Access to Information and Protection of Privacy Act

Department of Justice

Request for Review ATP18-63R

SUBMISSIONS

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FACTS

1. On November 7, 2018, the Applicant made a request for access to information in the custody or control of the Department of Justice.

2. On December 6, 2018, the Records Manager advised the Applicant that the Department had granted access, in part, to 224 pages of records responsive to the access request.

3. On December 7, 2018, the Applicant requested a review under s. 48 (1)(b) of the ***Access to Information and Protection of Privacy Act*** ("***ATIPPA***") of the Department's decision to refuse access in part.

4. The Information and Privacy Commissioner authorized an investigator to try to settle the matter in accordance with s. 51.

5. Between December 7, 2018 and February 27, 2019 the parties arrived at a partial settlement.

6. The period prescribed by s. 52(6) for completing an inquiry is a maximum of 90 days after the Commissioner's receipt of the request for review, or within up 150 days if extra time is needed for mediation.

7. The statutory period for the inquiry in this matter therefore ended no later than March 7, 2019 (or May 7, 2019, if additional time was needed for mediation).

ARGUMENT

LIMIT OF COMMISSIONER'S POWERS

8. One of the fundamental elements of the rule of law is that a person given powers (or duties) under a statute may exercise those powers (or perform those duties) only in accordance with the terms of that statute. No person acting under a statute has any authority to take any action beyond the limits of those statutory power simply because those actions are seen as being in the public interest.

Roncarelli v. Duplessis, [1959] SCR 121, at pp. 142-143, 154-155, 158.

ROLE OF THE COMMISSIONER

9. The Commissioner's powers and duties under ATIPP are set out in s. 42:

> 42 In addition to the commissioner's powers and duties under Part 5 with respect to reviews, the commissioner is responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may
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> (a) inform the public about this Act;
>
> (b) receive complaints or comments from the public concerning the administration of this Act, conduct investigations into those complaints and report on those investigations;
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> (c) comment on the implications for access to information or for protection of privacy of existing or proposed legislative schemes or programs of public bodies;
>
> (d) authorize the collection of personal information from sources other than the individual the information is about; and
>
> (e) report to a Minister information and the commissioner's comments and recommendations about any instance of improper administration of the management or safekeeping of a record or information in the custody of or under the control of a public body.

Access to Information and Protection of Privacy Act, c. 1, s. 42.

10. Because the Commissioner has already addressed the issue of time limits under the ***Health Information Privacy and Management Act***, the differences between the powers and duties of the Commissioner under the two statutes are worth noting.

> Decision #HIP16-021, Department of Health and Social Services, October 6, 2017 ("***HIPMA Time Limit***").

11. Under ***HIPMA***, the Commissioner has a statutory responsibility for "overseeing" (as opposed to merely "monitoring") how that Act is administered to ensure that its purposes are achieved. The Commissioner also has a broader remit in terms of advising custodians and promoting best practices.

12. The other suggestive difference in the powers and duties set out under the two Acts is that s. 42 of ***ATIPPA*** explicitly sets out the Commissioner's authority to receive complaints, conduct investigations into them, and issue reports on the investigations. There is no comparable provision in s. 92 of ***HIPMA***. This emphasis on moving through the review process from complaint to report supports the perspective that the timely completion of that process is of particular importance under ***ATIPPA***.

ADMINISTRATIVE DECISION-MAKERS

13. The Supreme Court of Canada recently offered guidance to administrative decision-makers engaged in statutory interpretation:

> [120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

> [121] The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.
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> ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65, at paras. 120-121.

14. The Court also underscored that precise or narrow statutory language may mean that there is only one "reasonable" interpretation of a statutory provision possible for an administrative decision-maker:

> [68] Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker — perhaps limiting it one.
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> ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65, at para. 68.

PRESUMPTION OF CONSISTENT EXPRESSION

15. The presumption of consistent expression means that the same word should be given the same meaning wherever it is used in a statute. In the absence of very clear language indicating a different legislative intention, a court should not conclude that that a term means one thing for some purposes, but not for others.

> ***R. v. Middleton***, 2009 SCC 21, at paras. 11-12.
> ***Thomson v. Canada (Deputy Minister of Agriculture)***, [1992] 1 SCR 385, at p. 400.

"MUST" IN ***ATTIPA***

16. The word "must" is used 72 times in the body of ***ATIPPA***.

17. In 1 instance, the word is not used in the imperative mood.[1]

18. The word is used in the imperative mood in every other instance. The context in each case makes it clear that the Legislative Assembly intended to use that mood, indicating that the requirement, condition, or step was not optional or discretionary, but obligatory.

    (a) In 6 instances, the imperative obligation is made operative or inoperative on specified conditions.[2]
    (b) In 6 instances, the imperative obligation is subject to explicit exceptions.[3]
    (c) In 9 instances, the imperative obligation is qualified by a reasonableness standard or by the phrase "if practicable".[4]
    (d) In 1 instance, the purpose for the time period of the imperative obligation is explicitly identified.[5]
    (e) In 1 instances, the time for performing the imperative obligation and the standard to which it must be performed are set in relation to other statutory provisions or purposes.[6]
    (f) In the other 48 instances, including s. 52(6), the imperative obligation appears without condition, exception, or qualification.

1. ***ATTIPPA***, s. 12(1)(b).
2. ***ATTIPPA***, ss. 14(4), 20(2), 24(1), 24(2), 27(1), 30(2), and 30(3).
3. ***ATTIPPA***, ss. 13(1), 17(2), 30(1), 30(2), 44(1), and 44(3).
4. ***ATTIPPA***, ss. 7, 10, 11(1), 26(1), 28(1), 28(2), 31, 33, 44(3),and 60(3).
5. ***ATTIPPA***, s. 34.
6. ***ATTIPPA***, s. 9.

EXTENSIONS OF TIME

19. Where the Legislative Assembly wished to give the Commissioner the authority to extend the time for taking a step in the review process, it did so explicitly.[7]

20. The Legislative Assembly also made explicit provision to allow the Records Manager to extend the time for responding to an access request.[8]

MANDATORY V. DIRECTORY

21. The Supreme Court of Canada has made it clear that in considering whether a provision is mandatory or directive the key issues are:

    (a) the object of the statute; and

    (b) the effects of ruling one way or the other (*i.e.*, "directory" or "mandatory").

    M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., [1999] 2 SCR 961, at para. 44.

COMMISSIONER'S OBLIGATION TO COMPLETE

22. Unlike many of the imperative obligations imposed elsewhere in ***ATIPP***, the obligation imposed on the Commissioner by s. 52(6) to complete an inquiry is entirely unconditional and unqualified.

23. The Commissioner's obligation to complete the inquiry within a set period of time is not, for example, conditional on the Commissioner being satisfied that all potentially relevant evidence has been collected within that time.

24. The Commissioner's obligation to complete the inquiry is also not a "reasonable effort" obligation, unlike the obligations set out in ss. 7, 10, and 31, for example.

7. ***ATTIPPA***, ss. 49(1)(d).
8. ***ATTIPPA***, s. 12.

25. Finally, the Commissioner is not given any power to allow a longer period for the completion of the investigation. This contrasts with the power given to the Commissioner in s. 49(1)(d) to allow a longer period for the delivery of a request to review.

26. All of which is entirely consistent with an intention by the Legislative Assembly to create an expeditious process for the resolution of disputes over access to records, with firm deadlines at each stage of the process (subject only to an explicit power of extension).

COMMISSIONER'S OBLIGATION TO REPORT

27. Under s. 57, after completing a review, the Commissioner "must prepare a report setting out" the Commissioner's findings and recommendations, with reasons.

28. The "must" in s. 57 cannot be directory, rather than mandatory, because it would completely defeat the purpose of the Act if the Commissioner could exercise a discretion to refuse to issue a report, or delay its preparation and delivery indefinitely.

29. The preparation and delivery of a report to both the applicant and the public body is therefore the sort of statutory obligation that may be enforced by an applicant (or a public body) obtaining an order in the nature of *mandamus*.

30. In an analogous situation under the mediation provisions of the Ontario ***Insurance Act***, the application judge in first instance suggested that when the time for completing a mediation had expired before the process was substantively complete, the mediator could still meet the obligation to report on its results and make a recommendation, while noting the expiration of the deadline.

Cornie v. Security National Insurance Co., 2012 ONCA 837, at paras. 44-45.

31. In confirming the mandatory nature of the time limit under the Ontario legislation, the Court of Appeal approached the point from a different perspective, but described the application judge's reasons as "thoughtful" and did not cast any doubt on his reasoning.

Cornie v. Security National Insurance Co., 2012 ONCA 837, at para 45.

32. Following that suggested procedure, on the expiration of the time limit set by s. 52(6), the Commissioner could issue a report with a recommendation, based on whatever information the Commissioner had accumulated to that point, and note that the expiration of the time limit had prevented further investigation.

HEARING ON THE MERITS

33. Under s. 59, once a report has been prepared and delivered as required by s. 57, an applicant may appeal to the Supreme Court of Yukon if:

(a) the Commissioner finds that the public body is authorized or required to refuse access; or

(b) the public body refuses to follow the Commissioner's recommendation to give access.

34. Under s. 60(1)(a), the Supreme Court is not confined to an review of the Commissioner's decision. The Court may conduct a new hearing. The Court is therefore not limited to reviewing the record before the Commissioner, but may consider any matter that the Commissioner "could have considered", whether or not the Commissioner did, in fact, consider it.

35. In addition, under s. 60(2), the Court is given the broadest possible power to examine any record despite any "any other Act or any privilege available at law".

36. The Supreme Court of Yukon thus has a fact-finding capacity that is in all respects at least the equal of the Commissioner's and, in some respects, exceeds it.

37. Therefore, an applicant is not deprived of the ability to have a full hearing on the merits of a review because the Commissioner has lost the ability to continue with the review after the time period in s. 52(6) has expired.

38. Similar appeal provisions exist in ss. 113-116 of ***HIPMA***. These were noted in the ***HIPMA Time Limit*** Decision, but the impact of the Commissioner's obligation to issue a report was not fully considered in the analysis. Indeed, the Decision simply assumed that a report could not be issued and that an applicant would be therefore be left without a remedy:

> [76] If subsections 103 (2) and (3) are found to be mandatory, the Complainant would lose his ability to have his Complaint addressed and the Custodian would not be held accountable for potential non-compliance. There is no appeal mechanism available to the Complainant. Appeal under HIPMA can only occur after a consideration is complete, a report issued and when a Custodian refuses to follow the recommendations of the IPC. The prejudice to the Complainant, as a result of a finding that these subsections are mandatory, is clear.
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> ***HIPMA Time Limit***, at para. 76.

39. It may well be that where the consequence of holding a time limit to be mandatory is to deprive a party of a right to have a complaint addressed, a discretion to provide relief should be implied.

40. However, this is not the case here. To the contrary, it is only by treating the obligations in ss. 52(6) and 57 as mandatory that an applicant's right to have a matter processed in a timely fashion can be secured.

41. If the completion and reporting obligations imposed on the Commissioner are treated as directory only, then there is no way for an applicant to ensure that a review moves through the review, report, and appeal stages in a timely manner—or, indeed, at all.

42. The danger of treating these provisions as directory is illustrated by the history of this case, where it is asserted that the Commissioner has:

    (i) the authority to resume a review process that has already extended more than a year past the statutory 90-day deadline, and

    (ii) no obligation to complete the review in any fixed period of time.

POLICY OF STATUTORY TIME LIMITS

43. It is almost a tautology to say that the general purpose of time limits for the performance of duties by statutory officers is to ensure that they attend to those duties in a timely manner. In the case of ***ATIPPA***, this means that reviews can proceed through the investigation, decision, and appeal process in both a timely and a predictable manner.

44. The imposition of a time limit for the completion of the Commissioner's review is therefore properly seen as an integral part of the Legislative Assembly's intention that issues over access to records or breaches of privacy are dealt with promptly and efficiently.

    Cornie v. Security National Insurance Co., 2012 ONCA 837, at paras 29-30, and 43.

ALBERTA CASE LAW

45. The ***HIPMA Time Limit*** decision relied heavily on a group of Alberta cases that examined the comparable time limits under similar Alberta legislation.

    Freedom of Information and Protection of Privacy Act, RSA 2000, c. F-25, s. 69(6).
    Personal Information Protection Act, S.A. 2003, c. P-6.5, s 50(5).

46. The starting point in that line of cases is the ***KBR*** decision, where the court held that the completion time specified in the Alberta legislation was mandatory.

    Kellogg Brown and Root Canada v. (Alberta) Information and Privacy Commissioner, 2007 ABQB 499 ("***KBR***").

47. In ***Alberta Teacher's Association***, the Alberta Court of Appeal approved of the characterization of the time limit as mandatory, and concluded that the "presumptive consequence" of failure to complete the inquiry in time was the termination of the inquiry. However, the court went on to hold this presumptive consequence could be overcome by the Commissioner showing both:

    (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, and

    (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 legislation.

    Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner), 2010 ABCA 26, at paras. 35-36.

48. On appeal, the Supreme Court of Canada explicitly declined to address this issue on the grounds that it did not arise.

    Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61, at para. [76.

49. The Alberta Information and Privacy Commissioner has accepted that failure to complete an inquiry by the statutory deadline raises a presumption of termination that may only be overcome by the Commissioner addressing the two factors identified by the Court of Appeal in ***Alberta Teachers' Association***.

    Edmonton (Police Service) (Re), 2010 CanLII 98612, at paras. (AB OIPC).
    Alberta Employment and Immigration (Re), 2011 CanLII 96702, at paras. 11-13 (AB OIPC).

50. Even if the Alberta Court of Appeal's two-factor test were to be adopted in Yukon, there is nothing in the record of this case that addresses either of them.

DISADVANTAGES OF DIRECTORY "MUST"

51. If the time limit in s. 52(6) is read as being merely directory, then a review might extend for an indefinite time. Without a fixed time for the completion of a review, an applicant would be left without any way to compel the Commissioner to complete an inquiry, come to a decision, and issue the report required by s. 57(1).

52. In other words, treating the time limit in s. 52(6) as directory would allow for indefinite delays in processing reviews, potentially delaying applicants access to records that they would otherwise be entitled to see or from obtaining redress that they would otherwise be entitled to.

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AUTHORITIES

CASES