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Procedural Fairness When Challenging Timeline Extensions for Freedom of Information Requests

By: Drew Yewchuk

Decision Commented On: *Re Energy*, [Order F2022-20, 2022 CanLII 29391 \(AB OIPC\)](#)

Office of the Information and Privacy Commissioner (OIPC) Order F2022-20 shows how easy it is for public bodies to drag the *Freedom of Information and Protection of Privacy Act*, [RSA 2000, c F-25](#) (*FOIP*) process out to prevent timely transparency, even where there is little or no plausible justification for the public body to withhold records.

F2022-20 relates to the same *FOIP* request as *Blades v Alberta (Information and Privacy Commissioner)*, [2021 ABQB 725 \(CanLII\)](#) (*Blades*), a decision I wrote about [here](#). The request in question is an attempt to get government records explaining the Alberta government's decision to revoke the [1976 Coal Development Policy for Alberta](#).

The Coal Policy Context and Purpose of the *FOIP* Request

As most ABlawg readers will know by now, Alberta's 1976 *Coal Development Policy* was [revoked on May 15, 2020](#). The 1976 *Coal Development Policy* was [reinstated on February 8, 2021](#), pending the [reports of the Coal Policy Committee](#), which were released on March 4, 2022 (see my blog [here](#) for a summary of their contents).

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
(F2022-20 at para 1)

The Applicant's intention was to use the records in two earlier processes that have since been completed. First, to prepare for their [judicial review](#) relating to the initial Coal Policy rescission, and second, to prepare their submissions to the Coal Policy Committee - which meant they needed to receive the records before the committee completed their consultation on September 19, 2021 (*Blades* at paras 21-37).

The Applicants (and the public) have already been denied the substantive right to timely access to government records that *FOIP* was meant to create. The records ought to have been released in late 2020, and they have yet to be released. The records at issue are now more than a year old and show the decision-making for a decision that has already been made, announced, cancelled, and (at least temporarily) reversed. The Applicants did all they could to enforce their rights under *FOIP*. The Applicants retained counsel and vigorously pursued their rights – a judicial review and the OIPC process are not a small amount of work. Whatever happens next, Alberta Energy’s strategy has bought itself two years of secrecy.

The *FOIP* Processing Time

Alberta Energy extended its time limit to reply to the request by 90 days as allowed by the temporary COVID-related Ministerial Order (*Blades* at paras 13-14). Then Alberta Energy sought permission from the OIPC to extend its time limit by 612 days, but the Commissioner granted an extension of only 270 days, set to end October 14, 2021 (*Blades* at paras 52, 70). That decision to extend the time limit was the subject of the judicial review in *Blades*. On October 13, 2021, Alberta Energy sought permission from the OIPC to extend the time limit again, but the OIPC refused (F2022-20 at para 4).

Alberta Energy released a first package of 30 pages of records, and the Applicant filed a complaint to the OIPC about the redactions to those pages (F2022-20 at para 5-7). The Public Body later released a package of 169 pages, but 116 of those pages were fully redacted and only 53 partially released. This second release is mentioned in F2022-20 (at para 8) but is not subject to OIPC review yet (I only know the number of pages in the second release because the Applicant showed me the records).

The Shrinking Record and the Missing Consultations

F2022-20, like most OIPC decisions, was not written by the Information and Privacy Commissioner, but by an adjudicator appointed by the Commissioner.

The Adjudicator noted that Alberta Energy had not properly fulfilled its duty under section 14(4)(c) to inform the Applicant of their right to complain to the commissioner about a time extension, as Alberta Energy had described only a general right to seek a review from the OIPC (at paras 12-15). The Adjudicator then discusses the much more important reduction in the number of responsive records. When Alberta Energy obtained the 270-day extension from the OIPC, and when Alberta Energy defended the reasonableness of that extension at Queen’s Bench in *Blades*, Alberta Energy claimed to have 6539 pages; when Alberta Energy filed its initial submissions in F2022-20, they said they had 2,700 pages (at para 17), and when Alberta Energy filed its rebuttal submission they claimed to have around 2180 pages (at paras 18-20).

The Adjudicator crafts an interesting remedy for this case of shrinking records:

In addition, if the Public Body ultimately includes less than 6539 pages of records in response to the access request, I require it to provide an affidavit to the Applicant and this office that explains the discrepancies between the number of records it cited in its request

for permission to extend and the number it ultimately included in its response. (F2022-20 at para 31)

The Adjudicator also noticed other apparent irregularities around Alberta Energy’s claims of time-consuming third-party consultations:

I note that the Public Body received permission to extend the time for responding to the access request in part so that it could carry out consultations. There is no evidence before me that it has actually carried out any consultations, as its submissions do not refer to having done so. (at para 23)

The Adjudicator notes that third-party consultations in the sense of a back-and-forth discussion on what to release are not a necessary step under *FOIP* in any case, and time extensions cannot be taken to carry out such a consultation (at paras 24-26).

Exceptions to Disclosure

Exceptions to disclosure allow a public body to withhold information on records that would otherwise be subject to disclosure on *FOIP*. Alberta Energy withheld information under sections 21, 22, 24, and 25 of *FOIP*.

Section 21(1)(a)(iii) gives a public body discretion to withhold information where the information “could reasonably be expected to harm the Government of Alberta’s relationship with an aboriginal body that exercises government functions” (at para 33). Section 21 is a discretionary exception, so the public body has the burden of showing “why there is a reasonable likelihood that its intergovernmental relations with any aboriginal bodies set out in section 21(1)(a)(iii) will be harmed by disclosure of the information” (para 35). Alberta Energy argued the information was inaccurate and might confuse first nations about their rights. The adjudicator did not find this likely and ordered the records released (at paras 37-40).

Section 22 is a mandatory exception to disclosure that requires a public body to withhold information that would reveal cabinet confidences. The Adjudicator determined that “[e]ven accepting that the severed information may refer to general topics that may have been discussed by Cabinet at some point, the information does not reveal anything of the substance of such deliberations” (at para 45). The adjudicator ordered Alberta Energy to release the information.

Section 24 gives a public body discretion to withhold information that reveals advice from officials. Alberta Energy applied it to records that showed work planned to be done, lists of tasks to be done, the timelines and deliverables of the Coal Category Review project, a list of the potential risks relating to the Coal Category Review project, and planned deliverables and milestones of the Coal Categories Review Project. Alberta Energy’s strategy was to add the words “the information that [or which] advises decision makers of” before each type of information to make it grammatically sound like advice within the scope of section 24 (at paras 55-75). The Adjudicator did not accept this strategy and ordered Alberta Energy to release the information.

Section 25 gives a public body discretion to withhold information that would be harmful to the economic or other interests of a public body if it were released. The public body must show a reasonable expectation of harm (at paras 76-78). A portion of Alberta Energy's justification for applying this section is worth quoting:

Section 25(1)(c)(i) was applied to information on these pages as its disclosure could reasonably be expected to harm the economic interest of the Public Body and the GOA by confusing investors about Alberta's ultimate intentions regarding resource development. In addition, it could reasonably be expected to undermine good will towards the Public Body from individuals critical of resource development.

Further, disclosure could contribute to financial loss to the GOA by potentially discouraging companies from investing in GOA resource development as it reveals that some stakeholders are not supportive of responsible resource development investment in the Province. (at para 79)

These submissions are not compelling. Bearing in mind the Coal Committee's findings, it is doubtful that anyone who is critical of resource development has any goodwill left towards Alberta Energy. Similarly, no reasonable investor in 2022 could possibly fail to realize some Albertans are not supportive of coal development. As somewhat of an aside, Alberta Energy is apparently maintaining the department's practice of using the jargon of 'responsible resource development' that implies any opponent of development as irresponsible. If Alberta energy were even slightly concerned about goodwill from those opposed to development, they would stop doing that. The Adjudicator noted that both the SCC and the OIPC have rejected 'misinterpretation' arguments in the access to information context (at paras 83-84) and rejected Alberta Energy's submissions (at para 86-89).

Alberta Energy also withheld information as 'nonresponsive.' 'Nonresponsive' works as an exception to disclosure implied by *FOIP* because a public body does not need to provide records that the Applicant did not request. The public body must show the information is not reasonably related to the request (at para 94). The Applicant argued:

Non-responsive redactions should never cut apart entire sentences or paragraphs. Entire sentences and paragraphs are necessary to contextualize what is being given access to.

For example, if one sentence in an email discusses the Coal Policy, the remainder of the paragraph is necessary to contextualize that one sentence. Cutting away entire paragraphs on the basis of 'Non Responsive' removes context necessary to understand the material that is responsive.

At most, 'Non Responsive' redactions should only occur to content that is completely out of context of the records that are responsive. (at para 95)

The adjudicator agreed that "information that lends context to, or sheds light on, obviously responsive information is also responsive, particularly when that information forms part of the

same sentence, paragraph, or record” (at para 96). The Adjudicator reviewed the information withheld, found it was all responsive, and ordered Alberta Energy to release it (at paras 98-103).

As a result, the Adjudicator ordered Alberta Energy to release the 30-page record without redactions and to provide the applicant with the rest of the requested records (at para 105-107).

Commentary

First, the time between the complaint being filed and the OIPC decision shows the OIPC expedited this complaint because it had already been the subject of a judicial review and was seriously delayed. The OIPC currently takes more than a year to hear standard complaints about exceptions to disclosure.

Second, a short victory lap. I foresaw Alberta Energy’s failure to find 6,539 relevant pages of records in my [first post on *Blades*](#):

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.

Alberta Energy will not find 6,539 pages unless they send the Applicant copies of dictionaries and phone books and try to argue those are somehow relevant to the request. I look forward to reading its affidavit explaining why they misled the OIPC and the Queen’s Bench Justice.

Third, why is Alberta Energy working so hard to keep these records from the public? It appears to be because the records are almost definitely going to show the government’s decision-making was incoherent. Alberta Energy knew rescinding the 1976 Coal Policy would leave policy gaps and was not justifiable. It misrepresented its internal reasoning to the public in its initial statements about why it rescinded the policy, essentially what Nigel Bankes argued had happened in a [February 15, 2021](#) post:

The government could not have reasonably concluded that the [1976 Coal Policy] had been completely superseded or rendered obsolete. *The government’s own briefing papers make this abundantly clear.* The government went ahead and rescinded the [1976 Coal Policy]

in order to encourage investment in coal exploration and development, all the while knowing that the ground rules necessary for ensuring healthy functioning ecosystems at the landscape level were not in place.

Fourth, I am of the view that Alberta Energy was aware they were not correctly applying the exceptions to disclosure in *FOIP*. Alberta Energy's arguments are given short shrift by the Adjudicator, and F2022-20 does not deal with any questions of how to interpret exceptions to disclosure in *FOIP* because Alberta Energy's justifications for its redactions are either incoherent or clearly contradicted by past OIPC decisions. I have seen the records in question. Here is one section from page 3 of the records showing how Alberta Energy used "non-responsive":

The screenshot shows a document with a section titled "Coal category review". It contains three bullet points, each followed by a redacted area. To the right of each redaction is the text "Non Responsive" in red. The third bullet point is underlined. Below the list, there is a "Drafted by:" field with "Micheal Moroskat" and an "ADM:" field with "Doug Lammie". To the right of these fields is the text "Energy Operations". At the bottom right of the redacted area, there is another "Non Responsive" label in red.

Coal category review

- The Government of Alberta has committed to superseding the direction in the coal categories in the South Saskatchewan Regional Plan, [REDACTED] Non Responsive
- The Livingstone-Porcupine Hills Land Footprint Management Plan of 2018, [REDACTED] Non Responsive
- The Livingstone-Porcupine Hills Land Footprint Management Plan of 2018, [REDACTED] omits to replacing the coal categories with updated footprint-based land use direction within three years, by May 2021.
- A cross-ministry working group consisting of members of Energy and Alberta Environment and Parks has already begun analyzing the implications of rescinding the coal categories and preparing recommendations. [REDACTED] Non Responsive

Drafted by: Micheal Moroskat
ADM: Doug Lammie

Energy Operations

No one could seriously believe the ends of those sentences do not reasonably relate to the rescission of the coal policy. When I started filing *FOIP* requests around 2017, I never saw "non-responsive" redactions used to cut apart sentences, but in the last year or so, most records come back covered in them, despite the OIPC never having sanctioned this bizarre approach. The approach is not consistent with *FOIP* at all, as *FOIP* requires applicants to request 'records' and not answers to particular questions (*FOIP*, section 7(2)). If a record contains information responsive to the request, the applicant gets the entire record. That is how *FOIP* has been understood to work for decades. The "non-responsive" redactions are also totally unprincipled, as an applicant can file a request specifically asking for the "non-responsive" information in order to make the information "responsive", but that produces more delay.

I strongly suspect Alberta Energy's absurd use of the exceptions to disclosure is not due to incompetence but strategy. Even if Alberta Energy complies with the adjudicator's order and releases the records in May, Alberta Energy will have delayed the release of embarrassing records by seven months by using unfounded redactions and dragging this through an OIPC review. If the media's attention to coal has waned over those seven months, Alberta Energy can avoid the uncomfortable attention that transparency and democracy would have brought. The OIPC can order the records released, but [lacks any authority to penalize a public body](#) for applying exceptions to disclosure on flimsy or clearly incorrect grounds. The only penalty a public body gets for misusing the exceptions to disclosure in *FOIP* is scorn from the public. In effect, this critical blog post is almost the entire penalty Alberta Energy will face.

Conclusion

This OIPC decision is about as good as an OIPC decision can be. It shows the OIPC is trying to hold government to account, despite the serious delays due to underfunding and understaffing at

the OIPC. But it also demonstrates the limited power of the OIPC since the decision does not stop future public bodies from adopting the exact same strategies to delay *FOIP* requests.

Another important decision for the OIPC is coming soon: Jill Clayton, the current information commissioner, has opted not to seek a third term, and the Alberta Government will need to appoint a new information commissioner by the end of July 2022. Hopefully, Alberta will get another commissioner dedicated to the public's right to government transparency. Considering how troubled *FOIP* is even with a dedicated commissioner, the appointment of a commissioner not interested in government transparency would likely turn *FOIP* into a completely lost cause.

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