ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

DECISION F2010-D-002

March 23, 2010

GRANDE YELLOWHEAD PUBLIC SCHOOL DIVISION No. 77 (formerly GRANDE YELLOWHEAD REGIONAL DIVISION No. 35)

Case File Number F3728

Office URL: http://www.oipc.ab.ca

Summary: This decision addresses the objections of the Public Body (Grande Yellowhead Public School Division No. 77 or GYRD) and Affected Party (the Alberta Teachers' Association or ATA) that were made in response to the time extension in this case that was done by the Director of Adjudication, as delegate of the Commissioner, on January 6, 2010, in which she informed the parties she was extending the time for completion of the review to January 31, 2011.

The Commissioner applied the test from the decision of the Alberta Court of Appeal in *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)* 2010 ABCA 26 (the ATA decision). He found that although a "presumption of termination" within the terms of the ATA decision had arisen because the initial time extension had been done after the initial 90-day period for completion of the inquiry had expired, the presumption was overcome in this case because the delays had been occasioned by

operational factors inherent to the inquiry process, as well as by positions taken by the parties themselves.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 67(1), 69(1), 69(6), 70; *Personal Information Protection Act*, S.A. 2003, c. P-6.5, s. 50(5).

Orders Cited: AB: F2007-031.

Court Cases Cited: *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.

BACKGROUND

[para 1] Case File Number F3728 arises out of a June 8, 2006 complaint to this Office that GYRD (the "Public Body") disclosed the Complainants' personal information to the ATA (the "Affected Party"), contrary to the *Freedom of Information and Protection of Privacy Act* ('the FOIP Act' or 'the Act').

[para 2] As this decision involves timelines, I will set out the timing of various steps in the processing of this matter in some detail. As part of my task in making this decision, as explained further below, is to decide whether the "presumption of termination" which has arisen from breach of the timelines is overcome, I will at the same time provide information that explains the length of time some of the stages took.

[para 3] The complaint was brought to this office on June 8, 2006. On June 21, 2006, this office wrote to the Complainants and to the Public Body notifying these parties that this office had received the complaint, and that a portfolio officer would investigate the alleged disclosure by the Public Body. The matter was not resolved through the investigation/mediation process, and on September 25, 2006, the Complainants requested that the matter proceed to inquiry. (The initial period of 90 days, which is significant in this matter, had expired in the interim, on September 6, 2006.) On October 2, 2006, the portfolio officer wrote to the Public Body, informing the Public Body that an inquiry into the matter would proceed. This letter did not contain any anticipated end-date for the inquiry process. The file was received in the adjudication unit on October 6, 2006.

[para 4] At the time the file was received for inquiry, notices of inquiry were the means by which the adjudication unit communicated to parties the dates for the hearing and other procedural information. It was not the practice of the office to issue formal time extension letters containing anticipated dates for completion, as it was thought that

keeping parties apprised of developments as a matter proceeded and of any steps they had to take as participants was sufficient to meet the intention of the legislation.

[para 5] During the three-month period (August to October, 2006 near the end of which the file was received in the adjudication unit, the number of files for inquiry that were received in the unit (47) rose sharply from the average (of five to ten per month), creating a back-log in processing files for the inquiry stage. The notice of inquiry (which was for a written inquiry and included dates for the provision of submissions), was sent to the parties on February 27, 2007.[1]

[para 6] During the period between October 6, 2006 and February 27, 2007, the following steps were taken: I made a determination that the matter should proceed to inquiry, the matter was assigned to a decision-maker, affected parties were determined (and the affected party, the ATA, was identified), the file was reviewed to determine what issues were outstanding from the mediation, and the issues were identified and formulated for the purpose of inclusion in the notice of inquiry.

[para 7] Subsequent to the issuance of the notice of inquiry, parties were given until April 12, 2007 to provide submissions. Submissions were received and were exchanged on April 13, 2007, and parties were given three weeks to respond. After rebuttal submissions were received, on May 3, 2007, the matter was ready for review by the assigned adjudicator.

[para 8] On August 1, 2007, I sent a letter to the parties informing them that the anticipated date for completion of the review was February 1, 2009. As no formal extension had been issued, this step was taken in an effort to comply with the ruling of the Court of Queen's Bench in *Kellogg Brown and Root v. Alberta (Information and Privacy Commissioner)*, [2007] A.J. No. 896, (KBR) which the Court of Queen's Bench had issued in July 2007.

[para 9] The file was transferred from one decision-maker to another on three occasions between May, 2007 and February, 2008. The first assigned adjudicator retired before issuing a decision. The adjudicator to whom the file had been transferred left the office before issuing a decision. During the period in which the file was with the third adjudicator, she found from her review of the file that the submissions contained insufficient factual information to enable her to decide the issues; on March 26, 2008 she requested additional information from the parties, but at that point, an objection to the

[1] In early February of 2007, the adjudication unit began to notify parties on receiving new files for inquiry that their matter had been transferred to the unit for inquiry, and to provide information about the process and its timing. However, the Public Body did not receive the communication just described. Although staff had been directed to send such letters routinely to both applicants and complainants and to public bodies or respondent organizations and any affected parties that had been identified, through oversight, these letters were for a short period of time sent only to applicants and complainants, and not to other parties. The notice of inquiry of February 27 was thus the first communication received by all the parties which contained timing information. (The notice provided a date for submission of briefs, and stated that the office would advise as to when rebuttals were to be submitted following exchange of the initials.) As the ATA had been identified as an affected party by that time, the notice of inquiry was sent to it also.

Commissioner's jurisdiction was brought (on March 31, 2008) by the ATA and the Public Body, on the basis that the Commissioner had lost jurisdiction by breaching the time rules. This necessitated submissions and the exchange of submissions on this question. As the third adjudicator had gone on leave in October of 2008, I assumed jurisdiction over the file, and on November 27, 2008, I issued Order F2007-031, in which I decided that I had not lost jurisdiction.

[para 10] On January 7, 2009, the Affected Party filed an Originating Notice for judicial review of Order F2007-031. The Affected Party and the Public Body were named as applicants, and I and the Complainants were named as respondents.

[para 11] On January 21, 2009, by which time the office had adopted a practice of issuing extensions where anticipated completion dates were approaching and it appeared the matter would not be concluded by that date, I extended the time for completing the review to February 1, 2010.

[para 12] On January 26, 2009, the Affected Party filed a Consent Order in the judicial review. The terms of the consent order were:

> 1. The Applicants' application for the relief sought in its Originating Notice herein is adjourned, *sine die*.
>
> 2. Any party to this proceeding shall be at liberty to apply, on notice to all other parties, for an Order setting this proceeding down for hearing.
>
> 3. The Applicants, or either of them, shall be entitled to file a fresh or amended Originating Notice seeking judicial review of Order F2007-031 within 45 days of receiving the final decision of the Commissioner relating to the merits of the inquiry that is the subject of Order F2007-031;
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> 4. This Consent Order may be endorsed by the parties in counterpart and by facsimile, or scan and e-mail, or other electronic communication.
>
> 5. There will be no costs of this application.

The Assistant Commissioner signed the Consent Order on my behalf. The unrepresented Complainants also signed the Consent Order. This Office received a copy of the filed Consent Order on January 28, 2009.

[para 13] On April 24, 2009, I wrote to the Affected Party and the Public Body (copying the letter to the Complainants), indicating that I was proceeding with the inquiry, had reviewed the submissions, and was asking for seven items of additional information from each of them. I asked that this information be provided by May 25, 2009. I received submissions from both these parties. On August 14, 2009, I returned the submission of the Public Body, as it contained material from the mediation of the case, which I do not accept in an inquiry. I asked the Public Body for another submission. The Public Body responded, as follows, on August 27, 2009:

> Now taking the position that you do with respect to GYRD in rejecting its submissions of May 21, 2009, and not having taken a similar position with the Complainants leads GYRD to the view that it has not been treated fairly. As a result GYRD will not submit new submissions…

[para 14] By letter dated September 28, 2009, the Alberta Teacher's Association provided an Affidavit (which it stated to be provided "as a courtesy to and at the request of" the Public Body) which contained information that answered the first of the questions I had asked. On October 6, 2009, the this office shared the submissions with the other parties.

[para 15] By letter dated January 6, 2010, pursuant to the authority I had delegated to her on August 7, 2009 to extend the time limit for completing inquiries under section 69(6) of the FOIP Act, the Director of Adjudication informed the parties to the inquiry that I was extending the time for completion of the review to January 31, 2011. The amount of time provided for completion was chosen by her, in consultation with my counsel, to try to ensure sufficient time to obtain all information necessary to make a decision and to issue an order.

[para 16] By letter dated January 13, 2010, the Affected Party wrote to the Director of Adjudication (copying the letter to the Public Body), as follows:

> We have received your letter dated January 6, 2010, in which you purport to extend the time for completing this inquiry to January 31, 2011. We object.
>
> You are undoubtedly aware that the complaint from the Complainant was received by your office on September 25, 2006. The Notice of Inquiry was not even issued until February 27, 2007. Both Grande Yellowhead Regional Division #35 and the Alberta Teachers' Association, our client, have filed for judicial review (adjourned by consent January 11, 2009) in which we have raised the issue of delay in completing this review. At the very least, that should have alerted your office to the issue of timeliness.
>
> This is the third letter of extension. Not only did the Commissioner purport by letter dated August 1, 2007, to extend the time to February 1, 2009, but he again wrote on January 21, 2009, purporting to extend the time to February 1, 2010. And now this.
>
> Our position is that these extensions are not only unreasonable, but contrary to law. The initial loss of jurisdiction is not corrected by additional attempts to extend, all of which have occurred far beyond the 90 days set out in section 69(6) of FOIPPA. The current date in the most recent letter, January 31, 2011, is nearly 4 ½ years after the complaint was received by your office. This is nothing less than an abuse of process.
>
> The result is that you should now notify the parties that the review is at an end and that no final order will be issued. Otherwise, we will be forced to consider our remedies.
>
> We understand that Grande Yellowhead Regional Division #35 takes the same position as we do and will be writing you to that effect.

[para 17] By letter dated January 13, 2010, the Public Body also wrote to the Director of Adjudication (copying the letter to the Affected Party), as follows:

> Grande Yellowhead Regional Division No. 35 (GYRD) is in receipt of your letter of January 6, 2010 and the response of the Alberta Teachers' Association (ATA).
>
> Grande Yellowhead concurs with and shares the position set out in the response of the ATA.
>
> GYRD notes that whereas the previous purported extensions of time have all been in the name of the Commissioner your letter is not. In addition to the position set out in the ATA response, GYRD asserts that any purported extension by you is in contravention of section 69(6) which can only be exercised by the Commissioner.

[para 18] By letters dated January 19, 2010, General Counsel for this Office wrote to the Public Body and the Affected Party asking that they send their letters to the other parties to the inquiry, to inform those other parties about the issue they were now raising. In the letter to the Public Body, she addressed the questions of the Public Body about my delegated authority to extend the time limit under section 69(6) of the FOIP Act.

[para 19] By letter dated January 21, 2010, (copied to the Public Body and to the Director of Adjudication) the Complainants responded to the January 13, 2010 letter from the Affected Party, opposing the objection made by the Affected Party. Among other things, they pointed out that "…the ATA and GYRD did not comply to the request by the Commissioner for further answers and evidence."

[para 20] By letter dated January 26, 2010 (copied to the Affected Party and to the Director of Adjudication), the Complainants responded to the January 13, 2010 letter from the Public Body, opposing the objection made by the Public Body. Among other things, they pointed out that:

> GYRD as a Public Body must produce any record or copy of a record requested by the Commissioner under 56(1) or (2) within ten days. Instead all we received was unsubstantiated excuses as to why the GYRD and the ATA should both not have to answer and produce the requested evidence…

[para 21] On January 27, 2010, the Alberta Court of Appeal released its decision in *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)*, 2010 ABCA 26 (the "ATA decision"). In making a decision under section 50(5) of PIPA, the Court said:

> [37] The principles I would propose can be summarized as follows:
>
> (1) The Commissioner has no power to extend the time limit after the time limit has expired. If he does extend the time within the time limit, the exercise of that discretion will be subject to judicial review. Blanket or routine extensions seem unlikely to be regarded as reasonable if they cannot also be justified in the specific circumstances of the case. Because the points were not argued, I need not say whether the time can be

> extended more than once or whether in light of the possibility of prejudice from inactivity it would be appropriate for the Court of presume prejudice after a certain period of time: see, by analogy, S. (D.B.) v. G. (S.R.), [2006] 2 S.C.R. 231, [2006] S.C.J. No. 37 (Q.L.) at para. 123 (see also dissent at para. 173). For example, a delay beyond double the 90 day period might be unreasonable for the case.
>
> (2) Breach of the time rules creates a presumptive consequence, namely termination of the inquiry process when the default is raised. There is no "loss of jurisdiction" involved.
>
> (3) An objection to the process should be raised at the earliest opportunity, either before the Commissioner or the adjudicator. It is not acceptable to await the outcome and then raise the objection. The Commissioner or adjudicator will have to consider whether or not the presumptive consequence should apply, and will be expected to provide reasons for the decision then made. The decision of the Commissioner or adjudicator will be subject to judicial review. As noted above, it is not necessary in the circumstances of this case to offer an opinion as to the standard of review to such situations.

[para 22] By letter dated January 29, 2010 (copied to the Affected Party), the Public Body wrote to General Counsel for this Office, explaining why it did not copy its January 13, 2010 letter to the Complainants.

[para 23] On February 9, 2010, the Director of Adjudication, as recipient of the correspondence from the parties about the time objection, wrote to the parties to give them an opportunity to comment as to the significance of the ATA decision to the question of whether the present inquiry can continue. She also asked them to comment on a number of other questions which were potentially significant to the matter of the time extension. The objecting parties provided responses.

DECISION

[para 24] Before beginning the substantive part of this decision, I note that the Director of Adjudication made the most recent time extension in this case, and that the objections that have been raised appear to have been prompted by this extension, and were addressed to her. Despite this, I have concluded that 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, as pointed out by the Public Body, I am the decision-maker that has assumed jurisdiction over 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 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, a close review of the objections has made it clear that the Public Body and the Affected Party are objecting not just to the most recent time extension made by the Director of Adjudication. Rather, they are objecting to all the time extensions that have

been made in this case (two of which were made by me), as well as to the totality of time this matter has taken thus far.

[para 25] 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 26] In this case, the first time extension was done after the initial 90-day period for completion set out in section 69(6) had expired (on September 6, 2006). (The request for review was received on June 8, 2006.) A notice of inquiry, which contained information about the due date for submission, was issued on February 27, 2007, and a formal letter of extension was sent on August 1, 2007.

[para 27] The Court in the ATA decision ruled that in the circumstance in which the time has been extended after the time limit has expired, there is a "breach of the time rules". This gives rise to the presumptive consequence of termination, and calls for an examination of the factors set out at para 35 of the decision to determine if the presumption is overcome in the circumstances.

[para 28] A possible reading of the ATA case is that if an extension is done after 90 days expires, since I have "no power to extend the time", there is no question of continuing. In other words, conceivably the decision could be read such that a consideration of whether a "presumption of termination" can be overcome can be undertaken only if an extension has been done within the time period.

[para 29] However, in my view, that is not the correct reading. In the ATA case, the extension of time had been done after expiry of the initial time period. The Court in the ATA case applied the factors it had articulated for determining if the presumption of termination had been overcome (to decide whether the timeline has been "substantially breached" in the circumstances) even though the extension had been done after expiry of the 90-day period. Thus I conclude that I am to do this in the present case as well.

[para 30] Accordingly, I must review the factors set out by the Court to decide if the presumptive consequence stands, or if it is overcome. I will do so for the events in this case that took place prior to the signing of the Consent Order discussed above, even though I have already commented on these events in Order F2007-031. I do this because in the ATA case, the Court set out the "presumptive termination" principle and the factors to be applied for determining if it is overcome, and that test, which was not available at the time of the order just mentioned, is now the appropriate one to be applied. Thus the present review does not involve a review of my earlier decision in Order F2007-031 (which could only be done by the court).

[para 31] 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.

[para 32] 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 33] The Court spoke of "the delay". It is not entirely clear to me from the ATA decision whether in considering whether the "presumptive termination" is overcome in this case, I am to take into account only the circumstances that gave rise to the presumption – that is, the circumstances relating to the extension that was done after the initial time period expired and that thereby breached the timelines (the delay in that context constituting the time from the expiry of the 90 days until the extension of time was done) – or whether I am also to take into account the entire period the process has taken thereafter.

[para 34] The parties' present objection in this case was made recently and is to the entire period. Further, an objection only to the initial delay would not be timely in the manner required by the Court. I will assume for the present purpose that it is appropriate for me to consider the entire period, including the period surrounding the lapse of time that preceded the first formal time extension, as well as subsequent events in the history of this file.

[para 35] The first-stage mediation/investigation process took almost four months. The steps taken in mediation are highly variable but generally involve discussions and written communications between the portfolio officer and the parties, examinations of records and other documents, and recommendations for resolution by the portfolio officer, which usually take the form of a written report. Currently (according to the most recent Annual Report of this office) approximately 48% of cases are resolved at this stage within 90 days, 24% are resolved within 180 days, and 28% take longer than 180 days. Thus the time taken for the investigation/mediation stage was within the middle range of the spectrum of time usually taken for this part of the life of a file.

[para 36] Turning to the post-mediation or 'inquiry' stage, there was a period of almost five months after the Public Body was notified by the portfolio officer that the file was being transferred to the adjudication unit before the notice of inquiry was sent.

[para 37] To explain the lapse of time in this particular case I will first set out what the process leading to the issuance of a notice of inquiry necessarily entails. As well, I will refer to the fact that the file was received when there was a spike in the number of inquiry

files, with an ensuing backlog. I will also comment on the further delay before the formal time extension was sent.

[para 38] The usual process involves a number of steps which I take to fulfill my mandate. The steps are also necessitated to some degree by the fact that most applicants and complainants are unrepresented, and that the FOIP Act is more complex than can readily be understood by lay persons. With the assistance of my staff, I take steps to ensure that a matter is dealt with efficiently by focusing the inquiry on the matters over which I have jurisdiction that are raised by the facts. The steps are as follow.

[para 39] First, I have a screening function under section 70 of the Act, which I have not delegated. I perform this function for every file that comes to the adjudication unit. With the assistance of staff, I consider every case to ensure that it is appropriate for inquiry (and issue letters explaining my reasons when I decide not to conduct an inquiry).

[para 40] Second, section 69(1) provides that I am to conduct an inquiry into matters regarding which a review has been requested, but which have not been settled at the investigation/mediation stage. Applicants and complainants often bring matters to inquiry that were not included in their request for review. Thus adjudication unit staff, with the assistance of legal staff as needed, ensure that the issues brought to inquiry after the investigation/mediation stage are within the scope of the original request.

[para 41] Third, under section 69(1), I am to decide the questions of fact or law arising in the course of an inquiry. Again, staff must determine whether and how the applicants' or complainants' concerns as expressed in their request for inquiry fit within the scope of the Act. Considerable time is often required to excise extraneous matters and materials provided by complainants. As well, to facilitate an efficient resolution of the issues, staff set out the issues in the notice of inquiry in sufficient detail and in an order that will help the parties to make submissions that address all necessary points. For some cases, staff also prepare a summary of the facts for inclusion in the notice of inquiry so that parties can be clear about the events or alleged events that gave rise to the issues as stated.

[para 42] Finally, under section 67(1), I am to determine, as soon as is practicable, whether any other parties are affected by the request, and must notify any such persons. I must also decide whether the affected parties ought to be identified to the other parties. (If an inquiry is to be conducted by a delegated adjudicator, this part of the process is usually performed by that person.)

[para 43] The steps just described often involve communicating with the parties to clarify the nature of the complaint or access request, and to explain the steps being taken.

[para 44] Typically, as staff work on multiple files, the stage just described takes approximately eight to ten weeks. In this case it took considerably longer. However, this was due to the particular operational issues faced by the office at that time. As noted above, receipt of this file coincided with the influx of an unusually large number of cases for inquiry, which created a significant backlog for taking the steps above in order to

prepare notices of inquiry. (As evidence of increased file volume, the Annual Reports of this office indicate that in the fiscal year April 2007 to March 2008, the office issued 81 orders, in contrast to 56 orders in the preceding year and 36 orders in the one preceding that (the latter of which was itself a record over any earlier year).

[para 45] With regard to the time period that elapsed before a formal letter of extension was issued, unlike other events that happened in the course of the review in this case, the timing of this event was not a function of how long it took to complete particular steps. Rather, the letter was, as noted earlier, a response to the interpretation of the legislation by the Court of Queen's Bench in the KBR case, and it was done very shortly after the decision was issued. As explained above (at para 4), prior to this decision, the office regarded the notice of inquiry – which was typically issued after the investigation/mediation stage had concluded and 90 days had expired – as well as subsequent correspondence communicating with parties about developments in an inquiry and the steps they were to take, as sufficient mechanisms for communicating timing information to parties.

[para 46] I turn to the period subsequent to issuance of the notice of inquiry, and the receipt and exchange of submissions. I have noted that after the written submissions had all been received and were ready for review by a decision-maker (on May 3, 2007), the file was in the hands of three adjudicators, all of whom left the office without issuing a decision, before I ultimately took jurisdiction over the file.

[para 47] I have already noted that the period in which the file was received for inquiry also coincided with a significant increase in the inquiry caseload, involving an unprecedented number of matters to be resolved by way of inquiry orders. The case load pressure for the individual adjudicators experienced a concomitant increase.

2. the responsibility for the delay

[para 48] With respect to the time taken to investigate/mediate this case, typically, this phase entails communications with both sides to gather the facts and try to determine if the matter can be resolved, and the preparation of a report. To some degree the time this phase of the process takes depends on the availability and cooperation of the parties. As noted, in this case it took an average amount of time.

[para 49] This office is responsible for the historical practice (which has since been changed) of not issuing time extensions that would anticipate a time for completion of the inquiry process prior to transfer of a file to the adjudication unit.

[para 50] The office is also responsible for – in the sense of "occasioning" – the time taken between the conclusion of the investigation/mediation stage of this file and the issuance of the notice of inquiry.

[para 51] As well, the office is responsible for the time this matter has taken thus far insofar as it was caused by operational considerations (staffing changes and the resulting

need to transfer the file on three occasions, with associated time delays). It is also notable that during the period in which the case load in the adjudication unit was increasing, the complement of adjudicators and counsel assisting adjudicators had coincidentally been reduced because of staff departures. (The number of people (including myself) making adjudicative decisions or assisting in their drafting was reduced from seven to five in June, 2007 and only one of these positions was re-filled (in October, 2007).)

[para 52] It is possible, because of the backlog, that there were periods of several months in which the adjudicators to whom this inquiry file had been assigned were not actively engaged in reviewing the submissions and writing the decision. Trying to ascertain whether this was so would not only be impossible given that two of these people are no longer with this office; it would not, in my view, be a reasonable exercise to try to undertake in any event. A file that has taken its place in an adjudicator's caseload for the purpose of adjudication is not, in my view, in a state of inactivity such as is inconsistent with the intention of the time rules, as long as there is a reasonable expectation that the adjudicator will deal with it as time and their individual caseloads permit. Such situations are inevitable in an office with limited adjudicative staff and a large and variable caseload.

[para 53] I note that in raising its objection to the most recent time extension, the Affected Party referred to its application for judicial review of order F2007-031, and stated, "At the very least, that should have alerted your office to the issue of timeliness". While the office was at the time and remains very much alive to timing issues, it was not possible to speed up a particular matter relative to others on the basis that a party has raised an objection. Adopting a practice of acceding to requests to move matters forward in the queue would cause chaos, and has not been done historically except in highly exceptional circumstances.

[para 54] The Public Body and the Affected Party (who now bring the objections) also bear some responsibility for the delay.

[para 55] First, they brought the initial objection to jurisdiction (which required submissions, the exchange of submissions, and the issuance of an order (Order F2007-031)); these steps added several months to the process.

[para 56] The objecting parties also provided initial submissions that were insufficient to enable the decision maker to decide the issues in the case, necessitating the requests (first by the third adjudicator,[2] and later by me) for additional information. Further, one of them has declined to provide an additional submission in response to my further request for information. (It did ask the Affected Party to provide an affidavit on its behalf, but this document only partially fulfilled the request.) The period between my request for information and the date on which the item of information last mentioned was received (on September 30, 2009) was five months.

[2] As already noted, the third adjudicator made this request in March, 2008. The Affected Party and Public Body did not provide information in response to this request, but rather, raised the objection to jurisdiction referred to above.

3. any waiver

[para 57] There was no express waiver by the parties, and they objected to continuation of the process on two occasions. 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 timelines, as the parties maintained their ability to set the judicial review for hearing at any time.

4. any unusual complexity in the case

[para 58] The primary issue in this case is a privacy complaint based on an allegedly improper disclosure of documents related to a court proceeding. The final decision will require interpretation of the FOIP Act, and application of the Act to novel factual circumstances, which is a fairly complex issue. The difficulty with obtaining adequate information for deciding this issue has already been noted.

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

[para 59] There is nothing inherent in the particular complaint which would make it take as long as it has taken. The fact the matter is still unresolved is a function of the operational factors at play, together with the time taken to deal with the positions taken by the Public Body and Affected Party as described above.

Conclusion re (a) – substantial consistency with the intent of the time rules

[para 60] 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 serves the public interest."

[para 61] "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 a similar case takes on average. I have noted the Court's point that the public interest is best served when complaints are resolved quickly.

[para 62] 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 was so as a natural function of the nature of the proceeding, the presumption of termination nevertheless stands.

[para 63] 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, a strain on the resources of the office, or the actions or positions taken by the parties, means that the tasks that must be performed take longer than usual.

[para 64] I turn to the fact that the formal time extension was not issued until August 1, 2007. (I am not sure if this letter was strictly necessary in view of the fact that the notice of inquiry (of February 27) spoke to the timing of submissions and thus arguably met the requirements of section 69(6). However, I will assume for the purpose of this part of the discussion that formal letters are required.) As noted, the delay in issuing this letter was a function of the fact that it was done in response to the KBR decision (issued in July, 2007). Prior to August, 2007, the office did not have a practice of issuing formal extension letters at inquiry.[3] Thus the late date on which this letter was sent does not form part of the chronological explanation of the time taken to perform the various steps to date. Rather, the presumption that arises in consequence of the timing of this letter is the starting point for the inquiry – into whether the process can continue, even in the face of the defect, by reference to the factors set out by the Court in the ATA case.

[para 65] The Complainants want the matter to continue. The delays in the process reviewed above were a function of events over which I had no control. Furthermore, the delays occasioned by this office were not disproportionately long in comparison to those that resulted from actions taken by the objecting parties themselves.

[para 66] I conclude that that this review has been conducted by this office in substantial consistency with the intent of the time rules.

[para 67] 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 PIPA.

[para 68] The Public Body and the ATA were invited to provide submissions as to how they would be prejudiced by the length of time this case has taken if it were to continue. Neither of them indicated how they would be prejudiced, and I do not myself see how continuing to participate in this inquiry at a later time rather than an earlier one would cause prejudice to either of them.

[para 69] With regard to prejudice to the Complainants, if this matter were now terminated, they would lose the resources they have expended thus far on carrying their complaint forward. Possibly, they would also lose their right to a determination of their complaint. (The latter is not clear, however, insofar as if the matter is terminated, there appears to be nothing to stop them from bringing a new complaint. That this would be

[3] I have noted above that in early February, 2007, the adjudication unit had begun to notify parties on receiving new files for inquiry that their matter had been transferred to the unit for inquiry, and to provide information about the process and its timing, but that through inadvertence, the Public Body did not receive the communication just described.

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.[4])

[para 70] While the objecting parties have complained about the delays in this matter, none of the parties has told me of any factor which makes the timing of the final decision of particular significance.

[para 71] In the absence of any basis for concluding that the Public Body or ATA would be prejudiced by having the matter continue, I find that the condition set out by the Court in (b) (that there is no prejudice to the parties from continuing the inquiry) is met.

Conclusion

[para 72] I conclude that while the presumptive consequence of termination of this inquiry was raised because the first extension was issued after the initial 90-day period had expired, the presumption is overcome in this case by the following: first, the delays were a function of operational factors inherent to an inquiry of this type, as well as delays occasioned by the parties; and second, the Complainant would suffer prejudice from terminating the inquiry whereas the objecting parties have not indicated that they would suffer prejudice from continuing it.

[para 73] Consequently, I find that the presumptive consequence of termination of the inquiry process is overcome in the circumstances of this case. 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

[4] In her letter to the parties of February 5, 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 took up this invitation, and stated its view that the cases did not stand for the proposition that a further request for review could be based on the same facts. However I did not find its comments to be of assistance, as these comments did not appear to relate to the parts of the courts' decisions that contemplated the bringing of new complaints. The Public Body commented on a passage in para 40 of the *Business Watch* decision, whereas the passage which speaks of starting the inquiry over again is in para 59. Similarly, the Public Body commented on para 42 of the *Edmonton Police Service* decision, whereas the relevant paragraph is para 52 (no. 1). As well, the Public Body cited section 66 of the FOIP Act, which creates a time limitation for bringing a request for review. However, that provision permits me to extend the time for bringing the request, which means that a review is not necessarily precluded if the time limitation is exceeded.
The Affected Party did not address the idea that new complaints can be brought when an inquiry is terminated.