January 17, 2024

Information Shall be Released: The Long Wait for Access to Government Information in Alberta

By: Drew Yewchuk

Decision Commented on: *University of Alberta (Re)*, 2023 CanLII 122872 (AB OIPC)

This post is another installment in the Public Interest Law Clinic's work on improving access to government information in Alberta. See previous posts here, here, here, and here.

Re University of Alberta, OIPC Order F2023-46 is a decision of an adjudicator at the Office of the Information and Privacy Commissioner (OIPC), the administrative review body for Alberta's *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (*FOIP*). The decision draws out an important principle of access to government records: that no refusal of access ought to be permanent. Eventually, all government records should become public. This post provides the basics of when exceptions to disclosure expire and when a request can be usefully re-filed to obtain previously-redacted information.

Case Summary

The Applicant filed a first access request to the public body (the University of Alberta) in 2014, when they were an employee of the public body. The records were provided with significant redactions made under the exceptions to disclosure in *FOIP*. The Applicant did not seek administrative review of the redactions. In 2019, after retiring from the public body, the Applicant filed a second request, asking for unredacted copies of the same records (at paras 1-7). The public body refused to process the second request and argued that the OIPC should not hold an inquiry, as the public body had "responded to the request for these records already" when the first request was filed in 2014 (at paras 8-12).

During the OIPC inquiry, the public body argued that it had no duty to reprocess the records, and that the request was an improper attempt to restore the right to seek administrative review outside of the sixty-day limit to seek review (at para 20-22). The Applicant argued that issue estoppel (a rule against re-arguing the same issue; see for instance *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460 at paras 33-37) did not apply as her retirement raised new issues (at paras 26-29).

The Adjudicator noted that *FOIP* does have provisions allowing a public body to disregard some repetitious requests with the Commissioner's authorization (at paras 33-34), but that in general, repetitious requests are permitted under *FOIP* (at para 34-40). The Adjudicator rejected the application of the principles of issue estoppel to *FOIP* access requests, writing:

> Principles of issue estoppel are designed to bring finality to litigation. An access request under the Act is not a cause of action or any form of litigation subject to final decision and then never to be brought again. As already noted, the Act contemplates repetitious access requests, and while it provides a mechanism by which public bodies may disregard them, it does not bar them. (at para 41)

The Adjudicator found that the applicability of exceptions to disclosure in *FOIP* change with circumstances – an exception to disclosure does not apply to information once and for all, but based on factors that shift over time (at para 48). The Adjudicator found that the changed circumstances and passage of five years meant the exceptions to disclosure may no longer apply as they did five years ago, and ordered the public body to provide a new response to the request (at paras 51-55).

Commentary and Guidance for People Seeking Information from the Government of Alberta

First, *Re University of Alberta* shows the severe delays at the OIPC (which I have covered before). The second access request was filed on December 11, 2019 (at para 6), the request for review was filed January 29, 2020 (at para 9), the request for an inquiry was submitted December 15, 2020 (at para 10), and the OIPC's decision was released on December 13, 2023. A four year wait to resolve a procedural question is outrageous for a process intended to typically take 30 days (*FOIP* at s 11(1)) and to hold public bodies to account. It is another example of the miserable state of access to government information in Canada.

Second, I agree entirely with the Adjudicator's decision. In most litigation, *res judicata*, issue estoppel, abuse of process, and limitations periods are crucial for providing finality to disputes so the parties may get on with their lives. Access to records under *FOIP* is totally different: when a public body finds that information cannot be released under an exception to disclosure, that finding is only temporary. Many records that *FOIP* applies to are important for both reporting on recent news and historical research. Eventually, all records to which *FOIP* applies ought to be disclosed to the public. Public bodies relying on exceptions to disclosure to refuse to release information are not able to say 'you may never see these records' – only 'you cannot see these records yet'.

Rather than criticize the decision, I offer some general guidance on when to refile a *FOIP* access request after an initial record has come back covered in redactions. First, do not refile the request immediately. That would be pointless, vexatious, and the request would be correctly disregarded. When considering when to refile a request, the key question is under what exception to disclosure the public body refused to release the information. Each exception to disclosure expires at different times and for different reasons based on the language of the exception.

Some of the exceptions to disclosure in *FOIP* have a fixed expiry date, after which the exception can no longer apply. The most common expiry date is 15 years from when the record was created. This includes: records relating to an audit by the chief internal auditor of Alberta (at s 6(8)), disclosure harmful to intergovernmental relations (at s 21(4), cabinet and treasury board confidences (at s 22(2)(a)), local public body confidences (at s 23(2)(b)), and advice from officials (at s 24(2)(a)). Copies of records that were initially released with redactions will be available at

the end of the 15-year period. The exception to disclosure for information on the exercise of prosecutorial discretion expires after 10 years (*FOIP* at ss 20(1)(g), 20(2)). The exception to disclosure for personal information functions differently: rather than relating to the year the record was created, it expires 25 years after the death of the individual it relates to (*FOIP* at s 17(2)(i)). Note that the fixed expiry dates do not preclude earlier expiry for discretionary exceptions to disclosure – if no harm would result from the release, a discretionary exception cannot be applied.

In my view, 15 years is irrationally long for most of these exceptions to disclosure to last. Alberta has periodic elections every 4 years – why does *FOIP* protect cabinet confidences and advice from officials for nearly four election cycles? Either 4 years or 8 years would make sense – but 15 years appears to have been an arbitrary choice that has become a major obstacle to the public's right of access.

Where an exception to disclosure has no fixed expiry date, determining when to refile is more complex. In general, the question is when the harm that would have been caused by the release of the information would no longer occur. For example, section 26(c) of *FOIP* allows a public body to refuse to disclose information relating to "standardized tests used by a public body, including intelligence tests, … if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits." Section 26(c) therefore expires when the test is no longer being given and the results of the test are no longer being relied on.

There may be a troubling exception to the general rule: *FOIP*'s exception to disclosure for privileged information, including solicitor-client information, in section 27 has no expiry date and is not connected to any harm. Justice Wayne N. Renke of the Alberta Court of King's Bench has previously written that:

> to establish the privilege is to establish the grounds for relying on the privilege. The existence of the privilege is the warrant for reliance on the privilege. No additional IPC scrutiny of discretion concerning solicitor-client privilege claims is warranted. (*Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII) at para 74).

This total refusal to assess how a public body applied their discretion under section 27 creates a zone of permanent secrecy for communications between government and their lawyers (who may be government employees or may be contracted to provide government advice). In my view, this situation offends democratic principles of the publicity of government decision making and, as I have argued before, has no compelling connection to the beneficial purposes of solicitor-client privilege.

To conclude – if you filed a *FOIP* request and were legitimately refused access, get out your calendar and work out when to refile the request. Considering the 15 year-rule attached to most exceptions, soon Albertans will be able to access most of the records needed to hold Premier Stelmach's cabinet to account!

This post may be cited as: Drew Yewchuk, “Information Shall be Released: The Long Wait for Access to Government Information in Alberta” (17 January 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/01/Blog_DY_Information_Shall_be_Released.pdf

To subscribe to ABlawg by email or RSS feed, please go to http://ablawg.ca

Follow us on Twitter @ABlawg