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Freedom of Information in Alberta: The Troubles With the OIPC

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Decision Commented On: *Re Alberta Health*, F2019-16, 2019 CanLII 33710

This is the third in a series of posts on Alberta's access to information legislation, the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (*FOIP Act*). The first post set out the basic structure of the access to information, and the second post was a case study on the use of the *FOIP Act*. This post focuses on the Office of the Information and Privacy Commissioner (OIPC), which serves as the initial dispute resolution mechanism for *FOIP* issues. The post also describes how the "adequate alternative remedy principle" can make troubled administrative review bodies into obstacles to effective oversight.

The Purpose and Function of the OIPC

My focus is on access to information rights, but the OIPC has other functions, including serving as the initial dispute resolution mechanism for breaches of Alberta privacy law, including health information privacy. The OIPC's annual report shows addressing privacy law complaints takes up a great deal of time at the OIPC – part of the explanation of why the OIPC is so backlogged.

The OIPC deals with two general kinds of *FOIP* complaints from people requesting records held by public bodies:

> (1) that the public body did not reply to a *FOIP* request within the statutory timelines; and
>
> (2) that the public body conducted an insufficient search for records, or made unjustified redactions to the records prior to releasing them.

The manner in which FOIP requests are processed leads to most requests ending with complaints to the OIPC. Other than cases where a single document is requested, and delivered with full or only very minor redactions, requests should be expected to end with the requester seeking OIPC review of redactions. Most FOIP requests are filed because the requester has chosen not to trust the government (or at least chosen to verify what the government has said in public), and they are not going to trust the government more after receiving documents covered in redactions. FOIP requests frequently return comically suspicious looking documents. The longer a person has been working with *FOIP*, the less likely they are to trust the legitimacy of the initial FOIP redactions. This is because they will have learned that the internal records review involves Minister's offices, who intentionally redact material they know is contentious or could attract

negative attention for the elected government. In other words, what gets carefully redacted during the FOIP process is typically the exact information the requester is seeking.

The Long Delays At The OIPC

There is a mismatch between the OIPC's funding and the work the OIPC is meant to be performing. The OIPC's annual report for 2018-2019 is available here. The Commissioner's message opens with:

> When I appeared before the Standing Committee on Legislative Offices at the end of November last year I reported that my office had officially reached a breaking point in terms of our ability to keep up with the ever increasing volume of cases. (at 6)

The effect of the lack of funding and staffing is that the OIPC is incredibly backed up in sorting through complaints about *FOIP* requests. The Public Interest Law Clinic (Clinic) filed a request for information in July 2017 with respect to a creative environmental sentence imposed on CN Rail (see here for background on the offence and the creative sentence). The Clinic sent a complaint to the OIPC about redactions to the record provided pursuant to that request on October 18, 2018. The OIPC's inquiry process is not yet complete, and the anticipated completion date is June 11, 2020.

The Clinic sent another FOIP complaint to the OIPC to have the legitimacy of redactions reviewed on May 21, 2019 and the Clinic recently received a letter informing us the complaint was now "on an inactive caseload… the file will not be actively worked on… the anticipated date of completion [is extended to] November 16, 2020." The initial FOIP request was submitted August 7, 2018. From filing to the conclusion of the OIPC review, the request is going to have taken more than two years. The records at issue are less than 300 pages.

The Inadequate Remedies Of The OIPC

In *Re Alberta Health*, F2019-16, 2019 CanLII 33710 the OIPC addressed a complaint that Alberta Health did not reply to a *FOIP* request within the statutory timelines. The request in question was submitted October 3, 2017, and no records had been released by January 2, 2019. Alberta Health explained the delay as being the result of short staffed. An adjudicator for the OIPC noted that staffing is not an excuse for delay:

> I cannot accept the Public Body's arguments that it made every reasonable effort to meet its timelines for responding to an access request that is currently a year late for the reason that the Public Body is, by all accounts, systemically understaffed. Such a finding would mean that a public body could effectively thwart the timelines in the Act by understaffing the program areas that respond to access requests, which is an absurd result. The staffing levels of program areas are clearly within the control of public bodies. (at para 21)

The Adjudicator's intent here is admirable. The systematic understaffing of program areas that deal with *FOIP* should not excuse a public body's failure to meet the timelines in the *FOIP*. But whether understaffing legally excuses the failure or not makes little difference – the record is

late, and the OIPC is unable to grant meaningful remedies. The OIPC cannot order a public body to hire more FOIP staff, nor penalize the public body in a way that would change their practice (the powers of the OIPC's are set by section 72(2) of *FOIP*). My suggested change would be to enable the OIPC to order a public body that has exceeded statutory timelines or applied redactions in bad faith to release records without applying any of the discretionary redactions under the *FOIP* Act.

The Clinic has current FOIP requests with Alberta Health. The Alberta health FOIP office is still roughly 6-8 months behind their statutory deadlines, and the reason why is simple: the Alberta Health FOIP office continues to be systematically understaffed. The OIPC adjudicator's decision in *Re Alberta Health* does nothing to fix the systemic problems.

The OIPC As An Obstacle To Judicial Review

Where there is no administrative review body, a person can seek judicial review of administrative actions. The purpose of creating administrative review bodies was to provide for more affordable and efficient reviews of government action. The OIPC is a good example of how the underfunding of administrative review bodies has defeated that aspiration. But underfunded administrative review bodies are more than simply unhelpful: they become a roadblock for parties seeking to enforce their rights.

There is a general principle of administrative law (often traced back to *Harelkin v University of Regina*, [1979] 2 SCR 561) that a person should not be permitted to bring their concerns to court where they still have access to an administrative review body that could adequately address their concerns. The Supreme Court has described it as "the adequate alternative remedy principle" or the "adequate alternative remedy doctrine" *Canadian Pacific Ltd. v Matsqui Indian Band*, [1995] 1 SCR 3 at paras 33 and 36. The rule has other names, including "the doctrine of exhaustion" and "the doctrine against fragmentation or bifurcation of administrative proceedings" (*Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61 at paras 30-33). The purpose of the principle is to prevent parties from skipping over administrative review bodies specifically meant to address their issues and proceeding directly to court on judicial review.

The name "adequate alternative remedy principle" is a bit of a regrettable misnomer – as it can give the impression that a particular administrative remedy should not be granted because another judicial review remedy may be sufficient (for instance, that *mandamus* should not be granted because declaratory relief is available). This sort of argument has been made at least once: *Canada (Public Prosecutions) v Alberta (Provincial Court)*, 2019 ABQB 484 at paras 26, 31-32. A more descriptive name might be something like 'the adequate alternative administrative dispute resolution principle' – but that does not roll of the tongue.

The trouble with the "adequate alternative remedy principle" is that it converts troubled administrative review bodies like the OIPC into obstacles to effective oversight. The principle expects a person refused access to government records under *FOIP* to wait through the lengthy and often unhelpful OIPC process before getting to court. In order to go directly to court and jump the incredibly long wait at the OIPC, some adventurous litigant would need to assemble

sufficient evidence to show that the OIPC has become so slow that it is no longer an 'adequate alternative' to directly seeking judicial review at court.

Conclusion

An effective freedom of information process needs an efficient review body to conduct oversight. The OIPC comes up short. The OIPC needs sufficient funding and staffing, and the statutory power to grant effective remedies. However, there have not been any improvements to Alberta's freedom of information system since the Clinic started working in the area, and especially given the current governments desire to shrink the public service, there are unlikely to be improvements on the way.

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