September 27, 2021

Procedural Fairness When Challenging Timeline Extensions for Freedom of Information Requests

By: Drew Yewchuk

Decision Commented On: *Blades v Alberta (Information and Privacy Commissioner)*, 2021 ABQB 725 (CanLII)

The recent decision in *Blades v Alberta (Information and Privacy Commissioner)*, 2021 ABQB 725 (CanLII) (*Blades*) relates to two issues ABlawg has previously covered. First, the challenges of getting government records in a timely manner using the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (*FOIP*). Prior posts on *FOIP* have discussed the challenges with the information request process, and the challenges presented by the review process at the Office of the Information and Privacy Commissioner. Second, the Alberta government's decision to revoke the 1976 *Coal Development Policy for Alberta*. See the list of coal-related ABlawg posts listed at the top of this post. Looking past those specifics, *Blades* is a judicial review decision about an administrative body's obligation of procedural fairness and the right to be heard by the administrative decision-maker.

Background to the FOIP Request

The 1976 *Coal Development Policy* was revoked on May 15, 2020, and then reinstated on February 8, 2021 pending the report of the Coal Policy Committee. The Coal Policy Committee accepted submissions from the public until September 19, 2021. According to their terms of reference, the Coal Policy Committee is preparing two reports: one summarizing the perspectives and advice of Albertans about coal development to be submitted on October 15, 2021, and a second report with their recommendations to the Minister on November 15, 2021. Their terms of reference do not specify when those reports will be shared with the public.

On July 3, 2020, a coalition of ranchers who take an interest in the coal issue (the Applicants) sent a *FOIP* request to Alberta Energy asking for:

> Alberta Energy's records that discuss the rescission or change of the coal policy (1976 Coal Policy) or exceptions to the coal policy, including: any briefing materials (briefing notes, internal memos, reviews, reports), and correspondence (emails, letters). To be clear, we are also requesting third party records.
>
> Time period: January 1, 2020 to June 1, 2020 (*Blades*, at para 72, except for the time period, which is not set out in Justice Janice Ashcroft's decision, but was in the certified record.)

The Applicant's intention was to use the records to prepare for their first judicial review relating to the initial Coal Policy rescission, and to prepare their submissions to the Coal Policy Committee - which meant they needed to receive the records before September 19, 2021 (*Blades* at paras 21-37).

A public body receiving a *FOIP* request has an initial 30 days to reply under section 11 of *FOIP*, but may extend that period as described in section 14 of *FOIP*. One complicating factor in *Blades* was Ministerial Order SA:009/2020, a COVID-related order that temporarily extended the timelines for responding to *FOIP* requests – I will mostly skip discussion of the COVID-related Ministerial Order except where necessary for accuracy.

Alberta Energy extended their time limit to reply by 90 days as allowed by the temporary COVID-related Ministerial Order (*Blades* at paras 13-14). Then Alberta Energy sought permission from the Information and Privacy Commissioner (The Commissioner) to extend their timeline by 612 days, but the Commissioner granted an extension of only 270 days, set to end October 14, 2021 (*Blades* at paras 52, 70).

Alberta Energy based their request for the 612-day extension on a number of factors, some of which the Commissioner accepted, and others which the Commissioner rejected in determining a 270-day extension was appropriate. The two key factors the Commissioner accepted were the large number of records at 6,539 pages, and the need to consult with third parties who had information in the records (*Blades* at para 57).

The *Blades* decision addresses three different issues: a preliminary evidentiary issue, a procedural fairness issue, and a challenge to the substantive merit of the decision.

The Preliminary Evidentiary Issue: The Use of Affidavits in a Judicial Review

The preliminary evidentiary issue related to whether the applicant should be allowed to rely on an affidavit in the judicial review. The general rule for a judicial review is that the record before the administrative decision-maker becomes the record before the Court, because the Court is only reviewing the decision of the administrative body and not considering the issue anew. The Court typically allows new evidence only where the evidence relates to an allegation of a breach of procedural fairness that would not appear in the record before the administrative decision-maker, or the record produced by the administrative decision-maker is too deficient for the Court to review the decision. (See *Alberta's Free Roaming Horses Society v Alberta*, 2019 ABQB 714 (CanLII) at paras 22-26, and *Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 (CanLII) at paras 38-45.)

The affidavit in *Blades* contained evidence about the rescission of the Coal Policy and the Coal Policy Committee's submission deadline. Justice Ashcroft declined to admit the affidavit on the basis that it would not further the Applicant's arguments because if there was a breach of procedural fairness, that would invalidate the Commissioner's decision, and the Applicant had no need to prove a fairer procedure would have changed the outcome (*Blades* at paras 21-23).

The Procedural Fairness Issue

The Applicant was afforded no procedure in the process of the Commissioner making the decision to give Alberta Energy permission to extend the timeline by 270 days. The Applicant had no opportunity to make any submissions to the Commissioner, and only learned of the timeline extension after the decision was made. This is the regular practice of the Commissioner with regard to section 14 timeline extensions under *FOIP*. More than a dozen *FOIP* requests I have filed have had their timelines extended, and I have never been given the opportunity to make submissions.

Justice Ashcroft considered the five factors affecting the content of the duty of fairness from *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699, [1999] 2 SCR 817 at paras 21-22. For the first factor, Justice Ashcroft determined the nature of the decision pointed towards a lower degree of procedural fairness because an extension "should not generally be viewed as a decision to refuse an applicant's access to the record(s) requested" and "neither erodes nor amends the substantive content of the records to be disclosed", and that the process complied with the requirements of section 14 of the *FOIP Act* and the Commissioner's Practice Note on request for time extensions under section 14 (*Blades* at paras 31-32). Respectfully, these are considerations for *Baker* factors two, three, and five. The first *Baker* factor refers to "the closeness of the administrative process to the judicial process" (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII) at paras 115-116). When considering the nature of the statutory scheme, Justice Ashcroft notes other sections of the *FOIP Act* explicitly give applicants a right to be heard, and infers the legislature favoured speed and efficiency during the timeline extension stage of the *FOIP* process and did not require the Commissioner to seek submissions from applicants, again supporting a lower degree of procedural fairness (*Blades* at paras 34-36). Justice Ashcroft's finding in relation to the third factor, the importance of the decision to the individuals affected reads:

> The records elicited through the FOIP Request may have been relevant to both the then ongoing judicial review centered around the rescission of the 1976 Coal Mining Policy, and later, the submissions of the Applicants before the Coal Policy Committee, which deadline was apparently September 15, 2021. However, I cannot interpret the extension, even within this more time sensitive context, as equivalent to the denial of the records, or denial of a substantive right. (at para 37)

Strangely, the information from the affidavits Justice Ashcroft declined to admit is mentioned in relation to the third factor. For the fourth factor, Justice Ashcroft refers back to the process outlined in the *FOIP Act* (*Blades* at para 38). Respectfully, that is properly considered under *Baker* factor two. The doctrine of legitimate expectations is separate from statutory guarantees of procedure. For the final factor, the administrative body's choice of procedure, Justice Ashcroft notes that the Commissioner has made a consistent practice of not taking submissions from persons filing *FOIP* requests (*Blades* at para 39).

Justice Ashcroft concludes that the applicants were not owed an opportunity to make any submissions to the Commissioner before the Commissioner decided to give Alberta Energy permission to extend the timeline by 270 days. However, Justice Ashcroft says that "If the

extension is so long that the substantive right of access to records is infringed, this can be addressed under the analysis of reasonableness" (at paras 41, 45).

The Merits of the Decision: Reasonableness Review

The standard of review was not disputed, as *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) settled that the decision is to be reviewed for reasonableness (*Blades* at paras 46-47).

At this point, *Blades* becomes a little confusing. On the issue of what factors the Commissioner is permitted to consider in granting a timeline extension, Justice Ashcroft found the Commissioner was restricted in their considerations to only those factors enumerated in section 14(1), saying: "Both the purposes outlined in s. 2 of the *FOIP Act* and the wording of s. 14 lead to the conclusion, at least in terms of whether extensions can be *granted,* that the factors enumerated under s. 14(1) are both mandatory and exhaustive" (*Blades* at para 61), but Justice Ashcroft also found the Commissioner may be permitted to consider factors beyond those listed in section 14: "I decline to foreclose an interpretation of s. 14 which would allow the Commissioner to exercise discretion to refuse to grant an extension on the basis of particular information the Commissioner has at the time of considering the extension" (*Blades* at para 63). I will discuss the question of whether *FOIP* section 14(1) is exhaustive below.

Justice Ashcroft concluded that the Commissioner's decision to allow the 270-day extension was reasonable as it displayed "coherent internal reasoning and was made within the legal and factual context." Justice Ashcroft dismissed the application for judicial review (*Blades* at para 80-81).

Commentary

First, I suggest the confusion in the *Blades* decision about whether the Commissioner can consider factors beyond those listed in section 14(1) when making decisions about timeline extensions is the result of an unnoticed distinction between two different types of things that might be called 'factors': 'conditions' and 'considerations'. 'Conditions' determine whether a discretionary power can be used at all, and 'considerations' are used in making the discretionary decision about whether to exercise the statutory power. The *Blades* decision uses the word 'factors' to refer to both. When the COVID-related Ministerial Order is not in effect, Section 14 reads:

> **Extending time limit for responding**
>
> 14(1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period if
>
> (a) the applicant does not give enough detail to enable the public body to identify a requested record,
>
> (b) a large number of records are requested or must be searched and responding within the period set out in section 11 would unreasonably interfere with the operations of the public body,

(c) more time is needed to consult with a third party or another public body before deciding whether to grant access to a record, or

(d) a third party asks for a review under section 65(2) or 77(3).

I suggest that section 14(1) is an exhaustive list of four conditions, at least one of which must be met, before a *FOIP* timeline can be extended, but section 14(1) lists no considerations at all – the Commissioner's considerations are limited only by the general purpose of the *FOIP Act*.

The distinction between a condition and a consideration exists elsewhere in the *FOIP Act* – to properly apply any of the discretionary exemptions, the public body must determine information in the record meets one of the *conditions* described in the exemption, and then take account of appropriate *considerations* to when exercising their discretion to exempt the information from disclosure. For an example of a list of statutory considerations, see section 17(5) of the *FOIP Act*:

17 …

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

(i) the personal information was originally provided by the applicant.

Second, there is an unrecognized issue in the decision about what the enormous number 6,539 is actually referring to. There is an important difference between the number of records that need to

be searched through, and the number of records that need to be processed and released to the applicant. I do not believe the 6,539 number refers to the pages of records that will be processed and released. During the January 1, 2020 to June 1, 2020 time period of the request there are about 105 business days. To have 6,539 relevant records would require Alberta Energy to have accumulated about 62 pages of relevant pages of records each workday. I believe the 6,539 pages are pages that need to be searched through, and they will likely require no more than a moment's glance to determine they are not relevant to the request or are duplicates. These pages will not need review by any third parties, and they will not be released to the applicant. Where the pages are part of a large document of several hundred pages, a review of the index can be all it takes to determine the pages are not relevant, so that handling hundreds of pages can sometimes take 2 minutes. It has been my experience that *FOIP* offices are not clear about what they mean when they say 'relevant records' and the difference is often enormous – a search through thousands of records will reveal only a couple hundred that need to be released. If I am correct – the rationale for the decisions of the Commissioner will be undermined by the ambiguity about what the 6,539 pages refer to.

Third, in assessing the reasonableness of the extension, one should consider the length of time it took the records to actually be created. The request was for records produced over the course of five months (a total of 152 days). Counting all the timeline extensions, the public body took more than 450 days to prepare the record for release (assuming the public body does release the records on October 14, 2021). It does not seem reasonable to me for a public body to take three times longer to release records than it does to create them. It seems the Alberta government dedicates more time to keeping its decisions secret than it does to making its decisions.

Fourth, it is difficult to square how Justice Ashcroft both recognizes the importance of timely access to the information, and the risk of government delay frustrating the goals of accountability and openness, writing "[t]he purposes of the *FOIP Act* and the importance of disclosure to the meaningful participation of citizens in a democracy cannot be minimized" (*Blades* at paras 65-67) with Justice Ashcroft's finding that she cannot view the timeline extension "even within this more time sensitive context [referring to the Coal Policy Committee deadline], as equivalent to the denial of the records, or denial of a substantive right" (at para 37). *Blades* tries to have it both ways – the timely release of records under *FOIP* is described as incredibly important, but also not important enough for an applicant to have even basic procedural rights.

Conclusion

The *Blades* decision creates an odd catch-22 situation. The finding that the Commissioner may be permitted to consider a request filer's need to have records by a certain date fits strangely with the finding that there is no procedural opportunity for a request filer to get that information before the Commissioner during the administrative process, or before the court in an affidavit on judicial review. This suggests that there are things permitted by the *FOIP Act* that cannot procedurally occur. The door exists, but it is permanently locked.

Blades shows the continuing weakness of the *FOIP Act*, and the difficulty of challenging an administrative decision reviewed for reasonableness when you have no procedural opportunity to make any submissions. *Blades* approves of an administrative procedure that makes it virtually

impossible for an applicant to challenge the assertions of a public body seeking timeline extensions under the *FOIP Act*. If a solution to the problem of long delay does not materialize, the *FOIP Act* will be increasingly relegated to use only for historical research, rather than to hold current governments to account through the democratic system.

This post may be cited as: Drew Yewchuk, "Procedural Fairness When Challenging Timeline Extensions for Freedom of Information Requests" (September 27, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/09/Blog_DY_Blades_OIPC.pdf