 and 6, 2006) were set aside before expiry of the 90-day period, and that the documents on the file suggest that it is more likely than not that the parties were also made aware of these dates before that time. (The correspondence on the office file, as well as records in the office of the Inquiry Counsel, indicate that on September 26, 2005 (within the 90-day period) the Inquiries Clerk communicated with the Inquiry Counsel indicating that I would be available to conduct the inquiry on the April dates, and that these dates were being held pending confirmation by all parties. There is no written record in this office indicating that the Inquiries Clerk conveyed this information to the parties at the same time, but given the nature of the communication that was recorded, in my view it is more likely than not that this happened.) Thus, in my view, the requirements of section 69(6) were met on the facts.

[para 9] The Court in the ATA decision spoke of the "presumption of termination" arising in "all situations of default of the time rules, including those where the

Commissioner has already extended the time and the extended time expires". It also raised a question (but did not answer it) of whether the time can be extended more than once.

[para 10] In this case, the matter was not completed on the dates originally set for the inquiry. Counsel for the EPS had raised a preliminary issue prior to the hearing dates as to whether it was necessary to hear the evidence of particular EPS witnesses. (The EPS took the position that its presentation of the results of the internal investigation that it had conducted relative to the CPIC searches done by these witnesses was adequate for the inquiry's purposes.) It was decided that the oral inquiry would proceed on the scheduled dates, but that the preliminary question of whether the witnesses should be called would be dealt with following the oral proceeding, by way of written submissions and a written decision, and that the witnesses would be called at a later date if necessary. The exchange of these submission was completed on May 15, 2006, and on August 11, 2006, I issued my written decision on the preliminary issue, in which I stated that I would require the remaining EPS Officers who had not appeared to attend at the oral inquiry to provide evidence.

[para 11] An argument might be made relative to this series of events that, in the words of the Court, "the extended time had expired" so as to give rise to the presumption of termination. In my view, this would not be a sensible result in this case because the need to continue the hearing beyond the original dates was a function of a position taken by the EPS, and all the parties were aware by the time of the first oral hearing of the possibility that future dates would be set. They would also have been aware that the setting of oral hearing dates would be a consensual process.

[para 12] Neither would it be sensible to say (despite the Court's query as to whether there can be more than one extension, referred to above at para 9) that because the original oral hearing did not dispose of all the issues, (in particular the issue of whether the EPS witnesses needed to be called), and did not receive all the relevant evidence (in particular, the evidence of the EPS witnesses), the inquiry would have to be terminated and no further hearing dates could be set because this would necessarily involve "more than one" extension. I am confident that it is not the intent of the legislation that matters not be permitted to take as much time, in as many steps or stages as it takes, to reach a reasoned decision based on the admission of all relevant evidence and the participation of parties sufficient to meet the requirements of fairness.

[para 13] Thus I will proceed on the assumption that it was open to me to continue to conduct the hearing by receiving the submissions on the 'witness' issue, issuing a decision, and then scheduling new oral hearing dates to hear the evidence of the witnesses.

[para 14] As I mentioned in Order F2006-031, section 69(6) creates a requirement only relative to an initial 90-day period. The Act does not speak to what is to happen if an extension is done and the matter cannot be completed within the time that was projected. In the earlier order I stated my view that if an initial extension is done within the terms of

section 69(6), a violation of section 69(6) cannot be found relative to events that take place subsequently. Arguably, however, there is an implicit requirement in the provision that additional extensions be done if the matter cannot be completed within the period of the initial extension. Even if this is so, however, in my view the subsequent communications by this office to the parties met this requirement. As already noted above, I held in Order F2006-031 that the Act does not require that I issue formal time extensions as long as I communicate to the parties that the process will involve further steps and indicate to them when these steps will be taken. Where, as in this case, the matter involves steps (in this case a future oral hearing) for which the scheduling process is a consensual one that depends on the mutual availability of the parties and their counsel, the "anticipated date of completion" is the future date on which I and all the parties are available to complete those steps.

[para 15] It might be argued, in contrast, that for each point at which it becomes clear that further steps are required, in addition to undertaking the scheduling, I must try to guess, in advance, when the scheduling can be effected and the process completed, and advise the parties to that effect. However, since the steps to be taken and the scheduling thereof are often based on factors of which I can have no prior knowledge and are largely within the control of the parties, this does not strike me as a useful exercise; it was, in any event, not the practice of this office at the time. (The current practice of this office, which has been in place since August of 2007, is to issue time extensions for files that have come to inquiry. The time periods chosen are based on the steps yet to be taken and the amount of time that is usually required for such files.[1] This practice is used for both oral and written inquiries, although the likelihood of accuracy for oral ones is considerably lower, particularly where legal counsel are involved. Additional extensions are done for cases in which expiry dates are approaching and it appears that they cannot be completed within the formerly anticipated time.)

[para 16] Despite the change in practice just described, in my view, the practice of this office of setting dates consensually satisfies the requirements of section 69(6) for oral inquiries. Parties that participate in such a process know that the conclusion of the matter will depend in large part on the actions and choices they make as well as on their availability, and in my view, the Act does not require me to go further than to continue to communicate with them as to what the steps will be and when they can be completed, as each matter progresses.

[para 17] In this case, the parties were involved in the process throughout, and themselves raised many of the issues that required additional time. Thus, in my view, the series of events described above did not involve a "breach of the timelines" and did not give rise to the presumption of termination of the inquiry, either when the initial 90 days expired, nor when additional steps were scheduled with the involvement of the parties as the matter progressed. (I will describe the remainder of the steps that have been taken in this case more fully in the section below.)

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[1] The practice was changed in response to the decision of the Court of Queen's Bench in the *Kellogg Brown and Root* case which the Court had issued in July 2007, so as to try to meet the terms of the legislation as the Court had interpreted it.

2. If the answer to #1 is yes, has the presumption been overcome by reference to the factors set out in the ATA decision?

[para 18] I have concluded that the ATA case does not apply because the terms of section 69(6) were met in this case. However, in the event I am held to be wrong about this conclusion, I will also consider the factors set out by the Court in ATA, and apply them to the facts in this matter.

[para 19] Although the contrary is arguable, I will assume for the present purpose that the decision in the ATA case – which arose from a complaint under the *Personal Information Protection Act* – is to be taken as applicable to the parallel timing rules in the FOIP Act.

[para 20] The preconditions for continuing with an inquiry, as set out in para 35 of the ATA decision, are as follows:

> (a) substantial consistency with the intent of the time rules having regard to the reason for the delay, the responsibility for the delay, any waiver, any unusual complexity in the case, and whether the complaint can be or was resolved in a reasonably timely manner.
>
> (b) that there was no prejudice to the parties, or, alternatively, that any prejudice to the parties is outweighed by the prejudice to the values to be served by PIPA [or in this case, the FOIP Act}

[para 21] I will first comment on each of the sub-factors under (a), and then discuss whether there has been "substantial consistency with the intent of the time rules".

1. the reasons for the delay

[para 22] I have already described the circumstances surrounding the initial extension of time and the scheduling of the first portion of the oral inquiry. As noted, after receipt of submissions from the parties, I issued a written decision that I would require the EPS witnesses to attend and give evidence in the inquiry. It was determined that three additional days would be required.

[para 23] On December 12, 2006, following correspondence from the parties in September and early November asking about when the hearing would resume, oral communications between the Registrar and the parties in November, and correspondence to the parties from the Registrar of Inquiries in early December soliciting available dates, new dates for the oral inquiry were scheduled for March 6, 7 and 8, 2007. As of early December, these were the first dates on which both I and the parties had three free days in which continuation of the matter could be scheduled.

[para 24] Notices to Attend were issued on February 6, 2007 and served shortly thereafter.

[para 25] The oral inquiry continued on the dates scheduled (March 6, 7 and 8), but the inquiry could not be concluded at that time, as there was still evidence to be heard. On March 8, EPS indicated its counsel would be unavailable until May. The first dates on which the parties were available were May 7 and 9, 2007, and these were set.

[para 26] The hearing continued on May 7 and 9, but there was insufficient time to complete the inquiry, and it was adjourned on the understanding that an additional day would be scheduled. After correspondence with the parties, May 23 was set.

[para 27] The oral hearing continued on May 23, 2007. At the conclusion of that day, it appeared it would be necessary to recall one of the witnesses, and also, possibly, to obtain testimony from another witness, who resides in Ontario. As well, counsel for the EPS asked whether transcripts of the proceedings could be prepared. I agreed that this office would undertake to prepare such transcripts and provide them to the parties.

[para 28] This office is not equipped to itself produce transcripts of proceedings. It took some time to retain a person who could provide this service. The audio material was sent to the transcriptionist in July for testing as to whether the transcriptions could be done from the audio recording system used by the office. In August, the Registrar of Inquiries communicated to the parties that the contract with the transcriptionist had been entered into and that she would begin the task in September, and that dates for the conclusion of the hearing would be solicited after the transcripts were completed. The material was conveyed to the transcriptionist in stages in September and October, 2007.

[para 29] The transcripts numbered nearly 800 pages. Given the volume, I acceded to the request of the parties that they be provided in electronic format, in which it would be most useful. As the transcripts had been produced in 'Word' format, it was necessary to convert them to PDF files to preclude tampering. The transcriptionist did not have the ability to effect this conversion, so it was done by this office. This created difficulties with formatting. To this end, the Registrar of Inquiries undertook to reformat the documents. This was a time-consuming 'line-by-line' exercise which the Registrar performed in conjunction with her other duties. The Registrar provided the transcripts to the parties by e-mail on February 21, 2008.

[para 30] On August 16, 2007, in accordance with the newly-adopted practice of this office discussed at para 15 above, I had extended the time for completing the review of this matter to December 31, 2008.

[para 31] On March 7, 2008, the EPS raised an objection to the continuation of this inquiry, on the basis that I had lost jurisdiction, by reference to the decision of the Court of Queen's Bench in KBR and its allegation that I had failed to meet the requirements of section 69(6) of the Act.

[para 32] An amendment to the Notice of Inquiry incorporating this jurisdictional issue was sent to the parties on April 14, 2008. Both parties provided initial submissions. After receiving the initial submissions (on May 14, 2008), I requested further information from the parties with respect to communications between my Office and the parties in relation to the initial setting of dates for the inquiry. Both parties provided such information. The parties were also given an opportunity to submit rebuttals, by June 10, 2008. In mid-June, I also provided the parties with copies of correspondence, and other related correspondence, pertaining to setting the dates for the inquiry, and provided the parties with an opportunity to comment on their significance. The EPS provided a submission on June 23, 2008.

[para 33] On September 22, 2008, I issued my decision respecting the jurisdictional issue. I determined that I had not lost jurisdiction, and would continue with the inquiry.

[para 34] On October 31, 2008, the EPS filed an Originating Notice for judicial review of Order F2006-031, and asked that the Commissioner and the Complainant sign a consent order which stated that the application would be adjourned *sine die*, with an agreement that the EPS would be entitled to file a fresh or amended Originating Notice seeking judicial review of the order after the order on the merits had been issued in this matter.

[para 35] On November 19, 2008, the Director of Adjudication, acting as my delegate, issued an extension of time to complete this matter to December 31, 2009.

[para 36] On November 21, 2008, this office sent correspondence to the Complainant and to the EPS, asking them to confirm which witnesses would be required for the next step of the inquiry. Parties were asked to respond by December 19, 2008. This letter also indicated that the matter would be re-scheduled once the parties' comments on this question had been received.

[para 37] On December 19, 2008, counsel for the Complainant requested an extension to January 9, 2009, indicating he had discussed the letter of November 21, 2008 with counsel for the EPS, and that the request for extension was from both parties. This request was granted, and both the Complainant's counsel and counsel for the EPS were copied on this communication.

[para 38] On January 30, 2009, as no further communication had been received, the Registrar contacted counsel for the Complainant, asking for confirmation regarding whether a particular witness would be required for the hearing. The Registrar tried to contact counsel for the Complainant again on February 18, and March 11, 2009. On March 13, counsel for the Complainant contacted this office to indicate that he had been in discussions with counsel for the EPS in an effort to put together a proposal for the Commissioner as to how to proceed with the remainder of the inquiry. He explained that both counsel had needed to consult with their clients and therefore the process had taken some time. He indicated the proposal would likely be forthcoming by the end of March. On March 19, the Registrar sent a letter to the counsel confirming this arrangement.

[para 39] On April 22, 2009 the Registrar contacted counsel for the Complainant asking that he confirm the status of the aforementioned proposal by April 30, 2009.

[para 40] On April 29, 2009, counsel for the Complainant sent a proposal, on behalf of the Complainant and copied to counsel for the EPS, proposing that one further day be scheduled to hear evidence and a further day for closing submissions. On May 4, following a further question from the Registrar, counsel for the Complainant indicated he would be arranging for the attendance of one witness and asking that the Commissioner require the attendance of an EPS witness.

[para 41] On May 12, 2009, counsel for the EPS wrote a letter to this office indicating that the EPS wished to provide further evidence, possibly by way of affidavit, or by calling an EPS witness.

[para 42] On May 27, 2009, the Registrar contacted the parties proposing dates for continuation of the oral inquiry in September, 2009. This date was chosen in view of the difficulties in scheduling oral hearings in the summer, as well as the anticipated attendance of a witness from Ontario.

[para 43] On June 4, 2009, counsel for the EPS indicated that neither she nor her co-counsel were available on the proposed dates in September, and suggesting alternative dates in October and November. Following further communications with the parties as well as counsel for one of the witnesses, resumption of the hearing was scheduled for November 25 and 27, 2009. The hearing proceeded on those dates and was concluded.

[para 44] On December 11, 2009, the Director of Adjudication extended the time for completion of this matter to March 31, 2010.

2. the responsibility for the delay

[para 45] A review of the foregoing steps makes it clear that the responsibility for the length of time this matter has taken rests in part with this office, and in part with the choices and conduct of the parties, including the party raising the objection.

[para 46] The longest delay for which this office is responsible arose from the length of time it took to prepare transcripts. The difficulties with this process have been outlined above.

[para 47] As well, there were several occasions on which it took some time to schedule the matter, due in part to the fact that I was not available to conduct the inquiry. However, the availability of the parties and their counsel also played a role in scheduling problems.

[para 48] Two of the lengthy periods of delay were caused because it was necessary to receive submissions and issue decisions on preliminary issues raised by the EPS.

[para 49] Finally, I note that the EPS was asked to respond to a November 21, 2008 letter from the Registrar of Inquiries by December 19, 2008. Although there was an indication in the interim that the EPS was involved in discussions with the Complainant's counsel as to how to proceed in the inquiry, according to correspondence on the file of this office, no direct response from the EPS was received until May 12, 2009.

3. any waiver

[para 50] There was no express waiver by the parties. I note that the Consent Order was entered into for the purpose of retaining the ability to judicially review my decision to proceed after the final decision on the merits is issued. However, I do not regard this as a waiver of the requirements of the timing provisions of the Act, as the EPS maintained its ability to apply, on notice to all the parties, for an order to set the judicial review for hearing its objection based on alleged breach of section 69(6).

4. any unusual complexity in the case

[para 51] This is a many-faceted and contentious case, involving issues relating both to the conduct and credibility of individual EPS members, as well as to the database information-management practices of the EPS. It has required many days of oral testimony and argument. Developments in the case necessitated the recalling of witnesses, and in one case the need for a witness to retain counsel. As well, it has been procedurally very complex. As already noted, two written decisions have been issued before this one, both involving complex procedural analysis. The second decision required an extensive review of case law relating to timing issues. As already noted, the preparation of transcripts was required, which was an unprecedented step in the history of this office.

5. whether the issue can be or was resolved in a timely manner

[para 52] The factors noted above make this a case that could not be quickly resolved. However, the only remaining step is to review the evidence and arguments and issue a decision.

Conclusion re whether there has been substantial consistency with the intent of the time rules

[para 53] I turn to whether there was "substantial consistency with the intent of the time rules". The Court in ATA said that "The time rules intend to promote inquiry efficiency and the expeditious resolution of privacy claims. Timeliness is a necessary feature of how PIPA [in this case the FOIP Act] serves the public interest."

[para 54] "Expeditious" means done with speed and efficiency, and "timely" means occurring at the right time. This matter has not been concluded quickly – it has taken

considerably longer than most cases before this office take; indeed, it has probably taken longer than any other case. I have noted the Court's point that the public interest is best served when complaints are resolved quickly.

[para 55] The various reasons for the delay are nonetheless identifiable, as set out above. The question I must answer is: did the Court intend that when a process takes an unusually long time to complete, yet when this is inevitably so given the circumstances, the presumption of termination nevertheless stands.

[para 56] My answer is that the presumption is overcome in this case. In my view there is substantial consistency with the intent of the time rules when this office performs all steps essential to the processing of a request for review in as expeditious and timely a manner as circumstances allow. I cannot regard the time rules as intended to prevent me from performing my duties when, as happens occasionally, an unusually complex set of facts and issues, or the actions or positions taken by the parties, or (as in this case) a combination of both, means that the tasks that must be performed take longer than usual.

[para 57] The Complainant wants the matter to continue. The time taken to conclude this inquiry was a natural function of a substantively and procedurally complex matter heard in an oral format. Furthermore, any delays that were occasioned by this office were not disproportionately long in comparison to those that resulted from actions and positions taken by the objecting party itself.

[para 58] I conclude that that this review has been conducted by this office in substantial consistency with the intent of the time rules.

[para 59] I turn next to the second condition for continuing with an inquiry,

> (b) that there was no prejudice to the parties, or, alternatively, that any prejudice to the parties is outweighed by the prejudice to the values to be served by [the FOIP Act].

[para 60] In earlier submissions in this matter, the EPS explained that the detrimental consequences to it arising from delay include the following: uncertainty as to whether the case will proceed to inquiry and as to how to allocate its resources to the case; uncertainty as to whether the EPS is complying with the Act; and the fact that certain of its members have had to deal with added stress and uncertainty as to how their role in the events at issue may ultimately affect their careers with the EPS. The EPS provided affidavit evidence in support of these contentions. As well, the EPS points to the fact that its members are being asked to remember events that had taken place many years ago, and it says the additional delay has exacerbated this problem.

[para 61] I note to begin that prejudice must be not only asserted, but must be proven by the party alleging it.[2] With respect to the first point, the parties were notified at a very

[2] See *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.R. 307.

early stage that the matter would proceed to inquiry. The question of uncertainty as to how to allocate resources is an inevitable consequence of participation in a complex proceeding. Uncertainty as to whether the EPS is meeting its obligations under the Act will certainly not be resolved by terminating this proceeding.

[para 62] I turn to the impact on individual EPS members. I accept that this matter could cause stress for the members involved, and that a delay in knowing the outcome could cause additional stress. However, I do not believe this is the sort of prejudice that was contemplated by the Court. Rather, I believe the Court was referring to such prejudice from delay as can cause harm to the proceeding itself in terms of the potential of the proceeding to achieve a fair resolution of the issues to be decided. Arguably, the additional passage of time has caused memories to further fade to some degree. However, given the amount of time that has already lapsed since the events in question (the CPIC searches) took place (some as long ago as 1999), I am not persuaded that the additional passage of time would have had a sufficiently significant effect on the ability of the EPS members to recall the events as should give rise to termination of the entire proceeding. With respect to the point the EPS makes that one of its members may be prosecuted for perjury and obstruction of justice because he cannot now recall long-past events, I do not anticipate that a prosecution would be brought on the basis alone that a person failed to remember certain events.

[para 63] With regard to prejudice to the Complainant, if this matter were now terminated, he would lose the very considerable resources he has expended thus far on carrying his complaint forward. Possibly, he would also lose his right to a determination of the complaint. (The latter is not clear, however, insofar as if the matter is terminated, there appears to be nothing to stop him from bringing a new complaint. That this would be possible has been expressed in two recent judgments of the Court of Queen's Bench, *Business Watch International Inc. v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 10 and *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 268.[3])

[para 64] If I am incorrect in my view that the EPS is not prejudiced by delay in this proceeding as a function of added stress to its members (from anticipation of an outcome that might have an adverse impact on their careers), or by virtue of further eroding memories of distant events to some degree, and that these, as well as the other factors mentioned, are ones I am to take into account, I would nevertheless find that any such prejudice is outweighed by the prejudice to the values to be served by the FOIP Act. The primary purpose of this inquiry is to determine whether there was a breach of privacy rights under the Act such as requires the EPS to modify its information-handling practices to ensure compliance with the Act and the Act's objectives in the future. A great many days of effort by the large number of people involved in this proceeding have already been devoted to try to achieve this goal. In my view it would be most unfortunate and a

[3] In her letter to the parties of March 2, 2010, the Director of Adjudication invited them to comment on significance of this point, as made in these judgments, to their objections. The Public Body responded by stating that it was premature to state what position it would take on this issue, as this would depend on the circumstances at the time, including the nature of the complaint and the issues at inquiry.

tremendous waste of resources if the entire proceeding and its potentially-beneficial results should now be derailed by the EPS's claim that those delays (of a few months on several occasions) for which it was not directly responsible should cause the entire effort to date to have been for naught.

[para 65] I concluded above that the presumptive consequence of termination of this inquiry has not been raised. If I am wrong in this conclusion and the presumption has been raised, I find that it is overcome in this case by the following: first, the delays were a function of operational factors inherent in the oral inquiry process, as well as delays occasioned by the parties, including, to a significant extent, the objecting party; and second, any prejudice suffered by the EPS from continuing the inquiry would be vastly outweighed by the loss to the goals of the FOIP Act that would result from declaring the entire proceeding a nullity.

[para 66] Consequently, I find that the proceeding should not be terminated on the basis of the EPS's objection. As provided by the Court of Appeal in ATA, my decision is now subject to judicial review. The parties have 45 days to apply for judicial review: see *Alberta (Employment and Immigration) v. Alberta Federation of Labour*, 2009 ABQB 344, at paragraph 66.

Frank Work, Q.C.
Information and Privacy Commissioner