CLOSING THE DOOR ON TRANSPARENCY AND ACCOUNTABILITY: THE INFORMATION AND PRIVACY COMMISSIONER'S *EX PARTE* REVIEWS OF PUBLIC BODIES' REQUESTS FOR EXTENSIONS UNDER FOIP

By Michael M. Wenig, Big Spruce Law (www.bigsprucelaw.ca)

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I. Introduction

The axiom "timing is everything" is commonly used in the contexts of investing, business, and personal relations.[1] However, the phrase also resonates for governance. The timing of government decisions can have major practical outcomes for policy-making and democratic processes.[2] Even when decisions are seemingly small or minor, their timing can make a significant difference in substantive outcomes.

One example is the timing of government responses to public requests for access to government records. Legislators, courts, and commentators have long recognized that providing the public with rights of access to government information is central to

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[1] For example, actor/musician Garret Hedlund uses the phrase in a tear jerking, romantic context, in his country song "Timing is Everything," online: https://www.youtube.com/watch?v=5vO9qp9cx4Q.

[2] Sometimes timing has constitutional significance. For example, in *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34, the Supreme Court of Canada ("SCC") recently considered the constitutionality of Ontario legislation that changed the Toronto municipal voting districts mid-way through an election period. There was no dispute that the Legislature had constitutional authority to change the municipal voting districts; the constitutional question was just about the *timing* of the re-districting change—over three months after nominations had opened, and roughly two months before the election. The Court upheld the legislation but only by a slim, 5-4 majority. According to the dissent, the province's mid-election changes to the electoral districts was not only "unprecedented in Canadian history," but it "destabiliz[ed] the foundations of the electoral process and interfer[ed] with the ability of candidates and voters to engage in meaningful political discourse during the period leading up to voting day." *Ibid* at paras. 89-90.

ensuring government transparency and accountability which in turn are central to democratic government. Government delay in providing access to information can be tantamount to refusing to provide the information if the requested information is relevant to political or policy decisions or processes that are time sensitive. Therefore, access delays should be closely scrutinized. At the least, reasons for those delays should be transparent and subject to public challenge. Precluding public scrutiny of these reasons reduces the democratic values that access to information is meant to promote.

The processes that enable delays should also be transparent and closely scrutinized. In Alberta, one such process is the Information and Privacy Commissioner's consideration of an agency's request for an extension of time to respond to a citizen's application for the agency's records, under Alberta's *Freedom of Information and Protection of Privacy Act* ("FOIP" or "the act").[3] Currently, this process is non-transparent because the Commissioner reviews the agency's extension request on an *ex parte* basis—that is, without giving the records applicants advance notice of, and a chance to comment on the agency's extension request.[4] (This paper refers to a general notice and comment process as an "*inter partes*" process.)

In fact, the Office of the Information and Privacy Commissioner ("OIPC") will not even give the records applicant a copy of the agency's written extension request after the Commissioner decides whether to grant the request. To make matters even worse, the OIPC also does not routinely provide the records applicant with the Commissioner's reasons for granting the extension. Rather, the public body notifies the records applicant after the fact and refers cursorily to the legislative grounds (discussed below) for the extension.

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[3] RSA 2000, c F-25.

[4] For a general definition of "*ex parte*" proceedings, see e.g. *Ruby v Canada (Solicitor General)*, 2002 SCC 75 at para 25 (stating that, in legal terms, *ex parte* means a "proceeding, or a procedural step, that is taken or granted at the instance of and for the benefit of one party only, without notice to or argument by any adverse party").

My knowledge of these processes is based on my first-hand experience representing a records applicant in a recent FOIP file and on my knowledge of another recent FOIP file. In the latter, the Commissioner's delegate extended the time for Alberta Energy to respond to a request for records relating to Alberta Energy's May 2020 rescission of the province's longstanding coal policy. The records request was submitted by southern Alberta ranchers Macleay Blades and John Smith (and their respective ranching companies) (collectively, "Blades"). Although my *data set* is limited to these two files, the OIPC's procedures in those files appear to have been based on the OIPC's routine or standard practices in all files involving extension requests.

In both these files, the Commissioner gave the records applicants nearly identical reasons for using an *ex parte* process. These reasons are not tied to the specific circumstances of those files. In other words, they appear to be reasons for the OIPC's presumed routine use of an *ex parte* process for considering agencies' extension requests.

In *Blades v Alberta (Information and Privacy Commissioner) ("Blades v OIPC")*, Blades sought judicial review of that extension decision, on the grounds that the *ex parte* process violated FOIP and Blades' common law rights to procedural fairness. Blades also argued that the length of the extension granted by the Commissioner's delegate was unreasonable. Justice Ashcroft of the Alberta Court of Queen's Bench rejected both the procedural and substantive claims.[5]

Drew Yewchuk, a lawyer with the Public Interest Law Clinic at the University of Calgary Faculty of Law, discusses the Court's decision in a recent post on the Law Faculty's *ABlawg* website.[6] This paper supplements Yewchuk's insightful analysis of the

[5] 2021 ABQB 725 (CanLII) (Ashcroft, J.).

[6] Drew Yewchuk, *Procedural Fairness When Challenging Timeline Extensions for Freedom of Information Requests* (Sept. 27, 2021), online: https://ablawg.ca/2021/09/27/procedural-fairness-when-challenging-timeline-extensions-for-freedom-of-information-requests/.

procedural issues in *Blades v OIPC*. The primary focus of this paper is on the Commissioner's interpretation of FOIP and her policy-based reasons for using an *ex parte* process. This paper also touches on the procedural fairness issues but defers to Yewchuk's more extensive analysis of that topic.

Part II below summarizes the general principles underlying FOIP and the act's relevant provisions. Part III provides background on the Blades FOIP file and then sets out the Commissioner's reasons, as stated in that file, for reviewing extension requests on an *ex parte* basis. Part IV analyses each of those reasons and the Court's responses to those reasons, in *Blades v OIPC*.

II. FOIP – The Legislative Background

As noted above, it is widely recognized that public rights of access to government information are central to democratic government. For example, Alberta's Information and Privacy Commissioner recently noted Albertans' "increased awareness and understanding of information and privacy rights" as a "positive" trend that "should be encouraged – it is, in fact, essential for a healthy democracy and engaged citizenry."[7] Similarly, the OIPC's latest business plan refers to information access as a "cornerstone of democracy and good governance" and notes that, "[w]ithout transparency" facilitated by access to information, a "breakdown in trust can occur potentially undermining democratic institutions."[8]

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[7] OIPC, Annual Report - 2018-19 (Nov. 2019) at 7, online: https://www.oipc.ab.ca/media/1018858/Annual_Report_2018-19.pdf.

[8] OIPC, *Strategic Business Plan 2021-24* at 3, online: https://www.oipc.ab.ca/media/1121618/Business_Plan_2021-24.pdf. The plan notes that information access "has never been more necessary" given governments' struggles to manage the COVID-19 pandemic, which have brought a more "pronounced" "focus on open, transparent and accountable government". That trend in turn has brought citizens' rights to access government information into the "spotlight as people try to understand why and how decisions are made that affect their lives and livelihoods." *Ibid.*

The SCC has also recognized these principles, explaining that access to information is an "important element of a modern democratic society"[9] and that the "overarching purpose" of access to information laws is to "facilitate democracy".[10] According to the SCC, access laws further this purpose by ensuring that the public has the information it needs to meaningfully participate and to hold politicians and bureaucrats accountable.[11]

If, as the SCC opined in *Dagg*, access to information is "required to participate meaningfully in the democratic process,"[12] then delays in providing key information can preclude meaningful participation in a time-sensitive democratic process. As a former Alberta Information and Privacy Commissioner noted in a 2006 order, access to

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[9] *Alberta (OIPC) v University of Calgary*, 2016 SCC 53 at para 30 (maj.). See also *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 1 (noting that access to government information "can increase transparency in government, contribute to an informed public, and enhance an open and democratic society" (cited in *Alberta (OIPC) v University of Calgary*, *supra* at para 30)).

[10] *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403 at para 61. This principle was noted by the four-Justice dissenting opinion in *Dagg*, in the context of the dissent's explanation that exemptions from legislated access rights should be interpreted in light of the legislation's underlying purpose. *Ibid* at para 63. The majority agreed with the dissent's general "approach to the interpretation" of the two relevant statutes (*ibid* at para 1) and thus, impliedly endorsed the dissent's statement of the purposes of access to information legislation. Subsequent SCC decisions have also endorsed these principles. E.g. *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3 at para 22; see also *ibid* at para 1 (noting that "'[s]unlight', as Louis Brandeis put it so well, 'is said to be the best of disinfectants'" (citing "What Publicity Can Do", Harper's Weekly, December 20, 1913, 10, at 10)).

[11] *Dagg, supra* note 10 at para 61. Similarly, in a 2010 joint resolution, Canadian access to information commissioners—including Alberta's commissioner—explained that "enrich[ing]" the public's "information resources improves communication channels, promotes citizen engagement, instils trust in government, fosters economic opportunities and ultimately results in more open and responsive democratic government." Accordingly, the commissioners jointly resolved to "endorse and promote open government as a means to enhance transparency and accountability which are essential features of good governance and critical elements of an effective and robust democracy." Joint Resolution: Open Government – Resolution of Canada's Access to Information and Privacy Commissioners (Sept. 1, 2010), online: https://www.oipc.ab.ca/joint-resolution-open-government.aspx.

[12] *Dagg*, *supra* note 10 at para 61.

information laws generally set timelines for government responses "for good reasons." The former Commissioner explained that

> [a]ccess delayed can in some cases become access denied where the passage of time causes records to become less relevant than they were when the access request was originally made. When public bodies fail to comply with legislative timeframes, the [Alberta access to information] Act's goals of accountability and openness become increasingly frustrated.[13]

Consistent with these principles, FOIP gives the public a "right of access" to government records, subject to "limited and specific" exceptions stated in the act.[14] To facilitate this access, FOIP generally requires government agencies—termed "public bodies" under the act—to respond to public requests for information within 30 days after receiving those requests.[15]

Under FOIP's plain terms, the public body must make "every reasonable effort" to respond to a records request, rather than to actually respond, within this 30-day period. However, unless an extension is granted, a public body's failure to respond within 30 days is deemed a refusal of the request and that refusal is appealable to the Commissioner.[16] As a result, the 30-day period to make "every reasonable effort" to respond to a records request is, in effect, a 30-day deadline to respond.

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[13] *Alberta Health and Wellness (Re)*, 2006 CanLII 80847 (AB OIPC), Order F2005-020 at para 30. See also *Blades v OIPC, supra* note 5 at paras 65 (interpreting *Dagg* as "emphasiz[ing] that in order for meaningful participation to occur, citizens or interested parties must be given timely access to the information they require") and 66 (citing *Alberta Health and Wellness (Re)*).

[14] FOIP, ss. 2(a) and 6(1).

[15] *Ibid*, s. 11(1). In an April 2020 order, the Minister of Service Alberta modified section 11 of FOIP by extending this initial 30-day response deadline to 90 days, due to the "demands of the pandemic COVID-19". Ministerial Order SA: 009/2020 (Apr. 9, 2020). This order appears to have expired, although I have not been able to confirm that expiry with the Alberta government's FOIP staff at Service Alberta. For convenience, this paper refers to FOIP's default deadlines—that is, without the Ministerial Order, unless otherwise noted.

[16] FOIP, ss. 11(2) and 65(1).

Section 14(1) of FOIP states that a public body may unilaterally extend the 30-day deadline by another 30 days "or, with the Commissioner's permission, for a longer period," if one or more of four circumstances listed in that section occurs. [17] Briefly, the four listed circumstances are: (1) the records request lacks "enough detail" for the public body to identify the requested records; (2) the request is for a "large number of records"; (3) the public body needs more time to consult with a "third party" or another public body; and, (4) a third party has asked for an OIPC review of the public body's proposed response to the records request.

Under section 61 of the act, the Commissioner has broad discretion to delegate its decision-making authority under section 14 (along with other decision-making powers under the act).

Section 14(4) requires the public body receiving an extension to notify the records applicant: of the reason for the extension, of when the records applicant can expect to receive a response, and that the records applicant can submit a complaint about the extension to the Commissioner. [18] Nothing in section 14 (or anywhere else in FOIP) expressly requires the Commissioner to ask a records applicant's views on an agency's

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[17] Ministerial Order SA:009/2020 added an additional subsection which allowed a public body to extend the time limit for 60 days or, "with the Commissioner's permission, for a longer period" if, in the public body's opinion, "the pandemic COVID-19 unreasonably interferes with the operations of the public body." *Ibid*, s. 1(2) (adding new subsection (1.1) to section 14 of FOIP). In *Blades v OIPC*, the Court held that this 60-day extension period in the order was in addition to, rather than instead of, the 30-day extension in section 14(1) of FOIP. *Supra* note 5*,* at note 1.

[18] Presumably relying on the latter of these notice items, Blades asked the Commissioner to review her delegate's extension decision. The Commissioner denied the request on the ground that the OIPC was "*functus*" after granting the extension, because it lacked authority under FOIP to review the Commissioner's own extension decision. *Blades v OIPC*, Court File No. 2101 05431 (civil), Certified Record of Proceedings ("*Blades* Record"), Tabs 2 (May 26, 2021 letter from Commissioner Clayton to Richard Harrison at 5-8) and 8 (February 25, 2021 Request for Review/Complaint Form). Blades' judicial review application included a challenge to this jurisdictional ruling but Blades later withdrew this challenge, so the court's decision did not address this issue on its merits. *Blades v OIPC*, *supra* note 5 at para 18 and note 2.

extension request before the Commissioner decides whether to grant that request. However, nor does section 14 expressly prohibit the Commissioner from providing that type of transparent process.

III. The Commissioner's reasons for using an *ex parte* process

There does not appear to be a generic OIPC rule or policy requiring or providing for the Commissioner's use of an *ex parte* process for considering extension requests. There is an OIPC "practice note" that addresses the required content of public bodies' written extension requests. [19] According to this note, that the Commissioner's extension decision "will be made based on the information provided" in those written requests.[20] This statement is an implied policy that the Commissioner will not solicit and consider information from the person who requested the records.

This implied policy appears to conflict with a FOIP guide published by Service Alberta—the ministry responsible for FOIP's overall implementation.[21] According to that guide, a public body should notify a records applicant of the public body's extension request "before the Commissioner's final decision has been made as to whether the extension will be granted."[22] Arguably, by calling for pre-decision notice, the guide impliedly acknowledges that applicants should be able to provide their views *before* the Commissioner makes an extension decision. However, this inference is hardly certain.

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[19] OIPC, *Practice Note – Request for Time Extension Under Section 14* (Sept. 2016), online: https://www.oipc.ab.ca/media/1075621/practice_note_time_extension_sep2016.pdf.

[20] *Ibid.* at 1.

[21] Service Alberta's responsibility for FOIP is established, collectively, through section 1(k) of FOIP, section 16 of the *Government Organization Act*, RSA 2000, c G-10, and section 18(q) of the Designation and Transfer of Responsibility Regulation, Alta Reg 44/2019.

[22] Service Alberta, *FOIP Guidelines and Practices (2009)* at 67, online: https://www.servicealberta.ca/foip/resources/guidelines-and-practices.cfm.

At any rate, after the Commissioner's delegate gave the OIPC's reasons for using an *ex parte* process, in the Blades file. For background and context, the following is a summary of the history of Blades' records request, including the Commissioner's reasons for using an *ex parte* extension process.

A. Blades' records request

On July 3, 2020, Blades made a broad request for Alberta Energy's records relating to the coal policy rescission.[23] Alberta Energy granted itself two extensions to respond, the last to January 18, 2021, and then requested an additional, 612-day extension from the Commissioner. Using an *ex parte* process, the Commissioner's delegate granted Alberta Energy a 270-day extension, until October 14, 2021.[24]

Alberta Energy notified Blades of the extension request only after it was granted, in a letter with the bare-bones explanation that the extension was granted "under section 14(1)(b) of the FOIP Act [large volume of records]."[25] Blades requested that the Commissioner conduct an expedited review of the extension and, following the Commissioner's inaction on their review request, Blades filed a judicial review application in the Court of Queen's Bench.[26]

In their Court submissions, Blades claimed they needed the coal policy records promptly, to support an ongoing public awareness campaign on the coal policy rescission and to assist in another court case challenging the merits of that policy recission. That other court case was ultimately rendered moot by Alberta Energy's

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[23] For background information on that coal policy rescission, see the six-part blog series by Nigel Banks (parts 1-4 and 6) and Drew Yewchuk (part 5), on ABlawg.ca.

[24] *Blades v OIPC*, *supra* note 5 at paras 1-3, 70, and 72; *Blades v OIPC*, Civ 2101-05431, Brief and Authorities of the Applicants ("*Blades*, Applicants' Brief"), at paras 1-2 and 38-44.

[25] *Blades* Record, *supra* note 18, Tab 8 (Jan. 11, 2021 letter from Senior FOIP Advisor to Richard Harrison, Wilson Laycraft Barristers and Solicitors (brackets in original)).

[26] *Ibid,* Tabs 3 (Originating Application for Judicial Review), 8 (Request for Review/Complaint form), and 10 (March 8, 2021 Letter to the Commissioner from Richard Harrison).

reinstatement of the coal policy, but Blades still sought the records to assist in their and others' submissions to a "coal policy committee." The Energy Minister created and empowered that committee to hold broad-based consultations (through mid-September, 2021) and to make recommendations on a new coal policy.[27]

Roughly two weeks after Blades filed its judicial review application, the Commissioner issued a decision denying the requested review on jurisdictional grounds and providing expanded reasons for the extension and for making the extension decision on an *ex parte* basis.[28] (Those reasons are essentially identical to reasons the Commissioner previously gave following her issuance of an extension on the other FOIP file noted in part I above.)

On the October 14, 2021 deadline, Alberta Energy disclosed to Blades a pdf file with thirty-one pages of heavily redacted records. By contrast, Alberta Energy previously estimated, in its extension request to Commissioner and submissions to the Court, that there were roughly 6500 pages of responsive records.[29] In a letter accompanying this disclosure, a FOIP advisor stated that they are "continuing to process additional records" and will be disclosing them in a "staggered manner." The letter also states that "the records contain some information that is not responsive," but the letter does not revise Alberta Energy's prior estimate of 6500 total pages of responsive records.[30] Alberta Energy's 31-page disclosure is less than 0.5% of all pages of responsive records, using Alberta Energy's estimate of the number of those pages. Given this low percentage of disclosed records, for all practical purposes, Alberta Energy has missed the extended deadline granted by the OIPC.

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[27] *Blades*, Applicants' Brief, *supra* note 24 at paras 82-83.

[28] *Blades* Record, *supra* note 18, Tab 2.

[29] *Blades v OIPC*, *supra* note 5 at para 53.

[30] Oct. 14, 2021 letter from Alberta Energy Senior FOIP Advisor to Richard Harrison (Wilson Laycraft Barristers & Solicitors) at 1 (forwarded to the author by Richard Harrison).

B. The OIPC's reasons for using an *ex parte* process

As noted in part III.A above, the Commissioner explained why the OIPC uses an *ex parte* process in a letter denying Blades' request for the Commissioner to review the delegate's extension decision. In that letter, the Commissioner stated that the relevant criteria for making an extension decision

> are only those criteria set out in section 14. Section 14 is a complete code as to what may be considered. This list is exhaustive. I may not consider any factors other than those set out in section 14.[31]

The Commissioner then reasoned that "[o]nly the public body is in the position to speak to" the section 14 extension criteria, so the person requesting the records "cannot possibly know or speak to what is only within the public body's knowledge." Based on this logic, the Commissioner concluded that the Legislature intended the extension process under section 14 to be only between the Commissioner and the public body requesting the extension. According to the Commissioner, the Legislature

> did not intend that a time extension request under section 14 be structured as an adjudicative process in which the parties would exchange submissions before a decision is made. Section 14 is an expedited process in which a decision is issued quickly, based on the public body's evidence. An adjudicative process would add far greater time before a decision could be made.[32]

IV. Unpacking the Commissioner's reasons for using an *ex parte* process

This part assesses the Commissioner's justifications for using an *ex parte* process. Part IV.A addresses the scope of relevant factors in section 14(1) of FOIP. Part IV.B discusses whether records applicants might have useful input for the Commissioner's consideration of extension requests. Part IV.C considers whether the Commissioner has

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[31] *Blades* Record, *supra* note 18, Tab 2 (Commissioner's May 26, 2021 letter at 5).

[32] *Ibid.*

discretion, under section 14 of FOIP, to choose between *ex parte* and *inter parte* procedures for making extension decisions.

A. The scope of factors relevant to the Commissioner's consideration of a public body's extension request

As noted in part II above, section 14(1) of FOIP states that a public body may unilaterally extend the section 11 deadline by 30 days "or, with the Commissioner's permission, for a longer period," under one or more of four circumstances listed in that section. The four listed circumstances are:

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

In his blog, Yewchuk states that section 14(1) phrases these four circumstances as "conditions" rather than "considerations." Yewchuk explains that section 14(1) simply lists four conditions for the Commissioner's authority to grant an extension in the first instance. Yewchuk further explains that those four "conditions" do not limit what factors the Commissioner can "consider" when deciding whether to grant an extension when one or more condition applies.[33]

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[33] Yewchuk, *supra* note 6 at 4-6 (pdf). Besides distinguishing between "conditions" and "considerations," Yewchuk points to another FOIP section that spells out the "considerations" for another discretionary decision under the act. Yewchuk concludes that, absent any such express list in section 14(1), the scope of "considerations" for section 14 extensions is "limited only by the general purpose of" FOIP. *Ibid* at 4-5 (pdf).

Yewchuk's interpretation is well grounded in the plain language and logic of section 14(1) of FOIP. On its face, that section only states the circumstances when the Commissioner may grant an extension. The term "with the Commissioner's permission" does not purport to *require* the Commissioner to grant "permission" when one or more of those circumstances exist. Absent any such requirement, section 14(1) necessarily gives the Commissioner implied *discretion* to decide whether an extension should be granted when one or more of the four listed conditions exist. And section 14(1) does not purport to limit the scope of factors the Commissioner can consider when exercising that discretion.

This interpretation is further supported by the provision in section 14(1) allowing the Commissioner to grant an extension for a "longer period" (than 30 days). Because "longer period" is not specific, the Commissioner necessarily has discretion to decide the *length* of an extension even when one or more of the four extension conditions in section 14(1) apply.

In theory, this discretionary authority could enable the Commissioner to grant a truly short extension (e.g. one day). It would be nonsensical if the Commissioner lacked that same discretionary authority when deciding whether to grant an extension in the first instance.

Yewchuk's interpretation is also supported by the logic of section 14(1). The second and third of the four factors in that section use narrative, general tests, or triggers—"large number of records," "unreasonably interfere," and "more time is needed"—that are non-specific. How many records are a "large number"? What level of interference with a public body's operations is "unreasonable"? How much "more time" is needed to respond?

The Commissioner cannot answer these questions without considering a broader context framed by the act's purposes, *otherwise extensions for unlimited periods would*

always be warranted. Why not grant a public body five years to respond to a request for twenty-five records? If the act's purposes are irrelevant, who is to say that twenty-five is not a "large number" of records?

This outcome is clearly absurd, but only because it offends the act's underlying purposes.

Even if these tests were specific, they still do not say how much extra time is enough. Unless that judgement call is made in a broader context—namely, in light of the act's purposes—then no extension period would ever be too long.

Unlike the second and third conditions, the fourth condition in section 14(1) is triggered by a specific event—a third party's request for a review. But even this condition cannot logically be the sole basis for deciding the length of an extension. Otherwise, once again, no extension length would be too long. In fact, this is true for all four conditions.

In sum, by interpreting section 14 as a "complete code" or "exhaustive" list of factors for her consideration, the Commissioner failed to recognize that she has discretionary judgement under that section and that the listed factors cannot logically provide an exhaustive basis for her exercise of that discretion.

In its decision in *Blades v OIPC*, the Court touched on this issue, stating that, if the Commissioner is "aware" that a requested deadline extension

> would potentially defeat the purposes of the FOIP request, it may be that she is not precluded from considering this deadline along with the enumerated statutory factors…. 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.[34]

[34] *Blades v OIPC, supra* note 5 at para 63.

The Court thus refused to accept the Commissioner's position that the section 14 factors are exhaustive.[35] However, the Commissioner is unlikely to be aware of all the relevant, "particular information" if she does not hear from a records applicant before deciding whether to grant a public body's extension request.

At another point, the *Blades v OIPC* decision noted that the "importance of disclosure to the meaningful participation of citizens in a democracy cannot be minimized" and that the Commissioner is "in essence, the guardian of [records] applicants' interests and right to timely disclosure and must give them sufficient weight when deciding whether to grant an extension."[36] However, the Commissioner cannot give proper "weight" to a records applicant's "interest" without giving the applicant a chance to explain their interest.

In short, the Court's decision in *Blades v OIPC* overlooked the importance of records applicants' role in the Commissioner's consideration of public bodies' extension requests. The Court's decision is also inconsistent and incomplete as to whether delays frustrate the act's underlying objectives. On one hand, the decision noted that an extension "neither erodes nor amends the substantive content of the records to be disclosed."[37] On the other hand, the decision later clarified that delay "at some point, does impact the substantive rights of [records] applicants."[38] Similarly, the *Blades* decision noted that FOIP's purposes "may potentially be frustrated if a public body, when faced with a request for information disclosure, is allowed to significantly delay

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[35] In concluding that the Commissioner's extension was reasonable, the Court noted that the Commissioner "was attuned to the purposes of the *Act* and the importance of timely disclosure to applicants…." *Ibid* at para 80. This is another recognition that the Commissioner's considerations extend beyond the express conditions in section 14(1). However, it is unclear how the Commissioner could have been sufficiently attuned to the act's purposes when the Commissioner purported to consider only the four conditions in section 14(1).

[36] *Ibid* at para 67.

[37] *Ibid* at para 31.

[38] *Ibid* at para 37.

the disclosure."[39] However, the decision concluded that the extension granted by the Commissioner was not "equivalent to the denial" of the requested records or of a "substantive right," notwithstanding the Court's acknowledgement of the "time sensitive context" for the requested records.[40] Given this time sensitivity, the Court's conclusion calls for more explanation.

To further confuse the issue, the *Blades v OIPC* decision appears to conclude that a section 14 extension, *in general*, is "largely an interim decision that impacts process more than a substantive right to records." And, if a given extension is so long as to "infring[e]" a substantive right to records, that outcome "can be addressed under the analysis of reasonableness."[41] Presumably, this "analysis" is by a court on an application for judicial review of the reasonableness of a Commissioner's extension decision. In other words, procedural rights can be lessened when there is judicial review of the merits of the agency decision challenged on procedural fairness grounds. However, if a records applicant cannot provide its views during the agency's decision process, then the record in that judicial review is arguably incomplete.[42]

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[39] *Ibid* at para 66.

[40] *Ibid* at para 37.

[41] *Ibid* at para 41.

[42] The SCC's decision in *Ruby* may support the Court's analysis in *Blades v OIPC*. In *Ruby*, the SCC rejected a Charter challenge to a federal statute mandating *ex parte* proceedings, when requested by the government, for judicial considerations of the government's refusal to disclose personal information obtained in confidence from foreign governments or institutions. According to the SCC, the "constitutional requirements of procedural fairness" were satisfied by the records applicant's recourse to the Privacy Commissioner and to two levels of judicial review of the government's claim. *Ruby, supra* note 4 at paras 42 and 47.

B. Who can and should speak to the matters relevant to the Commissioner's extension decisions?

As noted in Part III above, the Commissioner reasoned that records applicants "cannot possibly know or speak to" an agency's extension request because the relevant factors are "only within the public body's knowledge."

This view shortchanges the potential value of public input. Depending on the nature of the records being sought, a records applicant may have useful knowledge of the records' general subject and of the circumstances of when and how the records were created. This knowledge may shed light on the likely volume of records, the clarity of the records request, and how difficult it might be for the public body to produce them. The public body may not have shared any of this background information with the Commissioner when requesting an extension.

A records applicant's contributions to an extension decision will be even more useful if, as Yewchuk argues, the scope of considerations for the Commissioner's extension decision is bounded only by FOIP's underlying purposes. For example, a records applicant can speak to the public importance of the requested records and to any timing constraints from the applicant or general public's perspective.

In addition, in some cases the public body's initial handling of the records request may bear on the fairness of the public body's extension request. Yet, if that history is not flattering for the public body, the public body is unlikely to make the Commissioner aware of it. Rather, that history will likely need to be reported by the records applicant.

Regardless of whether a records applicant has useful information in a given extension decision, allowing the applicant to participate in that decision enhances the public body's accountability. A public body is less likely to make far-reaching claims about its need for an extension, and to request inordinately long extensions, if the records applicant is participating.

Finally, giving a records applicant a chance to weigh in on an extension decision will promote cooperative resolutions. When a records applicant has advance notice of an extension request, the applicant can contact the public body making the request to discuss its timing constraints and explore creative solutions like phased records production.[43]

C. Whether section 14(1) precludes the Commissioner from making extension decisions on an *inter partes* basis

As noted in part III.B above, the Commissioner concluded that the Legislature intended section 14(4) to provide an "expedited" process in which an extension decision could be made "quickly," rather than a much slower, "adjudicative" process.[44] This expediency justification falls short if excluding records applicants from extension decisions makes it easier for public bodies to obtain extensions. Facilitating extensions means more not less delay for records applicants.

At any rate, it seems debatable that an *inter partes* process will unduly lengthen an extension decision. Giving records applicants advance notice and a chance to submit a written objection is a discrete, streamlined process. It is not a full-blown adjudication like a trial with oral testimony and cross-examination.

In many cases, records applicants likely will not object to public bodies' extension requests. (If a public body requests a short extension, the records applicant has little incentive to object and thereby prolong the decision process.) Even when a records applicant objects, that step may require only a few extra weeks. The Commissioner can

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[43] The *Blades v OIPC* decision hinted at the value of phased production. *Supra* note 5 at paras 69 (noting that "[c]ertainly, different types of records may warrant different types of time lines") and 74 (noting the Commissioner's "encourage[ment]" that Energy disclose the requested records in "tranches").

[44] *Blades* Record, *supra* note 18, Tab 2 (Commissioner's May 26, 2021 letter at 5).

count that extra time toward the requested extension period, so it is not *wasted* time in terms of the public body's processing of the records request.

In addition, the Commissioner can require a public body to check with a records applicant *before* submitting an extension request to the Commissioner and then to report, in its written request, whether the records applicant objects to the requested extension and, if so, whether the applicant wishes to submit a written response to the extension request. This approach would combine several steps and obviate the need for further notice and comment in those instances where the records applicant has no objection to a proposed extension.

If the Commissioner is still worried about inordinate delays, the Commissioner could consider providing an *inter parties* process only in those cases where the public body is requesting a long extension (and where the records applicant objects to the extension request).

As for her legal analysis, the Commissioner stated correctly that section 14 does not give records applicants an express right to participate in an extension decision. However, nor does that section expressly *prohibit* the Commissioner from making those decisions on an *inter partes* basis. Absent any such prohibition, the Commissioner has discretion to decide whether to let records applicants participate. That discretion is bounded by FOIP's objectives of promoting transparency and accountability, and by the common law of procedural fairness.

The Court's decision in *Blades v OIPC* supports this interpretation of section 14, by acknowledging that the section is "silent" on whether the Commissioner should apply an *ex parte* or *inter partes* process for considering public bodies' extension requests. The decision then points to section 69(3) of FOIP, which expressly requires the Commissioner to use an *inter partes* process when conducting "inquiries" for review requests. According to the Court, the more formal *inter partes* process required by

section 69(3) "shows legislative intent to require the Commissioner to hear from the [records] applicants at one stage of the process but not at other stages" but also an intent that the Commissioner "may not be foreclosed" from using an *inter partes* approach "at other steps in the process."[45]

However, the Court also inferred from this legislative scheme that the Blades applicants were entitled to a "lower degree of procedural fairness." Based on this and other factors, the Court concluded that the Commissioner's *ex parte* extension decision had not breached Blades' procedural fairness rights.[46]

The Court's choice of the word "lower" is confusing. "Lower" is a relative term but the Justice provides no comparator. Lower than what? No doubt there are other types of administrative decisions that require a "higher" degree of procedural fairness than the Commissioner's consideration of public bodies' extension requests. The question however is whether a records applicant is entitled to the procedural right of notice and an opportunity to be heard. That seems like a bare minimum of procedural fairness.[47] (Yewchuk's blog addresses other aspects of the Court's procedural fairness analysis.[48])

V. Conclusion

As noted in part I above, the Commissioner is generally a staunch advocate of information disclosure to promote government transparency and accountability.

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[45] *Blades v OIPC, supra* note 5 at para 35.

[46] *Ibid* at para 45.

[47] In *Canadian Broadcasting Company v Manitoba*, the SCC's eight-justice majority reiterated that, under principles of "[n]atural justice," when a person is "affected by a decision, they generally have the right to appropriate notice of that decision and an opportunity to be heard")." 2021 SCC 33 at para 44. See also, e.g. *Ruby*, *supra* note 4 at para 40 (noting, as a "general rule" of procedural fairness, that a "fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position").

[48] Yewchuk, *supra* note 6 at 3-4 (pdf).

However, the Commissioner's use of an *ex parte* process for considering public bodies' extension requests is inconsistent with this general philosophy. The *ex parte* process is itself non-transparent and limits the OIPC and public bodies' accountability for these extensions. Limiting accountability likely promotes delays in public bodies' responses to records requests. Because "access delayed" can be "access denied," the *ex parte* process ultimately frustrates public bodies' accountability and transparency on substantive matters. Democracy suffers.

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