ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

DECISION P2010-D-001

APRIL 27, 2010

ALBERTA TEACHERS' ASSOCIATION

Case File Number P1216

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

Summary: This decision addresses the objections of the Alberta Teachers' Association or ATA to the continuation of this matter, on the basis of the decision of the Alberta Court of Appeal in *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)* 2010 ABCA 26 (the ATA decision).

The Commissioner held that section 50(5) of the *Personal Information Protection Act* permitted more than one time extension. He found that a "presumption of termination" within the terms of the ATA decision had not arisen in this case.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 74; *Personal Information Protection Act*, S.A. 2003, c. P-6.5, s. 50(5).

Court Cases Cited: *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] By letter dated March 19, 2010, the ATA raised an objection my ability to carry on with an inquiry into the complaint in this case.

[para 2] The ATA bases its objection on the decision of the Alberta Court of Appeal in *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)*, 2010 ABCA 26 (the ATA case).

DECISION

[para 3] 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 4] In the present case, the complaint was received by this office on February 3, 2009. On February 10, I authorised a portfolio officer to investigate the complaint, and notified the parties of this fact. The notification letter included the following statement:

> It is anticipated that this review will be completed by Thursday, May 07, 2009; however, I may extend this period if additional time is needed. I will notify you in writing if the date is extended.

[para 5] On April 24, 2009, I extended the time for completing the review to July 31, 2009. The matter was not resolved at the investigation stage, and proceeded to adjudication. On June 18, 2009, the Director of Adjudication wrote to the parties to indicate that the Adjudication Unit had received the file. This letter included the following statements:

> If the Commissioner decides to proceed with an Inquiry, a Notice of Inquiry will be sent to all Parties giving details about the issues and the process. This will occur 21/2 to 3 months before the scheduled inquiry date.
>
> As this matter will take longer than 90 days to complete, the Commissioner has authorized me to notify you that he is extending the time for completing the review in this case, in accordance with section 50(5) of the *Personal Information Protection Act*. The anticipated date for completion of the review is June 30, 2010. An Order will be issued thereafter, which normally happens approximately 6 months later.

[para 6] As already noted, the objection has been brought before expiry of the anticipated date for completion of the review which is set out in the letter sent to the parties by the Director of Adjudication.

[para 7] In my view, the presumption of termination has not arisen in the present case.

[para 8] I have noted the Court's query in the ATA case as to whether there can be more than one extension, and that there was more than one extension in this case. However, I also note that first stage of the process (the investigation stage), which resolves approximately 90 percent of the requests for review that come before this office, commonly takes up most or all of the 90-day period mentioned in section 50 of the Act. The steps taken in investigation 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) which may or may not be accepted by the parties. 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.

[para 9] Thus matters that go to inquiry will more often than not do so only after the 90-day period has expired, but it cannot be known until the first stage has been concluded whether an inquiry will be necessary. Therefore, it makes more sense to issue an initial extension if it is anticipated that more time will be required to resolve the matter at the initial investigation stage, and to issue a subsequent one if the matter goes to inquiry. The alternative would be to issue an initial extension for all cases that is long enough to cover both the investigation and adjudication stages. However, since such a long extension is in fact not required in the vast preponderance of cases, this would be inaccurate and misleading in most cases, and would not be a reasonable practice for this office to adopt. It is my view, therefore, that it is more reasonable to interpret the legislation as permitting more than one extension, and as permitting such extensions as are necessary to deal with the steps that must be taken in a particular matter, as it unfolds.

[para 10] Since in this case each time extension was done before the previous period had expired, and in accordance with my conclusion that the legislation permits more than one extension if such is required, I find that the time rules in section 50 of the Act have not been breached in this case. Accordingly, the presumption of termination has not arisen, and it is not necessary for me to review the factors which the Court directed me to review in the ATA decision to determine if the presumption of termination has been overcome.

[para 11] The ATA has 45 days within which it may take this decision to judicial review (See *Alberta (Employment and Immigration) v. Alberta Federation of Labour*, 2009 ABQB 344, at paragraph 66, in which Verville, J. held that a procedural decision of an adjudicator is an order within the terms of section 74 of the *Freedom of Information and Protection of Privacy Act* (which is parallel to section 54 of the *Personal Information Protection Act*.) If it does not do so, a Notice of Inquiry will issue to the parties after that time.

[para 12] I make some concluding observations. One is that objections to time extensions add steps that themselves extend the time a matter takes, and expend the resources of this office that could otherwise be used to decide substantive issues. The ATA's complaint is about the time taken on this matter, yet its objection has further delayed the process.

[para 13] Further, the objection seems intended to ultimately defeat the purposes of the Act. I recognize that a party acts within its rights in bringing an objection based on timing, and organizations that are prejudiced in their ability to respond by the passage of time should not hesitate to do so. However, the ATA has not indicated how it would be prejudiced if the matter were to proceed. A primary purpose of the Act is to enable me to provide direction to organizations as to whether they are in compliance with their duties under the legislation. In the absence of such prejudice, I would ask respondent organizations, even private ones, to consider whether it is in their own and the public interest to make objections for the purpose of avoiding direction as to how to meet their duties under the legislation. As well, it is disingenuous for organizations to selectively rely on the timing provisions of the Act, or not, depending on whether doing so meets their own interests.

[para 14] My final observation relates to the tone of the ATA's letter. It states:

> As neither of the tests in paragraph 35 [of the ATA case] can be satisfied in this case, I have concluded that this notice of your default is necessary and should suffice to terminate the inquiry process, in accordance with the presumptive consequence set out in paragraph 37(2) [of the ATA case].
>
> Kindly confirm to the parties at your very earliest opportunity that the inquiry is hereby terminated. Thank you for your immediate attention to this matter.

The decision as to whether this inquiry is to continue must be made by me having regard to the submissions of both parties and the facts and law I regard as relevant. This demand that I terminate the inquiry, at my earliest opportunity, simply on the basis of the ATA's "notice of my default", reflects a misunderstanding of the different roles of the parties and the decision maker in this process. The ATA may put forward its views and make submissions, but it is not the decision-maker. Furthermore, while parties need not be deferential, they must be appropriately respectful of the role of the tribunal. I concur with the comment of the Complainant in this case that the demand made by the ATA, as quoted above, is not appropriately respectful.

Frank Work, Q.C.
Information and Privacy Commissioner