

Extraordinary Circumstances

Section 24 of the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015 or the Act)* allows the Commissioner to vary a procedure, including a time limit under the Act, where extraordinary circumstances exist:

24. (1) The head of a public body, an applicant or a third party may, in extraordinary circumstances, apply to the commissioner to vary a procedure, including a time limit imposed under a procedure, in this Part.

(2) Where the commissioner considers that extraordinary circumstances exist and it is necessary and reasonable to do so, the commissioner may vary the procedure as requested or in another manner that the commissioner considers appropriate.

At the time of making a request that the Commissioner vary a procedure or time limit under the Act, the public body, applicant or third party making the application must present evidence establishing that extraordinary circumstances exist. As *ATIPPA, 2015* does not define the term *extraordinary circumstances*, this guidance document is meant to assist in considering whether to make an application and the threshold for approval by the Commissioner.

There is no statutory definition of extraordinary circumstances in any of our Province's legislation. Looking to other Canadian jurisdictions that have defined extraordinary circumstances, examples include references to:

- natural disasters, such as fires or floods;
- labour disputes;
- disruptions of postal services, power services and technological facilities;
- personal tragedy such as a death in the family; and,
- theft or vandalism of records.

The theme that emerges from these examples is that extraordinary circumstances are normally external, unanticipated and beyond the control of the party seeking to rely on them to invoke statutory discretion to depart from otherwise applicable procedures and time limits. They do not include events that through the exercise of due diligence the impacts of those events could have been controlled or avoided. As an example, a public body neglecting to make arrangements to have a back-up coordinator in place during the planned vacation of its primary coordinator is not an extraordinary circumstance.

In terms of case law, what extraordinary circumstances might include was addressed by our Supreme Court in *Moss v. Moss*¹:

In Middleton v. McPherson, 1997 CanLII 11517 (AB QB), [1997] A.J. No. 614 (Alta. Q.B.), Moreau, J., addressed extraordinary expenses in some detail. In her discourse, she noted

¹ *Moss v. Moss*, 159 Nfld & PEIR 1 (SCTD); available at <http://canlii.ca/t/fww8q>.



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the dictionary definition of extraordinary as being out of the usual course, exceptional, etc. She observed that the Guidelines could not contemplate the many variations of such expenses, and also whether all are necessary or part of a spending pattern of a family prior to separation.

I subscribe to these opinions of Professor McLeod and Justice Moreau.

The dictionary definitions referred to by Moreau, J., in Middleton included:

Extraordinary

Concise Oxford Dictionary:

1. *out of the usual course; (of official etc.) additional, specially employed ...*
2. *exceptional, surprising; unusually great.*

Webster's New Collegiate Dictionary:

1a: going beyond what is usual, regular or customary

b: exceptional to a very marked extent: remarkable ...

Extracurricular

Concise Oxford Dictionary

'not coming within the normal curriculum'.

Webster's New Collegiate Dictionary:

1. *not falling within the scope of a regular curriculum; specif: of or relating to officially or semi-officially approved and usu. organized student activities (as athletics) connected with school and usu. carrying no academic credit*
2. *lying outside one's regular duties or routine."*

At some point, what may have once been extraordinary can cease to be so. As an example, public bodies that receive very few access to information requests may be able to establish extraordinary circumstances on experiencing a sudden and substantial increase in requests. A public body that has been regularly receiving large numbers of requests will be challenged to establish extraordinary circumstances when relying on volume of requests alone as the foundation of a request to alter the procedures and time limits set out in the Act. However, should the volume increase above the volume that has become the new normal, the public body would have a case for the volume being extraordinary, or if, for example, an exceptionally complicated request is received.

To date only public bodies have submitted requests for the Commissioner to apply section 24. Those requests all involved public bodies that had failed to meet the deadlines set out in sections 21(1) or 23(1) of the Act to request an extension of time or to disregard a request.² Public bodies seeking to rely upon section 24 in these situations must be aware that the burden of proof regarding the existence of *extraordinary circumstances* is in addition to the evidence they must show in order to have a time extension or an application to disregard approved.³ (For more information on these specific topics, please see our guidance documents on time extensions⁴ and requests to disregard⁵.)

In summary, parties seeking to establish extraordinary circumstances should normally present to the Commissioner evidence of events that were:

1. external to the party or personal tragedy;
2. unexpected; and,
3. beyond a party's control such that the exercise of due diligence would not have avoided the impact of the event.

Making a Request Based on Extraordinary Circumstances

An application to vary a procedure or time limit based on extraordinary circumstances shall be made in writing to the Office of the Information and Privacy Commissioner. Given the strict legislated time lines for making and responding to the request, the preferred method for making a request is by e-mail to commissioner@oipc.nl.ca (We request additionally that the Commissioner's Office be contacted by telephone prior to sending the e-mail to discuss the matter briefly. Analysts will, if asked, discuss whether circumstances are potentially extraordinary and the type of evidence that might be helpful).

Response by the Commissioner to an Application for an Extension of Time

The Commissioner is required to respond to an application based on extraordinary circumstances without delay but not later than 3 business days after receiving the application.

Please note that the time to make an application and receive a decision from the Commissioner does not suspend the period of time for responding to an access request as set out in section 24(4) of *ATIPPA, 2015*.

Notification of the Applicant where Application Approved by Commissioner

Where the Commissioner decides to vary a procedure upon an application of a head of a public body or a third party, the head shall notify the applicant in writing: (a) of the reason for the procedure being varied; and (b) that the Commissioner has authorized the variance.

² Any procedure within Part II of the Act can be varied by the Commissioner on demonstration of extraordinary circumstances.

³ Failure to discharge the burden of establishing extraordinary circumstances will negate any requirement to assess the merits of a time extension or a disregard. Establishing extraordinary circumstances but failing to justify a time extension or disregard means simply that the procedure would have been varied if the request had merit.

⁴ <http://www.oipc.nl.ca/pdfs/RequestingaTimeExtension.pdf>

⁵ <http://www.oipc.nl.ca/pdfs/ApplyingtotheCommissionerforApprovaltoDisregardAccessRequests.pdf>