**OFFICE OF THE**
**INFORMATION and PRIVACY COMMISSIONER**
**for Prince Edward Island**

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| **Public Body** | Department of Justice and Public Safety |
| **Public Body Ref. No.** | 2024-356 JPS |
| **OIPC File No.** | C/24/00270 |
| **Statute and Sections for Review** | *Freedom of Information and Protection of Privacy Act*<br>Sections:<br>14(1) [disclosure harmful to business interests of a third party]<br>28 [notification of a third party]<br>64.1 [refusal to conduct an inquiry] |
| **Decision #** | D-25-002 |
| **Decision-Maker** | Denise N. Doiron<br>Information and Privacy Commissioner |
| **Date of Decision** | May 9, 2025 |

**Summary:**

An applicant requested access to some records about a third-party business (the "Third Party"). Although the Third Party opposed disclosure, the Department of Justice and Public Safety (the "Public Body") decided that the 3-part test under subsection 14(1) of the *Freedom of Information and Protection of Privacy Act* (the "*FOIPP Act*") was not met, and notified the Third Party that they had decided to disclose the records to the applicant. The Third Party requested a review. The Commissioner refused to conduct an inquiry, pursuant to clauses 64.1(a) and 64.1(b) of the *FOIPP Act*.

**Access Request and Response:**

In August 2024, an applicant made an access to information request to the Public Body asking for the following:

> For this Business and Location: [*named third party business, address, and PID*]
> We want copies of any: Fire code inspections, permits, violations Any [sic] reports, permits or correspondence from the Justice and Public Safety office to

this Business [*name of business*] (Date range for Record Search: From 8/26/2021 TO 8/26/2024)

The Public Body found five pages of records they considered responsive to the access request, consisting of a Fire Inspection Report issued by the Fire Marshall, who is an employee of the Public Body, and a cover email.

As required by section 28 of the *FOIPP Act*, the Public Body notified the Third Party that they were considering giving the applicant access to records which may contain information that, if disclosed, might affect the business interests of the Third Party under subsection 14(1). The Public Body explained that subsection 14(1) has three criteria, which all have to be met before the Public Body is required to refuse to disclose information to an applicant. The Public Body advised that they intended to withhold a personal email address under another provision, which is not at issue here.

In accordance with section 28 of the *FOIPP Act*, the Public Body provided the Third Party with a copy of the records they were considering disclosing, and gave them 20 days to either consent to the disclosure or provide their written representations explaining why they believed the information should not be disclosed.

The Third Party objected to the disclosure of the records. In their representations to the Public Body, the Third Party presented their position that the three-part test had been satisfied, and that the Public Body should withhold the records in full. More specifically, the Third Party claimed the information contained in the records was the Third Party's commercial information, that disclosure could hinder their competitive position, and that disclosure could result in undue financial loss to the Third Party and others, or it could potentially be used by competitors to improve their commercial competitiveness.

After considering the Third Party's representations, the Public Body assessed that section 14 did not apply. The Public Body decided to disclose the five pages of records to the applicant, except for the personal email address, which they decided to withhold pursuant to subsection 15(1) of the *FOIPP Act* [unreasonable invasion of personal privacy].

The Public Body notified the Third Party of their decision, with an explanation, and gave the Third Party a copy of the records as they intended to disclose them. The Public Body also advised the Third Party that they could ask our office for a review of the decision if they were dissatisfied.

**Request for Review:**

The Third Party disagreed with the Public Body's decision to disclose the records and requested a review by our office. The Third Party asserted that all three parts of subsection 14(1) of the *FOIPP Act* have been satisfied and that the Public Body is required to refuse disclosure of the records.

**Analysis:**

Not all requests for review proceed to an inquiry. One of the first things I must do when we receive a request for review is to decide whether to conduct an inquiry, based on a preliminary assessment of the records and the information provided by the party asking us to review a public body's decision.

Clause 65(3)(b) of the *FOIPP Act* places the burden on the third party to establish that an applicant has no right of access to the record or part of the record. While a third party does not have to satisfy me at this stage that section 14 does apply to the records at issue, in considering whether a request for review should proceed to an inquiry, a third party must show that, on the face of it, that section 14 might apply. That is, the Third Party must show at least a *prima facie* case that section 14 might apply.

Subsection 14(1) of the *FOIPP Act* states:

> **14. Disclosure harmful to business interests of a third party**
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> (1) Subject to subsection (2) the head of a public body shall refuse to disclose to an applicant information
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> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of a third party;
>
> (b) that is supplied, explicitly or implicitly, in confidence, and
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> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of a third party
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization; or
>
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other

person or body appointed to resolve or inquire into a labour relations dispute.

It is well established law in this jurisdiction that, in order for a public body to be authorized to refuse disclosure under section 14 of the *FOIPP Act*, the information at issue must satisfy all three clauses of subsection 14(1). That is, the information in question must (i) be of the third party, be one of the types of business information described in clause 14(1)(a) and be "revealed" (i.e. not already public) by disclosure; (ii) it must have been supplied to the public body in confidence; and (iii) disclosure must reasonably be expected to result in at least one of the consequences set out in clause 14(1)(c). It is not sufficient that one or two of the requirements is met; all three must be satisfied in order for the section 14 exception to disclosure to apply.

The Third Party acknowledged that all three parts of the test must be met in order for section 14 to apply. To summarize the Third Party's position, the Third Party claimed that the 3-part test was met because:

(a) the records contained commercially and financially sensitive information relating to the fact that deficiencies were found on inspection and that costs would need to be incurred to hire contractors to do the work to effect repairs, and would be, among other things, "...evidence of ongoing relationships with the Fire Marshall and the Department of Justice and Public Safety..." and "...new commercial relationship with yet another party to perform the repairs..." [clause 14(1)(a)];

(b) the information in the records was provided to the Third Party implicitly in confidence, and the Third Party had a reasonable expectation of confidentiality that the information in the records would only be used for the Fire Marshall's duties and no other purpose [clause 14(1)(b)]; and

(c) disclosure of the information in the records could harm significantly the competitive position or interfere significantly with the negotiating position of the Thirds Party because competitors could learn of the repairs the Third Party would have to pay for and could take advantage by lowering their own rates to improve their commercial competitiveness and take business away from the Third Party [clause 14(1)(c)].

Upon examination of the records, it is apparent that the Third Party's position that the subsection 14(1) exception applies could not prevail in an inquiry.

Clause 14(1)(a) requires that disclosure would reveal one or more of six types of information set out in that clause, but only two of those are potentially at issue in the present matter: financial or commercial information. There is no financial information in the records, and no information in the records meets the definition of "commercial information" as it has been accepted in previous decisions of our office.

Our office has defined "commercial information" to be information that relates to the buying, selling or exchange of merchandise or services, including a third party's associations, history, references, bonding and insurance policies, pricing structures, market research, business plans, and customer records.

Former Commissioner Rose considered the issue of whether inspection reports met the subsection 14(1) test in Order No. 06-005, *Re: Department of Health*, 2006 CanLII 39088 (PE IPC), and Order No. FI-16-002, *Re: Department of Justice and Public Safety*, 2016 CanLII 23237 (PE IPC). Order FI-06-005 related to inspection reports of restaurants that were issued health orders or warning letters, and Order FI-16-002 involved shooting range inspection reports.

In Order FI-06-005, Commissioner Rose found that while the information in the inspection reports was information about a third-party establishment, it was not the type of information which section 14 is meant to protect, which is day-to-day operational information about the business.

She also found that the information collected by the inspector and entered into the inspection report, while information "about" the third party, was not information "of" the third party as required by clause 14(1)(a). Rather, the records originated from the public body, the public body collected the information in the process of conducting an inspection and prepared the records at issue for its own use. Therefore, the information was also not "supplied" by the third party.

With respect to the inspection report in the present matter, it is a fire inspection report that is a standard form, filled out by the Fire Marshall with information the Fire Marshall gathered during the conduct of their employment duties.

The Provincial Fire Marshall is an employee of the Public Body and has duties and authorities under the *Fire Prevention Act*, R.S.P.E.I. 1988, Cap. F-11. Among other things, the Provincial Fire Marshall enforces fire safety codes and standards, conducts inspections, carries out investigations, and gives advice and recommendations about such things as the means and adequacy of fire alarms and smoke detectors in buildings and exits from buildings in case of fire, and has the authority to make orders [section 6, *Fire Prevention Act, supra*].

Even if the Third Party were successful in persuading me that the information in the records is both information of a type described in clause 14(1)(a) and is information of the Third Party rather than simply "about" the Third Party, there is no reasonable possibility that the Third Party could establish that clause 14(1)(b) of the *FOIPP Act* would be satisfied.

While the Third Party's position is that the information was supplied to the Third Party by the Public Body in confidence, and therefore clause 14(1)(b) is met, this position cannot succeed in law. The fatal flaw in this position is that for clause 14(1)(b) to be met, the Third Party must have given, or "supplied", the information to the public body in confidence, not the other way around. This is how clause 14(1)(b) of the *FOIPP Act* has been consistently interpreted and applied in our jurisdiction. It is also consistent with how similar provisions in other jurisdictions across Canada have been interpreted and applied.

Because the information in the records at issue was information in an inspection report, which originated from the Public Body, and the information was collected by the Public Body in the process of an inspection, and the report was prepared for the Public Body's own use as part of their legislative duties, the Third Party has no reasonable possibility of establishing that information was "supplied" by the Third Party, as required by clause 14(1)(b).

It is not necessary to examine whether there is any *prima facie* merit to the Third Party's position that disclosure of the information in the records might harm the Third Party's business interests. As the Third Party, on the face of it, has no probability of establishing that at least one of the first two of the three required parts of the section 14 test can possibly be satisfied, the Third Party would have no reasonable possibility of meeting its burden of proof in an inquiry that section 14 applies and the Public Body is required to refuse disclosure. If the Third Party has no reasonable possibility of meeting its burden of proof that the Applicant has no right of access, then there is no triable issue.

The Third Party only referred to the inspection report, not the cover email. However, for clarity, the cover email did not contain any information that is of the types described in clause 14(1)(a) of the *FOIPP Act*. It was written by the Public Body, and contained no information supplied by the Third Party to the Public Body, so would not satisfy clause 14(1)(b). This was the record where a redaction of information was made under section 15(1) [personal privacy]. As with the inspection report, there is no reasonable possibility of the Third Party meeting its burden of proof that the Applicant has no right of access.

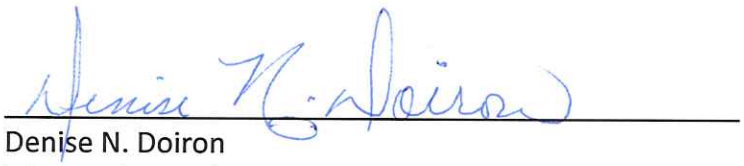
**Decision:**

Section 64.1 of the *FOIPP Act* gives the Commissioner the authority to refuse to conduct an inquiry if, in the opinion of the Commissioner: (a) the subject matter of a request for a review has been dealt with in an order or investigation report of the Commissioner, or (b) the circumstances warrant refusing to conduct an inquiry.

The records at issue are an inspection report produced by the Public Body as a result of it carrying out its statutory inspection duties, comprised of information produced through the observations of the inspector and conclusions drawn and recommendations made as a result of the inspection. The issue of whether inspection reports meet the section 14 criteria for mandatory refusal of disclosure has been the subject matter of previous decisions of this office.

Further, for the reasons explained above, the Third Party has not demonstrated a *prima facie* case that all three parts of the test in subsection 14(1) can be satisfied. It is well-settled law that all three parts of the test set out under subsection 14(1) of the *FOIPP Act* must be satisfied before a public body is authorized to refuse to disclose records containing business information about a third party. Because the Third Party has not demonstrated a *prima facie* case that all three parts of the subsection 14(1) test might be satisfied, the Third Party would have no reasonable possibility of success in a review.

Therefore, in my opinion, the subject matter of the Third Party's request for review has been dealt with in an order of the Commissioner previously, and the circumstances do not warrant conducting an inquiry in this matter. For these reasons, I am refusing to conduct an inquiry, pursuant to clause 64.1(a) and clause 64.1(b) of the *FOIPP Act*.



Denise N. Doiron
Information and Privacy Commissioner