Yukon Information and Privacy Commissioner

DECISION

File ATP18-63R

Pursuant to subsection 52 (1) of the

Access to Information and Protection of Privacy Act

Diane McLeod-McKay, B.A., J.D.

Information and Privacy Commissioner

July 27, 2020

Summary

After the time limits in subsection 52 (6) of the *Access to Information and Protection of Privacy Act* expired while completing a review into the decision of the Department of Justice (Department) to withhold portions of the records requested by an Applicant, the Department took the position that the Information and Privacy Commissioner (IPC) had lost jurisdiction to complete the Inquiry. After conducting an analysis to determine whether the time limits are mandatory or directory, the IPC concluded they are directory and found that, as a result, she did not lose jurisdiction to complete the Inquiry despite being outside of the timeline in subsection 52 (6).

Table of Contents

Statutes Cited:

Access to Information and Protection of Privacy Act, RSY 2002 c1

Health Information Privacy and Management Act, SY2013, c 16

Interpretation Act, RSY 2002, c125

Personal Information Protection Act, SA 2003 c P-6.5

Freedom of Information and Protection of Privacy Act, RSA 2000, cF-25

Cases and Decisions Cited:

Vancouver Island Railway, An Act Respecting, Re, [1994] 2 S.C.R. 41 (SCC)

Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), 1995 CanLII 50 (SCC)

Dagg v. Canada (Minister of Finance), 1997 CarswellNat 869 (SCC)

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

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 Teacher's Association v. Alberta (Information and Privacy Commissioner), 2010 ABCA 26

Edmonton (Police Service) (Re), 2010 CanLII 98612

Alberta Employment and Immigration (Re), 2011 CanLII 96702

Alberta Teacher's Association v. Alberta (Information and Privacy Commissioner), 2011 SCC 61

HIP16-02I Decision, Department of Health and Social Services, October 6, 2017, (YT IPC)

Order F2006-031, Edmonton Police Service, September 22, 2008, (AB IPC)

Order F2007-031, Grande Yellowhead Regional Division No. 35, November 27, 2008, (AB IPC)

Explanatory Note:

All provisions cited herein are to the *Access to Information and Protection of Privacy Act* (ATIPP Act) unless otherwise stated.

I. BACKGROUND

[1] On November 7, 2018, the Applicant made a request for access (Access Request) to information in the custody or control of the Department.

[2] On December 6, 2018, the Records Manager informed the Applicant that the Department had granted access in part to 224 pages of records responsive to the Access Request. Four records were redacted under subsection 18 (a) of the ATIPP Act.[1]

[3] On December 7, 2018, the Applicant requested a review under paragraph 48 (1)(b) of the ATIPP Act. As a result, the IPC authorized an investigator to try to settle the matter under review in accordance with section 51 of the Act.

[4] Settlement was attempted between December 7, 2018 and February 27, 2019. The settlement process was unsuccessful in resolving the redaction issue and the matter proceeded to Inquiry under subsection 52 (1).

[5] On February 28, 2020, the IPC requested additional submissions from the Department in order to decide whether the subsection 18 (a) authorized the Department to refuse access to information severed from four records. She requested that the information requested be provided to her by March 13, 2020.

[6] On March 13, 2020, the Department's response to the request was "…it is our view that the Commissioner is without authority to continue with this matter. Accordingly, we respectfully decline to provide further evidence as requested."[2]

[7] On March 17, 2020, the IPC informed the parties that as a result of the Department's jurisdictional challenge, the IPC would decide whether she had lost jurisdiction to continue the Inquiry as a result of being outside the timelines under subsection 52 (6). She also invited each to provide submissions on the jurisdictional issue.

[1] Response from the Records Manager dated December 6, 2018.
[2] March 13, 2020, letter from Department, at p.1.

II. JURISDICTION

[9] Subsection 5 (1) provides persons, referred to in the Act as an 'applicant', with a right of access to any record in the custody or under the control of a public body. An access request must be made to the records manager.[3] Once received, the records manager is required to pass on the access request to the public body identified therein.[4] The public body must then decide what its response will be to the access request and pass this information on to the records manager. The records manager is obligated under subsection 13 (1) to tell the applicant:[5]

> *(a) whether or not the applicant is entitled to access the record or to part of the record;*
>
> *(b) if the applicant is entitled to access, where, when and how access will be given; and*
>
> *(c) if access to the record or part of the record is refused,*
>
> > *(i) the reasons for the refusal and the provision of this Act on which the refusal is based,*
> >
> > *(ii) the title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
> >
> > *(iii) that the applicant may ask for a review under section 48.*

[10] Where the public body refuses access to part of a record in an access request, an applicant may ask for a review of that decision.

[11] The Applicant in the matter before the IPC requested the IPC review the decision to refuse access to parts of the records. The IPC's authority to review a refusal to grant access to a record is under paragraph 48 (1)(a) of the ATIPP Act. The Department is a public body under the ATIPP Act.

[12] Once a request for review is received under paragraph 48 (1)(a), the IPC may try to settle the matter pursuant to section 51. If settlement is unsuccessful, the IPC may then conduct an Inquiry into the refusal under subsection 52 (1).

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[3] Subsection 6 (1).
[4] Section 9.
[5] Subsection 8 (a) and subsections 9 (a) and (b).

[13] With respect to the issue, the IPC may decide all questions of fact and law arising out of an Inquiry under subsection 52 (1). The question of whether the IPC has lost jurisdiction for not completing the review in accordance with the timelines in section 52 (6) is a question arising during the course of an inquiry.

III. ISSUE

[14] The issue that I must decide is as follows.

> ***Has the IPC lost jurisdiction to complete the review as a result of not completing the Inquiry in accordance with the timelines set out in subsection 52 (6)?***

Submissions from the Parties

[15] The Applicant provided the following submissions on the issue. Their position is that the IPC has not lost jurisdiction to continue the Inquiry because the time limits in subsection 52 (6) are directory.

> *… I would encourage the IPC to take the same position on timelines for reviews as laid out in the ATIPP Act and that she took in decision HIP16-02I – that the time limits laid out in 52(6) are directory, not mandatory, and therefore a loss of jurisdiction has not occurred.*
>
> *Although that case involved a complaint under HIPMA and a different public body, I submit there are several parallels between that case and the situation at hand.*
>
> *Section 52(6) of the ATIPP Act is nearly identical in wording, and I would suggest identical in intent, as Section 103(2) and 103(3) of HIPMA.*
>
> *As well, like in HIP16-02I, I as the applicant have no recourse to my complaint other than going through the process provided in the legislation.*
>
> *The opening section of the ATIPP Act states that the purposes of the Act include "(making) public bodies more accountable to the public" by, among other things, "giving the public a right of access to records" and "providing for an independent review of decisions made under this Act."*
>
> *For the independent review to suddenly grind to a halt would suggest that a thorough, fair review process that doesn't conform exactly to the guidelines in the act is something to be punished. It would suggest that, in theory, a public body could simply stall the process until the timelines in the act are exceeded and escape accountability.*

I don't believe those outcomes are in the spirit of the Act, or to the benefit of anyone besides the department. To stop the inquiry now on account of a loss of jurisdiction shields the department from proper scrutiny and sets a dangerous precedent for other public bodies to follow, to the loss of me, future applicants, and the principles of transparency and access to information.

[16] The Department provided lengthy submissions that are attached hereto as Appendix A. The Department's position on the issue is that the IPC has lost jurisdiction to complete the Inquiry. A summary of its reasons based on its submissions are as follows.[6]

a. The IPC must act within the scope of authority granted under the ATIPP Act.

b. The general power of the IPC is to 'monitor' how the ATIPP Act is administered to ensure that its purposes are achieved. This power differs from the IPC's general power under HIPMA which is to "oversee" administration of that Act by custodians.

c. There are also differences between HIPMA and the ATIPP Act such that the authority granted to the IPC under the ATIPP Act as it relates to 'complaints' differs such that the process for investigating complaints under the ATIPP Act does not support a finding that the time limits in subsection 52 (6) are directory.

d. The rules of statutory interpretation apply to administrative decision makers interpreting their own statute and their decisions must reflect that they followed these rules.

e. The presumption of consistent expression in statutory interpretation requires that terms used in the ATIPP Act be given the same meaning.

f. The term "must" as it appears in the ATIPP Act is primarily used in the "imperative mood" making it clear that the legislature intended that the requirement associated therewith is obligatory.

g. If the Legislature intended that the IPC be authorized to extend the time to conduct a review, it would have done so expressly, which it did not.

h. The timelines imposed on the IPC under subsection 52 (6) are "entirely unconditional and unqualified" and is not "conditional on the [IPC] being satisfied that all potentially relevant evidence has been collected within that time."[7]

[6] See Appendix A for the Department's complete submissions.
[7] Department's submissions, number 22 and 23.

i. The timelines imposed are consistent with the intent of the Legislature to resolve disputes over access to information in a timely manner.

j. The IPC's obligation to prepare a report, which is a 'must' in the ATIPP Act, cannot be directory because if it is, it would "completely defeat the purpose of the Act if the [IPC] could exercise discretion to refuse to issue a report, or delay its preparation and delivery indefinitely".[8]

k. The expiration of the timelines in subsection 52 (6) does not prevent the IPC from issuing a report with recommendations "based on whatever information the [IPC] had accumulated to that point, and note that the expiration of the time limit had prevented further investigation."[9]

l. An applicant does not lose the ability to appeal to the Yukon Supreme Court even if the IPC has lost jurisdiction to complete a review because the Court has the authority under the ATIPP Act to conduct a new hearing.

m. The decisions issued under HIPMA wherein the IPC's authority to complete a consideration beyond the time limit in section 103 failed to consider whether the IPC could issue a report even though the timelines expired, which if issued would provide the complainant under HIPMA with a remedy, i.e., the right to appeal.

n. To preserve an applicant's right to have a decision regarding access to information in a timely manner or "at all", the time limit in subsection 52 (6) must be interpreted as mandatory.[10]

o. The purpose of time limits are to ensure that statutory officers fulfill their duties in a timely manner and the time limit in the ATIPP Act is "part of the Legislature's intention that issues over access to records or breaches of privacy are dealt with promptly and efficiently."[11]

p. The case law on whether the time limits for Alberta's Information and Privacy Commissioner to complete a review under Alberta's *Personal Information Protection Act* does not support that subsection 52 (6) is directory.

[8] Department's submissions, number 28.
[9] Department's submissions, number 32.
[10] Department's submissions, number 41.
[11] Department's submissions, number 43.

q. A finding that the time limits in subsection 52 (6) are directory leaves the applicant without any certainty as to when the IPC will issue her report and allow for "indefinite delays" in receiving a decision about their access to information held by a public body.[12]

[17] I will first address the Department's submissions a through d.

[18] There is no question that the IPC must act within the scope of her authority granted under the ATIPP Act. The rules of statutory interpretation apply to any interpretation of the ATIPP Act by the IPC the same as any other person interpreting the Act. I agree with the Department that to ensure those rules are followed, the IPC must demonstrate within her decision that the interpretation is in accordance with these rules.

[19] The Department makes a number of comparison's between HIPMA and the ATIPP Act for the purposes of determining whether the IPC's finding that the time limits for the IPC to complete a consideration in HIPMA are directory are relevant to determining whether the time limits in the ATIPP Act for the IPC to complete a review are directory. In my view, there can be no such reliance given that the rules of statutory interpretation require that I apply the modern approach to statutory interpretation. That is that the words of an Act, here the ATIPP Act, are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (Purposive Analysis).[13]

[20] That said, the case law referred to in the HIPMA decisions is relevant to determining whether the time limit in subsection 52 (6) of the ATIPP Act is directory or mandatory.

IV. LAW

[21] The test for determining whether a time limit in a statute is mandatory or directory is set out by the Supreme Court of Canada (SCC) in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development).*[14]

> *When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only…*
>
> *…<u>This Court has since held that the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is</u>*

[12] Department's submissions, number 52.
[13] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC), at para. 21.
[14] [1995] 4 SCR 344, 1995 CanLII 50 (SCC).

mandatory or directory: British Columbia (Attorney General) v. Canada (Attorney General), 1994 CanLII 81 (SCC), [1994] 2 S.C.R. 41.[15] [My emphasis]

[22] A number of cases from Alberta in which the courts and Alberta's Information and Privacy Commissioner (AB IPC) evaluated whether the timelines for the AB IPC to complete a review in Alberta's public and private sector legislation are informative on how to interpret whether the time line in subsection 52 (6) of the ATIPP Act is directory or mandatory. Below are the relevant portions of these cases taken from my HIPMA decisions. Where it is pertinent to the issue before me, I have also set out my analysis of these cases as contained in those decisions.

[23] Alberta Court of Queens Bench - *Kellogg Brown & Root v. Alberta (Information and Privacy Commissioner)*[16]

In KBR, the Court examined whether subsection 50 (5) of Alberta's Personal Information Protection Act (PIPA) is mandatory or directory. This subsection states as follows. An inquiry into a matter that is the subject of a written request referred to in section 47 must be completed within 90 days from the day that the written request was received by the Commissioner unless the Commissioner

> *(a) notifies the person who made the written request, the organization concerned and any other person given a copy of the written request that the Commissioner is extending that period, and*
>
> *(b) provides an anticipated date for the completion of the review.*

The relevant facts in KBR were that the Office of Alberta's Information and Privacy Commissioner (AB OIPC) received a complaint from an individual under PIPA on September 13, 2004. The complaint was that Kellogg Brown and Root Canada and Syncrude Canada Limited (Organizations) did not have authority to collect the complainant's personal information derived from pre-employment alcohol and drug testing.

Settlement of the complaint failed and on December 12, 2005, the complainant requested a formal inquiry. The Organizations were subsequently notified August 11, 2006, by the AB OIPC that the inquiry was proceeding. They never received a notification of an anticipated date for the completion of the investigation. The investigation was never concluded and no report was never issued. Organizations applied to the Court for a declaration that Alberta's Information and Privacy Commissioner (AB IPC) had lost jurisdiction and that he is prohibited from proceeding with the inquiry.

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[15] *Ibid*. at para. 42.
[16] 2007 ABQB 499.

Justice Belzil identified that "there is no uniform test to determine whether the legislation is mandatory or directory, but, rather, one must consider all of the circumstances in deciding the issue." The circumstances considered by Justice Belzil were as follows:

> *a. the wording and context of PIPA,*
>
> *b. whether a finding that subsection 50 (5) is mandatory would have a negative operational impact on PIPA,*
>
> *c. the impact on the complainant and Organizations,*
>
> *d. whether there are alternative remedies available to the complainant and Organizations, and*
>
> *e. whether a finding that subsection 50 (5) is mandatory would be contrary to public interest,*

Following his consideration of these circumstances, Justice Belzil concluded that subsection 50 (5) is mandatory. He based his conclusion on the following.

> *a. PIPA requires the equal balancing of the rights of individuals to have their personal information protected and organizations to collect, use and disclose personal information for legitimate business purposes. Part of this balancing requires the impact of prejudice on both parties to an inquiry. The timelines in PIPA support that the legislature intended timely resolution of complaints. Use of the word "must" rather than "may" suggests the timelines are imperative. The wording of the subsection gives Alberta's Information and Privacy Commissioner (AB IPC) maximum flexibility with no temporal constraints in that he can control the timing of the inquiry simply by giving notice. The Organizations argued they would suffer prejudice from the delay over which they would have no control if the subsection was found to be directory the effect of which would "skew" the balance of rights. There was no evidence to suggest the AB IPC would suffer hardship.*
>
> *b. There is no risk, and no evidence was presented in support of a risk, that PIPA would suffer negative operational impacts if subsection 50 (5) is found to be mandatory.*
>
> *c. Organizations would otherwise be adversely affected by the delay with no remedy for timely resolution. The complainant loses the benefit of having his complaint resolved at inquiry but the result is "neutral" as to prejudice between the complainant and the Organizations.*

> *d. The complainant has alternative remedies through the human rights commission or a union grievance to have his complaint addressed whereas the Organization has no remedies.*
>
> *e. It is in the public interest to have complaints resolved in a timely fashion. A finding that the subsection is directory would undermine public confidence whereas a finding that it is mandatory will enhance PIPA's credibility.*[17]

[24] AB IPC's decision – Order F2006-031[18]

In Order F2006-031 dated September 22, 2008, the Edmonton Police Service (EPS) alleged as part of its submission into an inquiry conducted by the AB IPC that he had lost jurisdiction for not completing the inquiry in accordance with the timelines in subsection 69 (6) of Alberta's Freedom of Information and Protection of Privacy Act (FOIPPA). In that case, an applicant submitted a request for review of EPS's decision regarding his access to information request on June 30, 2005, under FOIPPA. Settlement failed and the AB IPC decided to conduct an inquiry and notified the parties about it on January 17, 2006. Due to a number of factors, including a request by the AB IPC to be provided with additional details from the EPS and extensions requested by the parties, the process of obtaining evidence for the inquiry ended sometime after April 14, 2008, but before September 22, 2008 (the date of the Inquiry Report).

The AB IPC found he had completed the inquiry in accordance with the timelines after determining that he had met the notice requirements for extension in the subsection. Despite this finding, he went on to conduct the five-part analysis put forth in KBR for determining if subsection 69 (6) is mandatory or directory.

In the first part of his analysis, the AB IPC undertook a comparison between FOIPPA and PIPA. His comments in this regard follow.

> *It is clear* [in FOIPPA] *that the rights of individuals to have their personal information protected is primary; there is no corresponding reference to the rights of public bodies. As is the case under PIPA, public bodies must meet the requirements of the FOIP Act in order to have the authority to collect, use and disclose personal information, so that they are not in contravention of the FOIP Act.*

[17] HIP16-02I Decision, Department of Health and Social Services, October 6, 2017, (YT IPC) at paras. 25-30.
[18] Order F2006-031, Edmonton Police Service, September 22, 2008, (AB IPC).

Section 69(6) of the FOIP Act is a provision that is very similar in wording to one which the Court has already interpreted under section 50(5) of PIPA, relative to which the Court reached the conclusion that section 50(5) of PIPA was mandatory. In my view, if all of the elements of the purpose provision of PIPA are taken into account, it may be seen that the purpose provision of PIPA does emphasize the rights of individuals and does subordinate the needs of organizations to these rights, as is also the case for the comparable provision in the FOIP Act. "Rights" versus "needs" are precisely the words used in the purpose provision of PIPA.

Therefore, in interpreting section 69(6) of the FOIP Act, I find that I cannot be guided by the Court's interpretation of section 50(5) of PIPA, which was based on its assessment of the purpose provision of PIPA.

The same observations apply to two other matters considered by the Court in Kellogg.

With regard to the "Impact on the Complainant and Affected Organizations", the Court engaged in an even balancing as between complainants and organizations, resulting in what was in its view a neutral result in terms of prejudice. Again, this conclusion also seems to overlook that the primary purpose of the legislation is to protect personal information, and consequently, I cannot take this part of the Court's analysis into account in interpreting section 69(6) of the FOIP Act.

As to the Court's consideration of whether a finding that section 50(5) of PIPA is mandatory would be contrary to the public interest, the Court's analysis again depended on the fact that it did not accord primacy to my role of protecting those who deal with organizations by ensuring that organizations deal with personal information in the restricted way prescribed by PIPA. Again, as section 69(6) of the FOIP Act gives primacy to the rights of individuals to have their personal information protected, I cannot analyze it in the same way that the Court analyzed section 50(5) under the "public interest" heading.

Thus, despite the conclusion about section 50(5) of PIPA that the Court in Kellogg reached when it took these matters into account, I will interpret section 69(6) of the FOIP Act independently of this part of the Court's analysis.

When conducting his purposive analysis of subsection 69 (6), the AB IPC considered the following.[19]

[19] The AB IPC was referring to Order 99-011 wherein the former AB IPC interpreted the time limit in FOIPPA, which was subsection 66 (6) in 1999.

Section [66(6)] *of the Act says that an inquiry "must" be completed within ninety days after receiving the request for review, unless the Commissioner extends that period. In this case, the ninety-day period was extended once, but was not extended again before it expired on October 30, 1998.*

Section 25(2)(c.1) of the Interpretation Act, R.S.A. 1980, c.I-7, says that "must" is to be interpreted as imperative, that is, as a command or compulsory. A "must" provision is also referred to as a "mandatory" provision.

On the wording alone, section [66(6)] *of the Act is a mandatory ("must") provision. However, the Act does not say what happens if there is non-compliance with this legislative requirement.*

In Blueberry River Indian Band v. Canada, [1995] 4 S.C.R. 344 (S.C.C.), the Supreme Court of Canada has said that, regardless of the mandatory wording of a statutory provision, the Court may nevertheless interpret the provision as directory in its effect (that is, as a "may" provision) if certain factors are present. The Court quoted Montreal Street Railway Co. v. Normandin, [1917] A.C. 170 (P.C.) as the case that summarized those factors:

> *When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provision to be directory only…*

The Court then went on to say:

> *This Court has since held that the object of the statute and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory: British Columbia (Attorney General) v. Canada (Attorney General), [1994] 2 S.C.R. 41.19*

The AB IPC's conclusion following this analysis was that subsection 69 (6) is directory. Despite the concern he expresses about taking the other four factors into account, given that they are case-specific considerations, he went on to consider them.

On the remaining four-factors, he concluded as follows.

ii. There are no alternate remedies available to the complainant to have his complaint addressed like there were in KBR. Nor are there any for the EPS. On this point, he noted that

simply "[w]aiting for my decision about whether it had authority under the FOIP Act does not amount to jeopardy."

iii. The prejudice claimed by EPS would not be suffered by the delay. He highlighted that "[t]he Public Body has already done the collection, use or disclosure that gave rise to the complaint and request for review. It is simply waiting to find out if it was right or not. Indeed, the prejudice, if any, accrues to the Complainant whose personal information continues to be held, used or disclosed, possibly in contravention of the FOIP Act."

iv. There are operational impacts as a result of the KBR decision. He indicated that the operational impact of the Court's decision "has been enormous" given that the decision resulted in "numerous" jurisdictional challenges and applicants and complainants "potentially losing rights." He added that "[a] finding that section 69(6) is mandatory has the potential to leave me without jurisdiction on all FOIP Act cases and inquiries in my Office, and render all FOIP Act orders of my Office a nullity, which would have a significant operational impact on the FOIP Act."

v. Public interest is served if subsection 69(6) is directory. In reaching this conclusion he stated the following.

> *The Court in Rahman found that the failure to commence a hearing within the prescribed time frame was not fatal to the jurisdiction of the Alberta College and Association of Respiratory Therapy. The Court observed that the purpose of the legislation was to resolve complaints as expeditiously as possible, serving the interests of the health profession, the public and the individual complainant. The committee charged with hearing the dispute was not merely adjudicating a private dispute. It was also responsible for serving and protecting the public interest. Considering the relative prejudices associated with an interpretation of the relevant provision as mandatory versus directory demonstrated no prejudice or at worst minimal prejudice if the provision was deemed directory, but substantial prejudice to the complainant and the public interest if the provision was deemed mandatory, in the Court's view. Accordingly, on balance the provision was to be interpreted as directory.*
>
> *Similarly, my role under the FOIP Act goes beyond providing remedies to complainants. As provided by section 53(1) of the FOIP Act, my role is also to ensure that the purposes of the FOIP Act are achieved, including the purpose set out in section 2(b), which is:*
>
> > *2(b) to control the manner in which a public body may collect personal information from individuals, to control the use that a public body may make*

> *of that information and to control the disclosure by a public body of that information,…*
>
> *I have addressed the balance of prejudice issue above. I have also already addressed the idea that I can avoid any problems by extending timelines and issuing completion dates. Thus, in my view, the conclusion in the Rahman case applies.*
>
> *The AB IPC added a sixth factor that he identified as "[d]egree of seriousness of the breach." For this factor, he indicated that if his extension letter did not meet the requirements of subsection 69 (6), then the breach was "merely technical or trivial" in that the parties were aware the procedure was ongoing and were engaged throughout the process. He added that "I find that my actions under 69 (6) should not be invalidated, based on the legislative intent regarding the consequences of non-compliance with subsection 69 (6)."*
>
> *The AB IPC then decided, after considering the relevant factors in this case, that subsection 69 (6) was directory.*
>
> *Using the same approach, the AB IPC reached the same conclusion in the other three orders when the EPS, on two occasions, and another public body, on a different occasion, challenged him on his jurisdiction to complete an inquiry under subsection 69 (6).*[20]

[25] Alberta Court of Queen's Bench decisions *Business Watch International Inc. v. Alberta (Information and Privacy Commissioner)* (Business Watch)[21] and *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)* (EPS)[22]

> *In Business Watch, the Court examined whether subsection 50 (5) of PIPA and subsection 69 (6) of FOIPPA is mandatory or directory.*
>
> *The relevant facts in Business Watch are as follows.*
>
> *a. A complainant made a complaint about the authority of pawnshops in Edmonton and the City of Edmonton (City) to collect personal information under PIPA and FOIPPA. The complainant was a pawn shop owner who initiated a test case to determine if the collection of personal information by pawnshops as required by a City bylaw and the subsequent collection of this information by the City, which uploads the information collected into a database in the custody of Business Watch International Inc., was authorized. The date of the complaint was January 30, 2006.*

[20] HIP16-02I Decision, Department of Health and Social Services, October 6, 2017, (YT IPC) at paras. 32-40.
[21] 2009 ABQB 10.
[22] 2009 ABQB 268.

b. On February 28, 2006, the AB IPC informed the complainant that he would conduct an inquiry. In late 2006, the AB IPC sent Notices of Inquiry to the complainant, City, and Edmonton Police Service (Public Bodies).

c. Between June 2006 and the hearing, which was held in January, 2007, a number of things occurred: submissions were exchanged; timelines for submissions were extended at the request of the parties; the complainant requested more time to retain and prep legal counsel for the oral hearing; the City requested the opportunity to submit affidavits of certain witnesses and time was extended to allow the affidavits to be prepared; and parties were provided the opportunity to update their submissions.

d. After a decision of the Ontario Court of Appeal was made on a similar issue, the AB IPC reconvened the inquiry as a written inquiry and requested submissions on that decision.

e. The KBR decision was released on July 30, 2007.

f. On August 2, 2007, the AB IPC informed the parties that he was extending the deadline for completing the inquiry and that the anticipated review date was September 30, 2008.

g. On February 15, 2008, the AB IPC issued his decision.

After determining that the standard of review of the AB IPC's decision is reasonableness, Justice Veit went on to conduct her analysis of whether the subsections are mandatory or directory. She identified the following as relevant in finding that the provisions are directory.

> *a. No timeliness purpose would be served by having the process restart, given that the matter could be restarted. In addition, if restarted, then the AB IPC would take care to meet the timelines.*
>
> *b. The decision had been issued. Therefore, no remedy is available to address the delay in completing the inquiry.*
>
> *c. It is in the best interest of the parties that the AB IPC has sufficient time to make necessary inquiries.*
>
> *d. An application for prohibition, as was the case in KBR, is not a relevant factor.*
>
> *e. The complainant did not complain about delay and a purposive analysis of PIPA and FOIPPA demonstrates that "one must conclude that the primary party for whose benefit deadlines were introduced was the complainant party: it is presumably that party who has the greatest interest in the prompt resolution of the complaint."*

f. In certain circumstances, parties other than the complainant would have an interest in timely resolution of a complaint "where, for example, there might be a pall thrown over that party by the very existence of an inquiry." The applicants for judicial review, Public Bodies, did not contest the jurisdiction to embark upon the inquiry nor did they point to any prejudice suffered by a delay.

In EPS, the Court examined whether subsection 69 (6) of FOIPPA is mandatory or directory.

The relevant facts in EPS are as follows.

a. On March 27, 2006, the AB IPC received a request to review a decision made by the Edmonton Police Service in response to an individual's request for access to records (Applicant). After settlement failed, the Applicant asked AB IPC to conduct an inquiry.

b. A Notice of Inquiry dated June 13, 2007 was issued to the parties. Submissions were exchanged and timelines extended. The ultimate deadline for submissions and rebuttals was September 5, 2007.

c. The KBR decision was released on July 30, 2007.

d. Letters dated August 1, 2007 were sent to the parties from the AB IPC indicting the AB IPC was extending the time to complete the inquiry with an anticipated completion date of February 1, 2009. On February 14, 2008, the AB IPC issued his decision.

e. Total time taken by the AB IPC was: 11 months to initiate the inquiry, 16 months to send the extension letters, and 22 and ½ months until the decision was issued.

After determining he was not bound to follow the KBR decision, distinguishing it on the basis that KBR was an application for prohibition while the matter before him was a judicial review, Justice Nielsen went on to analyse whether subsection 69 (6) is mandatory or directory. In finding the subsection directory, he determined the following as relevant.

a. A finding that the subsection is mandatory would conclude the inquiry. "[T]here would be nothing to prevent [Applicant] from restarting the process again from the beginning." The positions of the party and decision of the AB IPC would be the same. It would only delay the inevitable decision.

> *b. It is in the interests of the parties that the AB IPC have sufficient time to "conduct whatever steps he deems necessary to complete the Inquiry" which could not have occurred within the 90 days. He could have extended the timeframe but didn't. Had he done so there would be no question of his jurisdiction, therefore, "no purpose would be served" by restricting the AB IPC's ability to extend the time to complete the inquiry.*
>
> *c. The Applicant would suffer prejudice through no fault of his own. Some of FOIPPA's purposes may be defeated if the subsection is mandatory given that the Applicant "may in fact not be willing or able to recommence the process if the [AB IPC] was found to have had no jurisdiction to complete the Inquiry.*[23]

[26] The Department relies on the *Alberta Teacher's Association v. Alberta (Information and Privacy Commissioner)*[24](ATA) decision from the Alberta Court of Appeal in support that subsection 52 (6) is mandatory.

[27] In ATA, the Court was tasked with determining whether the time limits subsection 50 (5) of Alberta's PIPA are mandatory or directory.

[28] The history of ATA is as follows. Various complainants alleged that the Alberta Teacher's Association breached their privacy in contravention of Alberta's PIPA. After a lengthy investigation, the AB IPC found in favour of the complainants. It took the IPC 22 months from the initial complaint before extending the date the inquiry would be concluded, then seven months later an order was issued by an adjudicator on behalf of the IPC finding that ATA had contravened PIPA. The ATA applied for judicial review of the decision. The ATA argued that the decision did not comply with subsection 50 (5) of PIPA, which at the time of the inquiry, stated as follows.

> *An inquiry into a matter that is the subject of a written request referred to in section 47 must be completed within 90 days from the day that the written request was received by the Commissioner unless the Commissioner*
>
> *(a) notifies the person who made the written request, the organization concerned and any other person given a copy of the written request that the Commissioner is extending that period, and*
>
> *(b) provides an anticipated date for the completion of the review.*

[23] HIP16-02I Decision, Department of Health and Social Services, October 6, 2017, (YT IPC) at paras. 42-47.
[24] 2010 ABCA 26.

[29] The Court of Queen's Bench agreed with the ATA and quashed adjudicator's decision. The Court found that the deadlines in subsection 50 (5) were mandatory and the IPC had lost jurisdiction as a result of not completing the inquiry within the time requirements.

[30] The Court of Appeal (ABCA) held that the order to quash was correct and that failure to complete an inquiry within the deadline raises a presumption of termination that may be displaced by factors set out in a two-part test. The ABCA stated that the presumptive consequence could be rebutted by proving both of the following.

> *(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 PIPA.*

[31] The AB IPC appealed this decision to SCC. The SCC reinstated the adjudicator's order. The SCC found that the adjudicator implicitly decided that extending the 90 day period for the completion of an inquiry after the expiry of that period did not result in the automatic termination of the inquiry and that there was a reasonable basis for that decision. The SCC did not specifically rule on whether section 50 (5) of PIPA was mandatory or directory as this case did not deal specifically with the consequences of the failure to comply with the timeline in PIPA, but rather whether the adjudicator complied with the provision itself.

[32] The SCC, at para. 32, did, however, state that the IPC is in the best position to interpret their home statute:

> *The timelines question engages considerations and gives rise to consequences that fall squarely within the Commissioner's specialized expertise. The question deals with the Commissioner's procedures when conducting an inquiry, a matter with which the Commissioner has significant familiarity and which is specific to PIPA. Also, in terms of interpreting s. 50(5) of PIPA consistently with the purposes of the Act, the relevant considerations include the interests of all parties in the timely completion of inquiries, the importance of keeping the parties informed of the progression of the process and the effect of automatic termination of an inquiry on individual privacy interests. These considerations fall within the Commissioner's expertise, which centres upon balancing the rights of individuals to have their personal information protected against the need of organizations to*

collect, use or disclose personal information for purposes that are reasonable (s. 3 PIPA*).*[25] [My emphasis]

V. ANALYSIS

[33] The relevant portions of the ATIPP Act are as follows.

Right to ask the commissioner for a review

48(1) *A person who makes a request under section 6 for access to a record may request the commissioner to review*

(a) a refusal by the public body to grant access to the record;

(b) a decision by the public body to separate or obliterate information from the record;

(b.1) a decision by the records manager to declare the request abandoned;

(c) a decision about an extension of time under section 12 for responding to a request for access to a record; or

(d) a decision by the records manager to not waive a part or all of a fee imposed under this Act.

Mediation may be authorized

51 *The commissioner may try to settle or may authorize a mediator to investigate and to try to settle a matter under review.*

Inquiry by commissioner

52(1) *If the matter is not settled under section 51, the commissioner may conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.*

52(6) *An inquiry into a matter under review must be completed within 90 days after receiving the request for the review or within an additional period of up to 60 days if the additional time is needed for mediation of the review.*

[25] 2011 SCC 61.

Subsection 52(6)

[34] My Purposive Analysis of these provisions follow.

[35] In Yukon's *Interpretation Act*, it states that "[e]very enactment and every provision thereof shall be deemed remedial and shall be given the fair, large, and liberal interpretation that best insures the attainment of its objects."[26]

[36] The purposes of the ATIPP Act are set out in subsection 1 (1) as follows.

> ***1(1)*** *The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*
>
> *(a) giving the public a right of access to records;*
>
> *(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;*
>
> *(c) specifying limited exceptions to the rights of access;*
>
> *(d) preventing the unauthorized collection, use, or disclosure of personal information by public bodies; and*
>
> *(e) providing for an independent review of decisions made under this Act.*

[37] Three of the five purposes outlined in subsection 1 (1) of the ATIPP Act are relevant to the subject matter of the review and the issue. They are as follows.

a. government information should be available to the public;[27]

b. necessary exceptions to the right of access should be limited and specific;[28] and

c. decisions on the disclosure of government information should be reviewed independently of government.[29]

[38] In *Merck Frosst Canada Ltd. v. Canada (Health)* (Merck),[30] a decision by the Supreme Court of Canada, Cromwell J. writing for the majority stated the purposes of access to information legislation in Canada is to provide a right of access to information in records under the control of a government institution. Further, in *Dagg v. Canada (Minister of Finance)* the SCC held that the

[26] *Interpretation Act*, RSY 2002, c125 at section 10.
[27] Paragraph 1(1)(a) of the ATIPP Act.
[28] Paragraph 1(1)(c) of the ATIPP Act.
[29] Paragraph 1(1)(e) of the ATIPP Act.
[30] 2012 SCC 3, at para. 21.

"overarching purpose" of access to information legislation is to "facilitate democracy" and stated that "rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable."[31]

[39] Therefore, as access to information legislation is intended to facilitate one of the foundations of our society, democracy, the legislation must be given a broad and purposive interpretation.

[40] The scheme of ATIPP is as follows.

[41] The ATIPP Act applies to public bodies. A "public body" is defined in section 3 and includes the Department of Justice.

[42] Section 2 of the ATIPP Act states that the Act applies to all records in the custody or under the control of a public body including court administration records with some exceptions.

[43] Section 4 states that the ATIPP Act prevails over an Act or regulation which may conflict with the ATIPP Act unless expressly stated otherwise.

[44] Section 5 states that a person has a right of access to any record in the custody or control of a public body, including personal information about the applicant.

[45] Sections 15 through 25 establish the limited and specific exceptions to the right of access and outline when information may or must not be provided by a public body.

[46] The general powers and duties of the IPC are set out in section 42. They are as follows.

> *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*
>
> > *(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;*
> >
> > *(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;*

[31] *Dagg v. Canada (Minister of Finance),* 1997 CarswellNat 869 (SCC) at paras. 61-62.

> *(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.*

[47] Section 48 states that a person who makes a request under section 6 for access to a record may request the commissioner to review the following:

> (a) a refusal by the public body to grant access to the record;
>
> (b) a decision by the public body to separate or obliterate information from the record;
>
> (b.1) a decision by the records manager to declare the request abandoned;
>
> (c) a decision about an extension of time under section 12 for responding to a request for access to a record; or
>
> (d) a decision by the records manager to not waive a part or all of a fee imposed under this Act.

[48] Upon receiving a request for a review, section 51 states that the IPC "may try to settle or may authorize a mediator to investigate and try to settle a matter under review." If the matter is not settled, section 52 allows the IPC the discretionary authority to "conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry."

[49] Section 57 requires the IPC to prepare a report setting out their findings, recommendations, and the reasons for those findings and recommendations.

[50] Section 58 requires the public body to decide whether to follow the recommendations and give written notice of its decision to the IPC and the persons who were given a copy of the report within 30 days.

[51] An applicant has the ability under section 59 to appeal to the Yukon Supreme Court a decision of a public body not to follow the IPC's recommendation that a record or a portion of a record be provided or a determination by the IPC that a public body is authorized or required to refuse access to all or part of a record.

[52] The timelines in the ATIPP Act for the completion of a review in subsection 52 (6) is 90 days from the receipt of the request for review or 150 days if the timelines are extended to allow for settlement.

[53] The facts show the following.

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

b. On December 6, 2018, the records manager advised the Applicant that the Department had granted partial access to 224 pages of records responsive to the request.

c. On December 7, 2018, the Applicant requested a review under section 48 of the decision of the Department to refuse part of the records.

d. Settlement was attempted between December 7, 2018 and February 27, 2019 and was not successful in resolving the decision of the Department to refuse access to part of the records.

e. The Notice of Inquiry dated March 4, 2019 was sent to the parties requesting submissions by the deadlines below.

    i. In camera request by Department due: 3:00PM Wednesday March 13, 2019.

    ii. Department's initial submission due: 3:00 PM Friday March 22, 2019.

    iii. In camera request by Applicant due: 3:00 PM Friday March 29, 2019.

    iv. Applicant's reply submission due: 3:00 PM Friday April 5, 2019.

    v. Department's reply submission due: 3:00 PM Friday April 12, 2019.

f. On February 28, 2020, the IPC determined that she required additional evidence from the Department to decide whether subsection 18 (a) applied to the information severed from the records at issue. The same day, she informed the Applicant that she was seeking additional evidence from the Department for the purpose indicated.

g. On March 13, 2020, the Department responded that it was of the view that the timeline in subsection 52 (6) had expired with the result being that the IPC had lost jurisdiction to complete the Inquiry.

h. On March 17, 2020, the IPC informed the parties that she would decide whether she had lost jurisdiction.

[54] Based on these facts, the time for the IPC to complete the Inquiry was May 6, 2019, as additional time was used to facilitate mediation. Whether or not I lose jurisdiction as a result of surpassing the timeline in subsection 52(6) is determined on the analysis of whether the section is mandatory or directory.

[55] The word "must" is presumptively imperative and imposes an obligation to do something. However, the issue to be determined is not whether the word must is imperative, but whether there are consequences for non-compliance with subsection 52 (6). As the legislation is silent as to any consequences for non-compliance, it must be determined whether non-compliance can be cured or disregarded.

[56] If breaching an obligation or requirement imposed by “must” entails a nullity, the provision is said to be mandatory; if the breach can be fixed or disregarded, the provision is said to be directory.[32] The result of nullification and its effect on the parties and others, in the context of the object of the legislation are therefore key to the inquiry, which Iacobucci, J. described as “blatantly result oriented”.[33]

[57] Would interpreting the term "must" in subsection 52 (6) as mandatory do anything to advance the purpose of the legislation? Conversely, would interpreting this provision as directory interfere with a citizen's right to fully participate in democracy? The answer to both questions must, in my view, be "no”.

[58] If subsection 52 (6) is mandatory, non-compliance of any nature means that an applicant has lost their right to have their matter reviewed and the right to appeal to the Supreme Court.

[59] How to evaluate the factors set out in the tests to determine whether subsection 52 (6) is directory or mandatory must be based on the purposes of the ATIPP Act which differ significantly from the purposes in Alberta’s PIPA.

[60] Alberta’s PIPA is private sector privacy legislation whose purpose is to *balance* the competing rights of an individual’s right to privacy against an organization’s right to use personal information for a legitimate business purpose. The purpose in the ATIPP Act makes it clear that the purpose of the Act is to facilitate the right of access to information within the scheme established under the Act. It therefore places the rights of applicants to access information held by public bodies above the ability of a public body to refuse access. The elevation of an applicant’s rights over that of the public body means that there is no equal balancing as in the case of Alberta’s PIPA. Rather, the rights of applicants are paramount consideration. It is on this basis that I will evaluate whether subsection 52 (6) is mandatory or directory.

[61] Depending on the circumstances of the case, non-compliance with the timelines in subsection 52 (6) may only be minimal and will have no significant effect on the legislative purpose. Conversely, the consequences of a loss of jurisdiction are considerable. The Applicant’s only

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[32] Sydney B. Horton, "The Manitoba Language Rights Reference and the Doctrine of Mandatory and Directory Provisions" (1987) 10:3 Dal. L.J. 195 at pp. 197-198, and Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) at 75.

[33] *Vancouver Island Railway, An Act Respecting, Re*, [1994] 2 S.C.R. 41 (SCC), at p. 123.

recourse to have the decision of the Department to withhold information reviewed is through the ATIPP Act as it governs access to records in the custody or control of a public body and the independent review of decisions made pursuant to the Act. Further, as stated above, the only mechanism for an Applicant to appeal to the Supreme Court is after an Inquiry report containing the IPC's findings, reasons and recommendations has been rendered by the Commissioner[34]. If jurisdiction is lost prior to an Inquiry report being rendered, there is no ability for an Applicant to pursue a review as submitted by the Department and there is no oversight of the decision to withhold information under the Act.

[62] Sections 57 to 61 set out the process of independent review of decisions by public bodies to refuse access to records. These provisions state as follows.

a. Subsection 57 (1) requires the IPC to prepare a report following an Inquiry setting out their findings, recommendations and reasons for the findings.

b. Subsection 58 (1) requires a public body to within 30 days of receiving the report to decide whether to follow the recommendations or not. Subsection 58 (2) requires the public body to inform the applicant if it decides not to follow the recommendations and to inform them that they have the right to appeal the public body's decision. Subsection 58 (3) deems the public body to have refused to accept the recommendations if it fails to inform the applicant of its decision within the 30 days.

c. Subsection 59 (1) authorizes the applicant to appeal to the Supreme Court a decision by a public body to not follow the recommendations or a determination by the IPC under section 57 that the public body is authorized or required to refuse access to the records requested by the applicant.

d. Sections 60 and 61 establishes the process of appeal that the Supreme Court must follow in deciding the matter. Section 60 clarifies that the Supreme Court may conduct a new hearing.

[63] The Department submitted that notwithstanding that the IPC may not have adequate evidence to complete the Inquiry, she may complete an Inquiry report noting the deficiencies. Its view is that if this occurs, the applicant retains their right of appeal to the Supreme Court, which supports their position that the timelines in subsection 52 (6) are mandatory. For the following reasons, my view is that the Department's reasoning in this regard is flawed.

a. First, if the IPC were to complete a review and issue an Inquiry report containing findings on inadequate evidence, the integrity of the IPC's decisions would be placed in

[34] Subsection 59 (1) of the ATIPP Act.

considerable jeopardy. In my view, it would be contrary to public interest for the IPC to be placed in the position of having to make findings based on inadequate evidence.

b. Second, the settlement phase takes up to 90 days. This leaves only 60 days to issue the notice of inquiry and to accept submissions, exchange them and receive replies. Often a public body or applicant asks for additional time for numerous reasons. If the timelines in subsection 52 (6) are mandatory, the IPC would not be allowed to extend timelines for submissions when circumstances warrant it. This would create a hardship for the parties who need the extra time and may lead to a party failing to provide proper or any submissions in some cases.

c. Third, the burden of proof in refusing access to information or records under the ATIPP Act rests with the public body. Many submissions received from public bodies are insufficient in that they fail to properly support the exception claimed. The IPC often has to seek additional information to decide whether the exception applies. If the IPC were forced to render decisions based on inadequate evidence, it is more likely than not that the public body will not meet its burden of proof and more likely that recommendations to provide access will be refused. This would leave applicants in the position of having to go to court more often to enforce their right of access.

d. Fourth, there are mandatory exceptions in the ATIPP Act that require a public body to refuse to disclose certain information to applicants. Public bodies are prohibited from disclosing personal information to an applicant if disclosure will result in an unreasonable invasion of personal privacy. They are also prohibited from disclosing records containing cabinet confidences and information that would harm a business. On occasion, while preparing a report, the IPC finds that the exceptions were not claimed properly such that the provision claimed does not apply but the mandatory provisions do. When this occurs, which happens often, the IPC has no choice but to seek additional evidence from the parties and the third party to decide if any mandatory provisions apply. The IPC cannot complete and issue an Inquiry report where it contains a recommendation to disclose information or records that the public body is prohibited from disclosing.

[64] Given the foregoing, the IPC's only option when the evidence provided is inadequate to determine if an exception applies, which as stated is often the case, is for the IPC to seek additional evidence. To issue an Inquiry report otherwise would be irresponsible and may lead to illegal disclosures of information. It follows from this that it cannot be the intent of the Legislature for the IPC to issue Inquiry reports without having the proper evidence to make findings and recommendations. An interpretation of subsection 52 (6) that leads to this consequence is absurd. Where a purposive analysis justifies a preference for interpretations that lead to good

consequences, which are presumed to be intended, avoiding absurdity justifies the rejection of interpretations that lead to bad consequences, which are presumed to be unintended.[35]

[65] As I have determined that the IPC cannot issue Inquiry Reports based on inadequate evidence where the timelines are exceeded in the ATIPP Act for completion of an Inquiry and the result is a loss of jurisdiction, the applicant's right of appeal is removed. This is significantly prejudicial to an applicant. The Applicant here has no other remedy to have a decision made concerning their access request if subsection 52 (6) is mandatory. Whereas a finding that the timelines in this subsection 52 (6) is directory does not prejudice the Department. It made no submissions indicating the it has been prejudiced from the delay.

[66] The duty I am responsible to perform as the IPC under the ATIPP Act, including my responsibility to conduct Inquiries and issue Inquiry reports rendering my findings, reasons and recommendations, is a public duty. It would be a neglect of this duty if each time I proceeded with an Inquiry I risked losing jurisdiction while trying to obtain sufficient evidence to make a decision, to accommodate requests from either party for additional time if needed, or determine any legal issues that may arise. It is clear that no benefit is gained through the loss of jurisdiction simply for surpassing the timeline in subsection 52 (6).

[67] The foregoing supports that the timelines in subsection 52 (6) are directory.

[68] As the Department cited the KBR decision in support of the submission that subsection 52 (6) is mandatory, I will consider the Court's application of the factors in that case in the context of the issue and the request for review that is the subject of the Inquiry. As part of my analysis of these factors, I will determine whether they weigh in favour of or against a finding that subsection 52 (6) is mandatory.

[69] In KBR, the Court concluded that PIPA required a balancing of rights, including as the balancing pertained to the prejudice suffered by the parties if subsection 50 (5) of PIPA were found to be mandatory.

[70] A purposive analysis of ATIPP clarified that its purpose is to provide an avenue to the public to access records under the control of a government institution with limited exceptions in addition to providing an avenue for the independent review on disclosure decisions. The overarching principle of allowing access is also supported by the independent review provisions to ensure that access has not been withheld improperly under the Act. As indicated, the rights of applicants are paramount to determining whether the timelines in subsection 52 (6) are mandatory or directory which differs from the balancing of rights under Alberta's PIPA.

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[35] Dreidger on the Construction of Statutes, Third Edition by Ruth Sullivan, Butterworths Canada Ltd. 1994, at p. 93.

[71] In KBR, the Court was presented with no evidence about an operational impact on Alberta's PIPA and determined there was no such risk. Conversely, there will be operational impacts on the ATIPP Act if subsection 52 (6) is mandatory as it has the potential to leave IPC without jurisdiction to complete Inquiries and remove an applicant's right to have decisions made by public bodies to refuse access with any oversight. This is a significant impact on the administration of the ATIPP Act.

[72] I will add here that one of the main factors that swayed the court's decision that the timelines in Alberta's PIPA are mandatory is that PIPA allows the AB IPC to determine their timelines by providing a process for the AB IPC in that Act. The ATIPP Act does not have a similar process as it establishes set time limes to complete an Inquiry.

[73] In KBR, the Court concluded that the impact of finding subsection 50 (5) is mandatory or directory on the parties is neutral based on its purposive analysis that PIPA requires the balancing of any prejudice suffered.

[74] Above, I determined that there would be a negative impact on the Applicant, given that if the provisions are found to be mandatory, they will have no recourse to have the decision of the Department reviewed. I also determined that the impact on the Applicant would be significantly prejudicial. On the other hand, the impact on the Department is minimal, given that it only has to provide the evidence requested by the IPC and then wait for her decision about whether they applied subsection 18 (a) correctly when they redacted portions of the records requested by the Applicant. Further, as indicated above, the Department has not made any submissions about any prejudice they will suffer as a result of the delay nor do I think they will suffer any.

[75] In KBR, the Court concluded there were alternate remedies for the complainant to pursue through the human rights tribunal and work grievance procedure. In this case, I confirmed that there are no alternate remedies for the Applicant. As I stated above, the ATIPP Act is a complete governance scheme for the access to information in the custody or control of a public body and the Applicant's only recourse to have her request for review addressed is through the ATIPP Act.

[76] Evaluating these factors on the basis that the rights of applicants are paramount in determining whether subsection 52 (6) is directory or mandatory, and the object of the ATIPP Act that facilitates scrutinizing government action and making government documents available to citizens so that they can participate more fully in democracy, points overwhelmingly to the conclusion that subsection 52 (6) is directory. While there is some prejudice to the Applicant in having to wait for the IPC's Inquiry report to be issued, there is much less prejudice flowing to the Applicant and none to the public body from interpreting the provision as directory.

[77] The Department also submits that the imposition of a time limit is an integral part of the Legislature's intention that issues over access to records are dealt with promptly and efficiently. In *Business Watch,* the Court considered whether a timeliness purpose would be served by finding the

time requirement provision mandatory and determined that it would not. The Court stated that matters could simply be restarted, in which case the AB IPC would take more care to meet the timelines. This could also be done under the ATIPP Act. The Applicant could simply restart the process if the IPC is found to have lost jurisdiction for not meeting the timelines in subsection 52 (6). As such, no timeliness purpose would be served in finding subsection 52 (6) to be mandatory.

[78] The Court further considered whose best interest it was to ensure timeliness of decision-making and concluded that it was in the best interests of all parties to ensure that AB IPC has sufficient time to make any necessary inquiries. I arrived at the same conclusion for the ATIPP Act as part of my analysis above. In addition, it is the Applicant who has the greatest interest in prompt resolution of the review.

[79] The Court in EPS concluded that the purposes of FOIPPA would be defeated if subsection 69 (6) was mandatory and a complainant did not recommence the process. The same can be said in this matter. Although an Applicant could restart the process, they may decide not to for a multitude of reasons. If this occurred the review would never be completed and the overarching principles of access and the need for independent oversight for decisions made under the ATIPP Act would be lost.

[80] The Department further submits that the AB IPC has accepted that failure to complete an inquiry before the statutory deadline raises a presumption of termination that may only be overcome by addressing the two factor test identified by the Court of Appeal in ATA in two decisions rendered in 2011.[36]

[81] As indicated, the court in ATA was evaluating the timelines in AB PIPA. For the reasons above noted, the reasons for the courts' findings that the timelines to complete an inquiry in AB PIPA are mandatory have no bearing on a determination of the mandatory or directory nature of timelines to complete an inquiry under public sector access to information and privacy laws, including the ATIPP Act. This is because public sector access and privacy laws have significantly different purposes than private sector privacy laws. The former elevates the rights of individuals over that of public bodies whereas the latter balances rights between individuals and organizations.

[82] Based on the foregoing, an interpretation that concludes that subsection 52 (6) is directory in nature is consistent with and best ensures the attainment of the purposes of the ATIPP Act and eliminates the absurd consequences and prejudice to applicants that result from concluding that the section is mandatory.

[36] *Edmonton (Police Service) (Re)*, 2010 CanLII 98612 and *Alberta Employment and Immigration (Re)*, 2011 CanLII 96702.

VI. FINDING

[83] On the issue, I find that subsection 52 (6) is directory and as a result, the IPC has not lost jurisdiction to continue the Inquiry as a result of not completing the review within the timelines set out in that subsection.

[84] As a result of my finding, I will continue the Inquiry and inform the parties about next steps.

ORIGINAL SIGNED

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Diane McLeod-McKay, B.A., J.D.
Information and Privacy Commissioner

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