

Addendum March 28, 2025, paragraph 30 references record (e) when it should read record (a)



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

Order No. OR-25-001

**Re: Department of Economic Development, Innovation and Trade
(file C/24/00007, formerly FI-19-321)**

**Maria C. MacDonald
Deputy Commissioner**

March 25, 2025

Summary:

The Applicant asked for a review of whether the Public Body should have notified third parties to seek their input before deciding whether to disclose information to the Applicant, and whether the Public Body conducted an adequate search.

The Deputy Commissioner found that the Public Body properly notified third-party businesses on all but 18 records, and that the Public Body showed that they conducted an adequate search.

Statutes Cited:

Freedom of Information and Protection of Privacy Act, RSPEI 1988, c F-15.01, subsection 8(1) [duty to assist], sections 28 and 29 [procedure on notifying third parties]

Decisions Cited:

Order FI-22-006, *Re: Department of Transportation and Infrastructure*, 2022 CanLII 83334 (PE IPC)]

Order FI-17-007, *Re: Department of Justice and Public Safety*, 2017 CanLII 49929 (PE IPC)

Order FI-19-013, *Re: Transportation, Infrastructure and Energy*, 2019 CanLII 93497 (PE IPC)

I. BACKGROUND

- [1] An individual (the “Applicant”) asked the Department of Economic Growth, Tourism and Culture, which is now known as the Department of Economic Development, Innovation and Trade (the “Public Body”), for information held by an employee over a seven-month period in 2012. They asked for the following:

All records, in any formats, electronic or otherwise, of [Employee A] which were either sent to – or received from – [Individual from a third-party company], or make mention of a conference called “SIBOS” from May 1, 2012, to December 1, 2012

- [2] Employee A was a Senior Director at Innovation PEI. “SIBOS” stands for “SWIFT (Society for Worldwide Interbank Financial Telecommunication) International Banking Operations Seminar” which is an annual conference, exhibition, and networking event for international financial services industries.
- [3] The Applicant made their access request in May of 2019. The Public Body had former Commissioner Karen A. Rose’s permission to extend the time for the Public Body to respond to the Applicant on this and a few other access requests, because the Applicant had 11 concurrent access requests at that time. The Public Body had not responded to the Applicant by the extended deadline, and the Public Body was in a deemed refusal position. In October of 2019, in a Consent Order, the Public Body agreed to respond to the Applicant by November 8, 2019. The Consent Order says that the responsive records contained information relating to third parties. It is a bit awkwardly worded, but the Consent Order also says that the Public Body has to comply with the time limits of section 29 of the *FOIPP*

Act which are triggered when a public body notifies a third party. The Public Body also told the Applicant that they could not disclose records before the third parties' request for review period ended.

- [4] During this process, the Public Body told former Commissioner Rose and the Applicant that they “agree to provide the applicant with any records not requiring third party consultation as soon as applicable protections are applied.”
- [5] On the date set out in the Consent Order, the Public Body told the Applicant that they notified third parties a week earlier, and that they were consulting third parties on all the pages. The Applicant requested a review. Their first concern was whether the Public Body should have consulted with third parties on all the records. The Applicant believed “that the Public Body is intentionally delaying release of documents.”
- [6] Before the Public Body gave records to the Applicant, the Applicant gave our office copies of five records that they expected to receive. The Applicant said that these were examples of records that illustrated that the Public Body did not need to notify third parties about all the responsive records.
- [7] On December 20, 2019, about six weeks after the date in the Consent Order, the Public Body disclosed all but one five-page email chain between Employee A and an employee of the federal government. The Public Body told the Applicant that they did not include this record because they were waiting to hear from the federal government, stating:

You will note that a five-page record (pp 22-26) is not included with this package. We are unable to release this record without a response from the federal government to our consultation request on disclosure. I will contact you as soon as I receive same.

- [8] Up to this stage, the Applicant was unaware that the Public Body had notified the federal government, and asked our office how the federal government was involved. Without

seeing the records or discussing it with the Public Body, I told the Applicant that the Public Body might have been consulting with the federal government about section 19 of the *FOIPP Act* which relates to intergovernmental relations. The Applicant considered it, but did not ask our office to review this issue. Nor did former Commissioner Rose or Commissioner Denise N. Doiron name it as an issue in this review or ask for submissions from either the Applicant or the Public Body.

[9] When the Applicant reviewed the records, they noticed that the Public Body did not include an attachment to an email, which has since been provided to the Applicant and resolved. The Applicant also gave our office copies of three records that the Applicant expected to receive but did not. The Applicant asked the Commissioner to review whether the Public Body conducted an adequate search.

[10] Former Commissioner Rose received and exchanged submissions from the Applicant and the Public Body. Commissioner Doiron delegated this matter to me to complete the review.

II. ISSUES

[11] The issues in this review are:

Issue A: Should the Public Body have notified third parties? and

Issue B: Did the Public Body conduct an adequate search?

[12] For clarity, I am not reviewing whether the Public Body should have consulted the federal government, or whether the Public Body followed the Consent Order. Orders from our office are final, subject to a judicial review. A copy of an order may be filed with the registrar of the General Division of the Supreme Court, and after filing, the order is enforceable as a judgment or order of that court.

III. RECORDS AT ISSUE

[13] I am reviewing all the responsive records but wanted to also describe the records that the Applicant gave our office. The first five records, (a)-(e), were records that the Applicant said illustrate that the Public Body did not need to notify third parties of all the records before deciding whether section 14 of the *FOIPP Act* applied. The next three records, (f)-(h), were records that the Applicant expected to receive but the Public Body did not provide. The Applicant believed records (f)-(h) show that the Public Body did not conduct an adequate search.

- (a) An email from the SIBOS registration office to Employee A including a personalized link for Employee A to register, dated June 6, 2012;
- (b) A blank calendar entry of Employee A with the subject "Sibos call", dated August 30, 2012;
- (c) An email from the Head of SIBOS to Employee A including a username and password to contact participants, access conference materials, etc., dated September 17, 2012;
- (d) An email exchange between Employee A and the CEO of Innovation PEI about a meeting at the SIBOS conference, two emails dated October 15, 2012;
- (e) An email exchange between Employee A and the CEO of Innovation PEI, consisting of three emails dated August 13, 14, and 16, 2012;
- (f) Two emails, one of which was from Employee A to the CEO of Innovation PEI, dated September 7, 2012;
- (g) An email chain consisting of three emails to or from Employee A, dated October 24, 2012; and
- (h) One email from Employee A to a third-party business, dated November 8, 2012.

[14] The Applicant also gave us a page with two emails dated September 10, 2012, but neither are responsive to the access request because neither of them are to, or from, Employee A. Each of the eight records described above includes at least one responsive email or calendar entry.

IV. BURDEN OF PROOF

- [15] There are two issues with different allocations of the burden of proof. I will first address who bears the burden of proof about whether a public body should have notified third parties.
- [16] The *FOIPP Act* is silent on which party bears the burden of proof about whether a public body should have notified a third party. Decisions from our office held that when the *FOIPP Act* does not allocate a burden of proof, the party who is in the best position to address the issues has the burden of proof. We look at logical factors such as which party raised the issue, and which party is best able to give us evidence.
- [17] The Applicant raised the issue of whether the Public Body should have notified third-party businesses. The Public Body and the Applicant are both aware of the content of the responsive records and both parties can give us evidence about whether the Public Body should have notified the third-party businesses. In consideration of these two facts, I find that the Applicant has the burden to show that the Public Body should not have notified third-party businesses.
- [18] When we review the adequacy of a public body's search, decisions of our office held that a public body has the burden to show that they conducted a reasonable search. Public bodies are in a better position to explain how they searched for responsive records, and to explain their role and their records. A public body's search does not have to be perfect, but they must show that they have made every reasonable effort to locate responsive records. Although applicants do not have the burden of proof, it is helpful for an applicant to explain why they believe that a public body did not conduct an adequate search [see for example, Order FI-22-006, *Re: Department of Transportation and Infrastructure*, 2022 CanLII 83334 (PE IPC)].

[19] In summary, the Applicant has the burden to show that the Public Body should not have notified the third-party businesses, and the Public Body has the burden to prove that they conducted an adequate search under subsection 8(1) of the *FOIPP Act*.

V. ANALYSIS

[20] First, I will address whether the Public Body should have notified third-party businesses. Next, I will address the adequacy of the Public Body's search.

Issue A: Should the Public Body have notified third parties?

[21] After searching and collecting responsive records, a public body decides if the *FOIPP Act* authorizes or requires them to withhold any information. When deciding whether to disclose a third party's business or personal information, a public body might need to notify the third party. Whether they need to notify third parties depends on how confident the public body is about whether the mandatory exceptions to disclosure apply under section 14 [business information], or section 15 [personal information]. If a public body is quite certain that the *FOIPP Act* requires them to withhold information, notification is optional under subsection 28(2). But subsection 28(1) requires a public body to notify a third party when the record may contain information the disclosure of which would affect the interests or invade the personal privacy of the third party.

[22] In Order FI-17-007, *Re: Department of Justice and Public Safety*, 2017 CanLII 49929 (PE IPC), at paragraphs 16 and 17, Former Commissioner Rose said that there is a low threshold for when a public body has to notify a third party:

[16] Section 28 of the *FOIPP Act* provides a very low threshold for requiring notice to third parties. As stated in Alberta Order F2010-037, 2011 CanLII 96633

(AB OIPC), at paragraph 48, it is not necessary for the records to actually contain information that affects the interests of a third party under section 14, or for section 14 to actually apply, as that determination is to be made by a public body after receiving the third party's representations. Further, in Alberta Order F2012-17, 2012 CanLII 70619 (AB OIPC), at paragraph 136, the adjudicator, relying upon *Merck Frosst, supra*, stated that a public body need only form the opinion that a record being considered for disclosure *may* contain information affecting a third party's interests under section 14, before the duties under this provision are engaged. There is no requirement for a public body to form the opinion that the requirements of section 14 or section 15 are already met before providing notice.

[17] To further describe the notice requirement of section 28(1) of the *FOIPP Act*, if a public body decides notice is required, it has determined, not that sections 14 or 15 actually apply, but that there is a possibility they apply. If one were to illustrate on a line drawing, showing a gradual transition from one extreme to another of whether the section 14 or section 15 exceptions to disclosure apply, there is no obligation to notify in the circumstances at the two extreme ends of this line drawing. One extreme would be when a public body is absolutely certain that the section 14 or section 15 exceptions to disclosure apply; the other extreme is when a public body is absolutely certain that the section 14 or section 15 exceptions to disclosure do not apply. With the exception of these two extremes, there is an obligation to notify.

[23] The *FOIPP Act* refers to "notifying" a third party. But sometimes public bodies informally refer to this process as "consultation", because the written notification includes an invitation for a third party to give their written consent or representations about whether the public body should disclose the information.

[24] The Public Body gave us copies of emails and letters that show that in late October they notified and invited third-party businesses to give their feedback on all but one page. These notifications triggered extensions to allow the third-party businesses to respond to the Public Body, for the Public Body to make their decision, and to allow time for the third parties to request a review. There were already delays in the Public Body's response to the Applicant. The Applicant thinks that the *FOIPP Act* did not require the Public Body to notify the third-party business and that the Public Body was intentionally delaying the process further.

[25] In assessing whether the Public Body should have notified third-party businesses, I will address the following:

- (a) The Applicant said that the Public Body did not need to notify any third party about communication between employees;
- (b) I will consider the five records that the Applicant gave to our office that the Applicant says show that the Public Body did not need to notify third parties about all the responsive records; and
- (c) I will consider the responsive records in general.

(a) Communications between employees

[26] Before the Applicant received the responsive records, they said that the Public Body should not have notified third-party businesses about communications between employees. It is foreseeable that a record between employees might include information that is subject to section 14. But I do not need to consider this because the Public Body did not find any responsive records between employees.

(b) Records the Applicant gave to our office

[27] The Applicant gave us five records that they claim shows that third-party businesses did not need to be notified. The Public Body did not notify any third-party businesses about four of the five records, specifically records (b), (c), (d), or (e), because they did not find them.

[28] The remaining page, page (a), is an email from the SIBOS registration office to Employee A. The Public Body notified the SIBOS organizer about this page and others.

[29] The following facts are relevant to the assessment of whether the Public Body should have notified the SIBOS organizer about page (a):

- The email included a personalized link, exclusive to Employee A, to complete their registration (as opposed to a username or password.);
- It is possible for this business to have commercial information related to their registration process;
- The email includes a ‘private and confidential’ notice at the bottom, although it could be an automated electronic signature; and
- Employee A had to ask or apply to attend. This annual event does not appear to be open to the public.

[30] I find that record ~~(e)~~ (a) may have contained information that affects the interest of a third party under section 14. I am not finding that section 14 applied, but that there is a possibility that it applied. Therefore, the *FOI/PP Act* required the Public Body to notify the SIBOS event organizer.

(c) The Rest of the Responsive Records

[31] The Public Body notified three third-party businesses about 181 of the 187 pages, which the Public Body described as follows:

The responsive records at issue contain information about and/or received from or as a result of a relationship or proposed relationship with SIBOS/its organizers and/or members; [the third-party company named in the access request]; and, a consulting agency. They may be described as follows, namely:

- Emails concerning or exchanged in relation to a business conference;
- Documents about the member owned cooperative organizer;
- Lists of exhibitors at SIBOS;
- Some standard emails related to a record of payment, registration and/or other confirmations;
- Emails with information circulated to registrants about history, issues and members or other businesses/organizations/associated third parties;
- Emails with invitations/information about exhibitors/participants in SIBOS;
- Exchanges with [the third-party company named in the access request] concerning a proposed business relationship/proposed work;
- A proposal and business contract;
- An attendee list and business contacts;

- Company profiles provided by [the third-party company named in the access request]; and,
- Exchanges with a consultant related to a proposed business relationship/proposed work and a proposal.

[32] The Applicant did not raise any concerns about these descriptions.

[33] The following facts are relevant to the assessment of whether the Public Body should have notified the third-party businesses:

- Some emails contain a small amount of information.
- Employee A's role included attracting businesses to PEI.
- The records relate to businesses, a trade show for networking and business matchmaking, prospective businesses to meet to discuss the possibility of coming to PEI, and consultants' proposals and contract.

[34] Eighteen emails to Employee A include the sender's email address, the recipient (Employee A), the date and time, and a subject line (pages 54, 55, 56, 57, 58, 75, 84, 85, 106, 107, 109, 111, 115, 118, 125, 171, 174, and 181), but there is no content or any reference to any attachment. I will refer to these pages as the "empty emails".

[35] I cannot identify information in the empty emails that the Public Body may have thought affected the interests of a third party under section 14. The date and time, and email address of Employee A, are not the third-party businesses' information. The sender's email address identifies the sender by their general role (e.g., Registration Office <siboshotels@delegate.com>, SWIFT Publications <supportnews-mailing@list.swift.com>), and the subject lines are not business information of the third-party business (e.g., "SIBOS 2012 - Hotel confirmation", "Sibos 2012 - Confirmation of registration ASRJD9S", "Confirmation of payment for Sibos 2012", "Your Sibos online tools – login to sibos.com"). Some of the other subject lines refer to invitations to social functions and a survey/feedback request.

[36] I find that the empty emails do not include any information that would affect the interests

of a third party under section 14. As such, subsection 28(1) of the *FOIPP Act* did not require the Public Body to notify the third-party businesses and ask for their input. I find that the Public Body should not have notified any third-party businesses about the empty emails.

[37] For the remainder of the 163 pages of records, I find that they may include information that would affect the interests of a third party under section 14 of the *FOIPP Act*. As such, subsection 28(1) of the *FOIPP Act* required the Public Body to notify the third-party businesses and ask for their input to complete the Public Body's assessment about whether section 14 of the *FOIPP Act* required the Public Body to refuse access to the Applicant.

[38] To address the Applicant's specific concern, I do not have any evidence that the Public Body arranged these notifications to the third-party businesses to further delay their response to the Applicant artificially. Although, in my opinion, the Public Body did not need to notify the third-party businesses about the empty emails, and it resulted in a six-week delay in the Public Body disclosing these 18 pages, I have no reason to think this decision was in made in bad faith or was malicious.

[39] The Public Body notified the third-party businesses and decided to disclose records to the Applicant. In these circumstances, I do not consider it appropriate or necessary to make an order or recommendation.

Issue B: Did the Public Body conduct an adequate search?

[40] Subsection 8(1) of the *FOIPP Act* states:

8.(1) The head of a public body shall make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[41] Subsection 8(1) of the *FOIPP Act* is often referred to as the duty to assist. Decisions from our

office have confirmed that the duty to assist includes a duty to conduct a reasonable search, but we do not hold a public body to a standard of perfection [Order FI-19-013, *Re: Transportation, Infrastructure and Energy*, 2019 CanLII 93497 (PE IPC), at paragraph 55]. A public body does not have to prove with absolute certainty that there are no more responsive records, but it must show that it has made every reasonable effort to locate responsive records.

[42] The Public Body gave us thorough information about who searched, where they searched (electronically and physically), and the keywords used in electronic searches, which are supported by search records from the Public Body's processing file.

[43] I considered who searched, the scope of their search, and the steps the Public Body took to search through electronic and physical files. Employee A and their administrative assistant were the appropriate people to search on behalf of the Public Body. The access request was for records of Employee A, and the two people who searched for responsive records were knowledgeable and experienced. They would be familiar with Employee A's work and records, their record management practices, and where they would store any potentially responsive records.

[44] Employee A and their administrative assistant searched the following locations:

- a. Employee A's email account (inbox, sent box and archive),
- b. Employee A's desktop, shared electronic directory and a shared electronic database,
- c. file cabinets in Employee A's office, and in their administrative assistant's cubicle, and
- d. records from the Records office.

[45] The Applicant requested records of Employee A, and I am satisfied that these are reasonable areas for the Public Body to search, and that the Public Body took reasonable steps to identify areas that might have responsive records.

[46] The Public Body acknowledges that their search was not perfect, but their position is that their search was adequate. The Applicant did not respond to the Public Body's position, or their description of their search, but appears to rely on the fact that the Public Body did not find seven records.

[47] The Public Body said that they did not find copies of seven of the eight records the Applicant gave to our office, records (b) - (h). We do not know when, where, or from whom the Applicant received the seven records. It appears that these records are responsive and once existed in 2012, but the Public Body did not find them in 2019. The Public Body did not offer any explanation about why they did not find them, except to note that Employee A may have considered the calendar entry at page (b) to have been transitory and did not retain it. I reviewed them carefully but did not find any clues about how the Public Body could have missed them.

[48] Subsection 8(1) of the *FOIPP Act* requires a public body to make "every reasonable effort" to assist an applicant. I considered whether the fact that the Public Body did not find these seven records is enough evidence to find that the Public Body did not conduct an adequate search. Despite the shortcoming of not finding records which appear to have existed at one time, in consideration of the search efforts, I find that the Public Body has satisfied their burden of proof. I confirm that the public body conducted an adequate search.

VI. SUMMARY OF FINDINGS

[49] I find that the empty emails do not include any information that would affect the interests of a third party under section 14 of the *FOIPP Act*. As such, subsection 28(1) of the *FOIPP Act* did not require the Public Body to notify the third-party businesses and ask for their input. I find that the Public Body should not have notified any third-party businesses about these 18 records.

[50] For the remainder of the 163 pages of records, I find that they may include information that would affect the interests of a third party under section 14 of the *FOIPP Act*. As such, subsection 28(1) of the *FOIPP Act* required the Public Body to notify the third-party businesses and ask for their input to complete the Public Body's assessment about whether section 14 of the *FOIPP Act* required the Public Body to refuse access to the Applicant.

[51] I find that the Public Body conducted an adequate search for records in response to the Applicant's access request.

VI. ORDER AND RECOMMENDATION

[52] In consideration of these findings, I make no Order or recommendations.

SGD MARIA MACDONALD

Maria C. MacDonald
Deputy Commissioner