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Albertan Waits: One Thousand and Three Hundred Delays

By: Drew Yewchuk

Case Commented on: *Alberta Energy v Alberta (IPC)*, 2024 ABKB 198 (CanLII)

Alberta Energy v Alberta (IPC), 2024 ABKB 198 (CanLII) is another decision relating to attempts to use the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (*FOIP*) to obtain records from Alberta Energy about their May 2020 decision to rescind the Coal Development Policy for Alberta (1976). Nigel Bankes described the initial rescission of the policy here and the reinstatement in February 2021 here.

The circumstances in *Alberta Energy v Alberta (IPC)* are an outrageous example of how Alberta's elected officials exploit weaknesses in *FOIP* to conceal how government decision-making works to keep Albertans misinformed or disinformed.

Background

This is the third ABlawg post relating to the *FOIP* request filed on July 3, 2020, by a coalition of ranchers (the Applicants) with Alberta Energy, requesting:

> 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.
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> Time period: January 1, 2020 to June 1, 2020

The first post covered the September 2021 judicial review decision *Blades v Alberta (Information and Privacy Commissioner)*, 2021 ABQB 725 (CanLII) (*Blades*), in which the applicants challenged the decision of the Office of the Information and Privacy Commissioner (OIPC) to grant Alberta Energy an extension of 270 days to process their records request. Justice Janice R. Ashcroft found that the OIPC's decision to grant the extension was reasonable and that the OIPC was not required to take submissions from the Applicants prior to granting the extension. Justice Ashcroft relied, in part, on Alberta Energy's claim that there were 6,539 records at issue in finding that the extension was reasonable (at paras 53-54, and 80).

The second post covered the April 2022 OIPC decision in *Re Energy*, Order F2022-20, 2022 CanLII 29391 (AB OIPC), which addressed Alberta Energy's first release of only 30 heavily redacted pages. The OIPC adjudicator rejected all of Alberta Energy's applications of *FOIP* exceptions to disclosure information on the 30-page release. The OIPC adjudicator also addressed

Alberta Energy's revised estimate of only 2,180 pages of records rather than the original estimate of 6,539 pages of records. The OIPC adjudicator ordered Alberta Energy to provide an affidavit explaining the discrepancy if 6,539 pages of records could not be found (at para 31).

In *Alberta Energy v Alberta (Information and Privacy Commissioner)*, 2023 ABKB 268 (CanLII) (not covered by ABlawg), the Applicants unsuccessfully opposed the judicial sealing order the OIPC had requested for the unredacted copy of the records that OIPC had submitted to the court.

Summary of the Decision

Alberta Energy v Alberta (IPC), 2024 ABKB 198 (CanLII) is a judicial review of F2022-20. Justice Kent Teskey began by noting "that the Public Body required 15 months to release less than 1 percent of the records responsive to the request." (at para 3). Justice Teskey accepted that the records were of broad importance but noted "broad public importance is not a prerequisite to obtaining government records under FOIPP" (at para 6), and that the Supreme Court of Canada has affirmed that "access to information legislation is quasi-constitutional" (at para 7).

Justice Teskey applied the standard of review of reasonableness to all issues (at paras 10-12), and provided a good summary of the burden of proof in OIPC proceedings: (1) there is a presumption of access, and the public body has the obligation to show their decision to deny access to the records was reasonable, (2) the public body must provide evidence to ground its arguments for the denial of access, and (3) "the public body must justify each denial on its own merits" – redactions must be justified line by line (at paras 15-20).

Justice Teskey was critical of Alberta Energy's arguments against the Adjudicator's findings on exceptions to disclosure, writing that Alberta Energy's argument were mostly "mere assertions" unconnected to the OIPC decision or the evidence (at paras 25-27). He rejected Alberta Energy's arguments that exceptions to disclosure should be interpreted more broadly, as this was contrary to the legislative intent of a presumption of access with narrow and limited exceptions (at paras 29-32). He also rejected Alberta Energy's arguments about 'non-responsive' records and expressly declined to "remit the records back to the Public Body" so Alberta Energy could "claim other statutory exceptions," as he would "not allow this Public Body the opportunity to compound the inordinate delay they have created" (at paras 33-35). On the Commissioner's rejection of Alberta Energy's claim of Cabinet confidence, he found the OIPC commissioner was both reasonable and correct "that there is a distinction between information that was provided to Cabinet and information that would disclose the deliberations of Cabinet" and that evidence was required to show that the two could not be separated (at paras 36-40).

Alberta Energy argued that it had been procedurally unfair for the Commissioner to have accepted and considered the Applicants' submission relating to the claimed number of records shrinking from 6,539 to 2,100. The Commissioner had allowed this irregular submission, however, because Alberta Energy had first included the new estimate in their final rebuttal submission. In other words, the Applicants could not have possibly addressed the issue any sooner (at paras 41-48). Justice Teskey rejected this procedural fairness argument, finding it "difficult to understand" how Alberta Energy could claim an unfair process when it had "provided final submissions that were inconsistent on their face and chose not to correct them" (at para 55).

Justice Teskey also rejected a range of arguments from Alberta Energy that the Commissioner either lacked the authority or acted unreasonably in ordering them to produce an affidavit explaining the reduced record size (at paras 56-70). Justice Teskey noted that Alberta Energy had not explained how it was harmed by the order to produce the affidavit and had made no effort to explain the shrinking record (at para 71). He concluded:

> Like the Adjudicator, I am concerned about the seemingly casual attitude that Alberta Energy adopted in representing the number of records before the Commissioner. It was reasonable for the Adjudicator to demand sworn evidence on this issue where previous representations had become concerningly inconsistent.
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> The fact that the Public Body has not elected to clarify the record before this Court reveals the lack of any fundamental unfairness arising from this process. I view this argument as a collateral attack on the decision and reject it.
> (at paras 72-73)

Last, Justice Teskey addressed the Applicant's argument that the court should decline judicial review because of Alberta Energy's "substantial and continuing delays in producing the records" (at para 74). He noted that freedom of information must be timely to be meaningful and that judicial reviews can compound delays and defeat the timeliness intended by the legislature (at paras 75-78). He criticized the extensive delays caused by Alberta Energy and was clear that the purposes of *FOIP* had been defeated by Alberta Energy's conduct:

> Every Albertan is entitled to a broad right of access to the records of their government. This is an essential pillar of a functional democracy. *FOIPP* contemplates a regime that is prompt, accessible and fair.
> …
> It is difficult not to look at the history of this matter and see the critical rights imbued by access to information as being largely illusory.
> (at para 79 and 81)

Justice Teskey warned public bodies to expect the Court to refuse to grant judicial review remedies where public bodies have failed to comply with their obligations under *FOIP* (at para 82) and dismissed Alberta Energy's application in its entirety.

Commentary

First, a practical note for lawyers practicing in administrative law: this case was argued prior to the release of *Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8 (CanLII), discussed here. Paragraphs 74 – 82 therefore do not address the distinction between a court's discretion to hear a judicial review and a court's discretion to grant remedies on judicial review. While the court could have given the parties the opportunities to make new submissions based on *Yatar*, Justice Teskey's decision not to do so is rational given that inordinate delay was a key issue and the outcome did not turn on the question. However, lawyers citing paragraphs 74 – 82 of this decision should read paragraphs 49 – 54 of *Yatar* carefully.

Second, it is notable how quickly Justice Teskey's dismissed Alberta Energy's 'arguments' about the exceptions to disclosure. Justice Teskey's rapid and total dismissal of Alberta Energy's claims reinforces my view that Alberta Energy filed and argued this case simply to further delay its ultimate release of all the requested records.

Third, quotes from the Minister of Energy and Minerals, Brian Jean, suggest he misunderstands what is happening:

> We have released thousands of documents … My understanding is we have and we've released all that we are required to by law. And of course there are opportunities to restrict some of the documents based upon the best legal advice and that's of course what we've taken and there is an appeal process for that. And of course, if they want to appeal that, that's fine and they can do so.

The Minister gets everything wrong. Alberta Energy has processed 1,353 pages (a processing rate of around one page per day since the *FOIP* request was filed) and released heavily redacted copies of just 622 pages. Given that Alberta Energy relied on interpretations of the exceptions to disclosure that the OIPC and the court have now rejected, almost none of those pages have been processed or released correctly. The Minister's statement also appears to misunderstand that Alberta Energy lost the case (and lost badly), so there is absolutely no reason the Applicants would be using an appeal process.

Last, as Justice Teskey wrote, "[r]eceiving records years after a request may often be a pyrrhic victory and one that does little to contribute to the need for public accountability for government actions" (at para 76). Is this decision a pyrrhic victory for the Applicants and for access to information in Alberta? The decision is well written and will provide a helpful precedent for Albertans arguing for access under *FOIP*. Further, there are rumours that the OIPC now requires more detail from public bodies on their estimates of the size of records when seeking extensions (although no official statement has been made, and there is no sign the OIPC will allow applicants to make submissions on extension decisions.)

But these small improvements are not even close to enough. If *FOIP*'s timelines had been followed, the requested records should have been available for use during an application for judicial review (now withdrawn) of the May 2020 decision to rescind the coal policy, the coal policy consultation (now finished), and the 2023 election. Justice Teskey's decision is a strong statement of judicial disapproval, but is unlikely to prevent this from happening again.

Access to information legislation is "an essential pillar of a functional democracy" with a quasi-constitutional importance (at paras 7 and 79). But as recently made plain in media reports, access to information has failed in Alberta, *FOIP* is too weak, and Alberta needs law reform to improve the public's access to government held information and government decision making. Without a working system for the publicity for government processes, Albertans endure the effects of a hobbled democracy: a government filled with people who make policy decisions with lobbyists in secret, provide public relations spin and invented cover stories to the public, and then leave for jobs consulting and lobbying for the industries they were meant to regulate for the public good.

This post may be cited as: Drew Yewchuk, “Albertan Waits: One Thousand and Three Hundred Delays” (24 April 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/04/Blog_DY_Albertan_Waits.pdf