

**ANNUAL REPORT
2003 - 2004**

**OFFICE OF THE
INFORMATION AND PRIVACY COMMISSIONER**

PROVINCE OF PRINCE EDWARD ISLAND



April 22, 2005

The Honourable Greg Deighan
Speaker of the Legislative Assembly
Province House
Richmond Street
Charlottetown, P.E.I.
C1A 7K7

Dear Mr. Speaker:

I am pleased to enclose the Annual Report of the Office of the Information and Privacy Commissioner, covering the period from December 1st, 2003 to December 31, 2004.

This report was prepared in accordance with Section 59(1) of the *Freedom of Information and Protection of Privacy Act*, S.P.E.I. 2002, Chapter F-15.01.

Respectfully submitted,

Karen A. Rose
Information and Privacy Commissioner
/emc

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Message from the Information and Privacy Commissioner

This was the second full year of operation for the Office of the Information and Privacy Commissioner and it was a busy one.

Ten freedom of information reviews were carried forward from 2003, and all but one was resolved in 2004. Of the four privacy complaints which were carried forward from 2003, all resulted in orders in 2004. The total number of new freedom of information reviews in 2004 was 23. The total number of new privacy investigations was seven. Thirteen of the files in the Office resulted in Orders during 2004. Nine files were resolved without an Order being necessary. Twenty-four files were carried over into 2005. By the date of this report, ten of those files have been resolved or resulted in Orders to be reported upon next year.

Review of Act

During 2004, the Standing Committee on Economic Development conducted a review of the *Freedom of Information and Protection of Privacy Act*. The Commissioner appeared before the Committee, and made several recommendations of an administrative nature relating to changes to the *Act*. However, this Office urged caution in making recommendations for change at this early stage, especially any changes which would relax the privacy requirements in the *Act*. A written submission from the Office of the Information and Privacy Commissioner may be found on our website at www.assembly.pe.ca/foipp.

On December 1, 2004, the Committee submitted its report which made five recommendations:

- (1) That section 76 of the *Act* be clarified to direct the Applicant first to bring his or her

fee waiver request to the Public Body and, then if the Applicant is not satisfied, to the Commissioner;

- (2) that a mechanism be investigated for the appointment of an *ad hoc* Commissioner in situations where the Commissioner is in conflict or where the Commissioner's Office is the Public Body which is the subject of the review;
- (3) that a review of the *Act* be conducted in three years' time to allow the Public Bodies, the Office of the Information and Privacy Commissioner and other interested parties sufficient opportunity to make decisions regarding possible amendments;
- (4) that section 3(e) of the *Act* be amended to accommodate the record retention policies of school boards and regional health authorities; and
- (5) that the potential impact of the U.S.A. *Patriot Act* be monitored.

This Office commends the Committee for its measured approach in the review of the *Act*, and we look forward to a full substantive review in 2007.

First Judicial Review

As reported in the 2003 Annual Report of this Office, one of the Commissioner's Orders was judicially reviewed by the Supreme Court of Prince Edward Island. The hearing was held in March and the decision from the Court was issued in November, 2004. One of the issues dealt with in the review was the proper standard of review for decisions of the Information and Privacy Commissioner. The Supreme Court determined that the proper standard is correctness where there are issues of law, but reasonableness

simplicitor where there are issues of fact. In determining the standard of review, the Court cited the fact that the Commissioner has not yet had the opportunity to develop expertise in the area. What this means is that, in future, during judicial review applications relating to the Commissioner's Orders, his or her decisions will be upheld only if they are correct on the law and only if they are reasonable on the facts. For more detail on the Supreme Court's decision, please see part V of this report.

I continue to be impressed with the quality of submissions we receive from both applicants and public bodies during the review process. They indicate, time and again, that Prince Edward Islanders value their rights to access information, as well as their rights to personal privacy. The process set out in the *Act* would not work if we did not first have this bedrock of support from both the public and provincial government bodies.

II. Report on Privacy

Development of a Privacy Impact Assessment

During 2004, this Office received a privacy complaint relating to an operating program of the Department of Health & Social Services. After consulting with the Complainant, it was agreed to approach that Public Body to seek its agreement to undergo a just-developing Privacy Impact Assessment (PIA).

A PIA is an invaluable tool to assess the privacy implications of proposed programs of public bodies, before these programs are implemented. In P.E.I., the Access and Privacy Services Office had drafted a PIA. In conjunction with this Office, a first draft was finalized with a view to perfecting the PIA over time, as it is used and flaws become apparent.

Once the Department of Health and Social Services underwent the PIA, it was apparent to this Office that the PIA must be more comprehensive as key issues of privacy remained unaddressed. The Department of Health and Social Services agreed to respond to further privacy protection-related questions, in order that this Office would get a full picture of the privacy impact of its operating program.

During 2005, it is expected that, in cooperation with the Access and Privacy Services Office, a final version of the PIA will be completed and made available on our website at www.assembly.pe.ca/foipp. It is also expected that the PIA will be perfected further over the coming years.

Patriot Act

In May, 2004, the Office of the British Columbia Information and Privacy Commissioner sought out submissions from the public and interested parties relating to the U.S.A. *Patriot Act*. Specifically, the British Columbia Commissioner sought submissions to address the following questions:

1. Does the USA Patriot Act permit US authorities to access personal information of British Columbians that is, through the outsourcing of public services, in the custody or under the control of US-linked private sector service providers? If it does, under what conditions can this occur?
2. If it does, what are the implications for public body compliance with the personal privacy protections in FOIPPA? What measures can be suggested to eliminate or appropriately mitigate privacy risks affecting compliance with FOIPPA?

Prince Edward Island's Office of the Information and Privacy Commissioner made a brief written submission on August 5, 2004, the text of which may be found on our website. In total, the British Columbia Information and Privacy Commissioner received more than 500 submissions. The British Columbia Commissioner issued his comprehensive report on October 29, 2004, with many recommendations to particularly address the challenges the U.S.A. *Patriot Act* presents. This report can be found on the website of the British Columbia Information and Privacy Commissioner at www.oipb.bc.ca.

As noted in my initial message of this Annual Report, Prince Edward Island's own Standing Committee on Economic Development, in its report following a review of our *Freedom of Information and Protection of Privacy Act*, recommended that the potential impact of the U.S.A. *Patriot Act* be monitored.

On this issue, the Committee stated as follows:

Your Committee is concerned about possible implications of section 215 of the USA Patriot Act, a US federal law passed in October 2001, for the privacy of Prince Edward Islanders. Specifically, section 215 concerns secret court orders enabling the FBI to obtain access of “any tangible thing” for foreign intelligence purposes or to protect against international terrorism or clandestine intelligence activities. Accordingly, your Committee recommends public bodies monitor implications for personal information located within the Province that might be subject to a US order for access.

In November, 2004, this Office issued an Order relating to a privacy complaint which dealt, in part, with the outsourcing of personal information to a U.S. company. Order No. PP-04-005 may be found at our website.

3. Report on Freedom of Information

Number of Requests

As may be gleaned from the statistics at Part VI of this Annual Report, the number of requests for review during 2004 was similar to that of 2003. The number of privacy complaints increased from 4 in 2003 to 13 in 2004. Interestingly, on the freedom of information side, the number of initial requests for access to public bodies decreased from 161 in 2002/2003 to 128 during the period covered by this report. We will watch closely over the next couple of years to determine an expected volume of requests. Naturally, these statistics have a direct impact on the total workload of the public bodies, as well as the Office of the Information and Privacy Commissioner.

Timelines

The *Freedom of Information and Protection of Privacy Act* sets out time limits for various stages of the freedom of information process. For example, section 9 requires that a Public Body respond to a Request for Access within 30 days of its request. The Public Body may extend the limit for another 30 days, and any further extensions require the permission of the Information and Privacy Commissioner. This year, Order 04-003 dealt with an undue delay of a Public Body which violated sections 8 and 9 of the *Act*. The text of this Order can be found at our website at www.assembly.pe.ca/foipp. Although that Order describes an undue delay, in many cases the delays of public bodies are justified in accordance with the *Act*. For example, time may be extended where a large number of records is requested or must be searched, and responding within the period set out in section 9 would unreasonably interfere with the operations of the public body.

The public bodies are not the only parties who cause delays in the freedom of

information process. Generally, a public body's delay, if any, is a short one which can be measured in days or weeks. Occasionally, however, an applicant delays the review process for months at a time by not responding to the Commissioner's requests for submissions or clarification. Generally, these delays by Applicants do not compromise the purposes of the freedom of information process, since the one who suffers from the delay is the Applicant herself, as she may not obtain access to the record at issue until the review has been completed. However, the public body, and the public at large, do have an interest in seeing the review reach a final resolution.

The *Act* also sets out timelines for the Commissioner's reviews. Section 64(6) of the *Act* sets out a 90 day time period from the receipt of a Request for Review to its final resolution by Order or otherwise. This time period may be extended by the Commissioner. Of the 27 files which have resulted in Orders from this Office since the *Act's* inception, only 3 have been within this 90 day guideline. Reasons range from delays of the parties, to complex issues, to workload and resulting backlog in this Office. This Office will continue to assess the time frames followed by it over the coming years, and develop potential solutions to delays.

4. Activities of this Office

Public Education

The Office continues in its goal to educate the public about it's rights and public bodies' obligations under the *Freedom of Information and Protection of Privacy Act*. During 2004, the Commissioner had fourteen speaking engagements, on topics ranging from health privacy, to access to court records, to the role of the Commissioner in the freedom of information process.

In December, 2004, the Commissioner participated in a CBC Radio interview which aired on four consecutive mornings, dealing with issues and Orders which had arisen since the opening of the Office two years previously. The public response to the interview was very positive, and we thank CBC Radio for allowing us the opportunity to inform the public through this medium.

Continuing Education of Staff

Both the Commissioner and the administrative assistant/intake analyst continued their french language education during 2004. In addition, in preparation for the development of a presentation to high school students throughout Prince Edward Island, the Office took a detailed course on Power Point presentations.

At the time of this Report, the administrative assistant/intake analyst is currently finishing up a course from the University of Alberta entitled "Information Access and Protection of Privacy Foundations". This has proved to be a valuable resource for the Office's development.

5. Summary of Selected Orders

Freedom of Information

- (1) Order No. 04-001 Re: Department of Transportation and Public Works, dated February 4, 2004

This Order concerned an applicant's request for access to information regarding Government's purchase of real property from private citizens. The Public Body responded to the request by providing the requested records, with portions of the records severed, namely the purchase price of the real property, based on section 15 of the Act. The public body later decided to provide the complete record to the Applicant. The Third Party, after being contacted by the public body, objected to the complete disclosure of their personal information (the purchase price paid to them by the Public Body) and applied to the Commissioner for a review of the public body's decision.

Following the completion of the review process, the Commissioner found that the public body had properly applied sections 15, 14 and 10 in making its decision to grant full access to the records, as disclosure would not be an unreasonable invasion of the third party's personal privacy, disclosure would not harm the third party's business interests, and disclosure of the existence of the records at issue would not be an unreasonable invasion of the Third Party's personal privacy.

In her findings, the Commissioner stated:

...In the case before me, there is compelling interest in disclosing the financial information in the records, to promote the objective of providing citizens of Prince Edward Island with an open,

transparent and accountable Government. If individuals are not permitted access to such financial information, then the public has no method of determining whether the public body has made responsible purchases. If public bodies are not held to such standards of accountability, then the purpose of legislation such as the *Freedom of Information and Protection of Privacy Act* is severely compromised.

...

...I agree with the Applicant that when private citizens conduct business with a Public Body, “the obvious bias is toward allowing the public the right to scrutinize those activities and expenditures.” In my view, when private individuals conduct business with a Public Body, they should presume a real possibility that the information contained in the Public Body’s records may be disclosed to the public, subject, of course, to the exceptions set out in the *Act*.

(2) Order No. 04-002 Re: Department of Environment and Energy, dated March 1, 2004

The Applicant applied to the Public Body for access to their own personal information, and clarified that the request would focus on their personal information relating to unsightly property allegations against them. The Public Body disclosed records to the Applicant, with severances based on section 15, that disclosure would be an unreasonable invasion of the third parties’ personal privacy. The Public Body claimed that the personal information was compiled and was identifiable as part of a law enforcement matter, under subsection 15(2)(b). The Applicants requested a review of this decision.

The Commissioner found that none of the severed information satisfied the requirement of subsection 15(2)(b). The severed information related only to individuals employed by or representing government bodies who, in their professional capacity, had forwarded complaints on behalf of the original complainant.

The Commissioner concluded that disclosure of the information previously

severed would not be an unreasonable invasion of the third parties' personal privacy. The Public Body was ordered to disclose the records, in their entirety.

(3) Judicial Review of Order No. 03-004 Re: Prince Edward Island Workers Compensation Board, dated August 19th, 2003

As reported in the 2003 Annual Report, the applicant had applied to the Workers Compensation Board for an alphabetical list of all employees of the Workers Compensation Board, including salary and job title. The public body provided the applicant with a partial response to his request, namely, the position titles of employees and corresponding salary range. The public body did not provide the names of employees or the corresponding specific salary. As the basis for its decision, the public body relied on section 15 of the *Act* and stated that disclosure of the records as requested would constitute an unreasonable invasion of a third party's personal privacy.

The applicant requested a review of the public body's decision by the Commissioner.

In the Commissioner's Order, section 15 of the *Act* was analyzed and guidelines were set out for the interpretation of section 15. These guidelines may be followed in future by individual applicants and public bodies.

The Order stated that in essence, in making a decision pursuant to section 15 of the *Act*, the public body should first determine whether the requested information is personal information in accordance with the definition set out in the *Act*. If the requested information is confirmed to be personal information, then the public body should then determine whether disclosure of the personal information will constitute an unreasonable invasion of personal privacy. The Order lists factors which should be considered by the

public body before reaching its conclusion.

On the facts of this case, the Commissioner found that job title and salary information do constitute personal information in accordance with the definition under the *Act*. The Commissioner also concluded that disclosure of the job title and salary information would constitute an unreasonable invasion of the personal privacy of the employees. The Commissioner added that the level of transparency and accountability achieved by the public body in disclosing the employees' job title and salary range is sufficient to promote the objectives of the *Act* while still protecting some privacy of the employees.

The applicant applied for judicial review of this Order. The hearing of the judicial review was held on March 23, 2004 and the Court's decision was issued on November 23, 2004.

The Court upheld the decision of the Commissioner, and made the following comments:

...the applicant...stated in argument that public servants lose the right to be protected from embarrassment because they are employed by government. If this was true prior to the passage of the Act, it no longer is. The Act covers public employees and they are entitled to the same protection of personal information as any other resident of this province.

...

Release of actual salaries in conjunction with name does not promote scrutiny, it promotes an invasion of privacy.

...

The Act does not attempt to prohibit public scrutiny of government expenditures or accountability. In fact it encourages scrutiny because it provides a means to obtain information which did not heretofore exist.

Privacy:

- (1) Order PP-04-004 Re: Prince Edward Island Workers Compensation Board, dated November 30, 2004

The Complainant alleged both improper collection and improper disclosure of her personal medical information in contravention of Part II of the *Act*.

The Complainant had applied to the Public Body as an injured worker. She claimed that her medical files were collected by the Public Body without her permission and that the Public Body used these files to discontinue benefits to the Complainant. In addition, the Complainant stated that the Public Body disclosed her medical information without proper authority.

In February of 2003, the Public Body requested clinical notes relating to the Complainant's injury from her family physician for the time period of two years prior to the initiation of her claim. In response to this request, the physician provided the Complainant's complete clinical history. With regard to the disclosure issue, the Public Body stated that it had disclosed MRI and CT films of the Complainant to a radiologist at the QE Health Sciences Centre for review.

The Commissioner found that the Public Body is authorized by the *Workers Compensation Act* and, therefore, authorized by subsection 32(1)(a)(ii) of the *Freedom of Information and Protection of Privacy Act* to collect the Complainant's personal medical information from third parties for the purpose of adjudicating the Complainant's claim only. Although the general rule is to collect personal information directly from the individual, with medical information, the Public Body must seek the information from third party professionals who are knowledgeable about the injury claimed. Therefore, the Commissioner agreed with

the Public Body that subsection 32(1)(g) applied to the circumstances of this complaint.

With regard to the issue of disclosure, the Commissioner also agreed with the Public Body that disclosing the medical information in order to obtain independent medical opinion was consistent with the original purpose of collection, i.e. to adjudicate the claim pursuant to subsection 37(1)(b) of the *Act*.

The Commissioner pointed out to the Complainant that the authority of the Public Body to collect and/or disclose her personal health information is limited to the ongoing adjudication of her claim only. In addition, only those employees of the Public Body directly involved in a worker's claim may access her personal information. The Public Body may only collect, use or disclose her information for its legitimate purposes relating to her claim.

Despite the Commissioner's conclusion that the Public Body did not contravene Part II of the *Freedom of Information and Protection of Privacy Act* in its collection and disclosure of the Complainant's personal health information, the Commissioner did make two recommendations to the Public Body to ensure informed privacy protection for client's of the Public Body in the future. These recommendations were as follows:

1. That the Public Body conduct regular audits of its privacy policies, in particular, to ensure that no employee of the Public Body has unauthorized access to clients' personal information. Although the policy is in place, it would be prudent to assure workers that regular audits are conducted to confirm the policy is being followed.
2. When the Public Body plans to request a physician's clinical notes relating to a worker, that the worker be notified beforehand. Although the worker has already consented to such collection of information in signing Form 6, this additional

notification would further define the consent and keep the worker informed of the progress of her file.

(2) Order PP-04-002 Re: Queens Health Region, dated March 31, 2004

The Complainant in this case alleged improper collection of personal information under the Disability Support Program, a program administered by the public body. The Complainant alleged that two types of personal information were improperly collected by the public body: the complainant's Notice of Assessment and the Individual Educational Plan of the complainant's child who is a participant in the Disability Support Program.

As the Queens Health Region became a public body on November 8, 2003, it was necessary to determine whether the public body still required the collection of the complainant's personal information after this date, in order to confirm the jurisdiction of this office over this matter. The investigation proceeded after the public body responded that the collection of the personal information of the complainant, in particular, his Canada Revenue Agency Notice of Assessment, is required to determine eligibility for the Disability Support Program.

Prior to November 8, 2003, the Complainant had originally directed this same complaint to the Department of Health and Social Services. At that time, the Commissioner concluded that in accordance with section 32 of the *Act*, this matter was outside the jurisdiction of the *Act*. After November 8, 2003, the new complaint was forwarded to the Public Body, after which a question was raised about which Public Body is the proper respondent, the Department of Health and Social Services or the Queens Health Region. Following a meeting with the head of each of the public bodies, it was determined that the Queens Health Region is the proper respondent.

Following completion of this review, the Commissioner found that the public body violated Part II, in particular, section 31(c) of the *Act* when it collected the entire notice of assessment from participants in the Disability Support Program. The Commissioner ordered the public body to stop collecting the entire Notice of Assessment from participants and stated that if the public body provides participants with the option of limiting their personal information collected to basic identifying information and line 236 of the Notice of Assessment, it will be in compliance with Part II of the *Act*.

Regarding the complaint concerning the Individual Education Plan, the Commissioner found that the public body did not violate Part II of the *Act* in collecting the Individual Education Plan of the complainant's child.

A postscript was added that as a result of the order, the Commissioner was informed that staff administering the Disability Support Program are no longer requesting the entire Canada Revenue Agency Notice of Assessment from clients. The staff are advising clients that they need only provide line 236 of this document, along with the client's identifying information, while any additional information may be blacked out prior to submitting. The staff have implemented this practice with new clients at the intake stage and with current clients during their regular review.

VI. Statistics

Summaries of the applications for review and privacy complaints are set out in Appendix “A” and Appendix “B”, respectively, and which form part of this Annual Report.

APPENDIX "A"

FREEDOM OF INFORMATION SUMMARY OF APPLICATIONS FOR REVIEW

December 1, 2003 - December 31, 2004

PUBLIC BODY	REQUESTS FOR ACCESS TO INFORMATION *	APPLICATIONS FOR REVIEW	RESOLVED OR CLOSED	ORDERS ISSUED	ONGOING
Agriculture, Fisheries & Aquaculture	7				
Community and Cultural Affairs	3	1			1
Development and Technology	14	3	1		2
Education	1				
Environment, Energy & Forestry	18	8	1	6***	1
Health and Social Services	24	3	1	1	1
Tourism	2				
Transportation and Public Works	12	7	1	1	5
Executive Council Office	1	1			1
Office of the Attorney General	5	1			1
Office of the Premier	3	1	1		
Provincial Treasury	10	2	1		1
Fathers of Confederation Buildings Trust					
Island Regulatory and Appeals Commission					

PUBLIC BODY	REQUESTS FOR ACCESS TO INFORMATION *	APPLICATIONS FOR REVIEW	RESOLVED OR CLOSED	ORDER ISSUED	ONGOING
Island Waste Management Corporation	2				
Prince Edward Island Liquor Control Commission					
Prince Edward Island Public Service Commission	5				
Workers Compensation Board of Prince Edward Island	1	2	1**		1
Workers Compensation Board Appeal Tribunal		3	2		1
Commission Scolaire de langue française					
Western School Board					
Eastern School Board	1				
Kings Health Region	2				
West Prince Health	3				
Queens Health Region	4				
East Prince Health	2				
Provincial Health Services Authority	8	1			1
TOTAL:	128	33	9	8	16

* Obtained from Access and Privacy Services Office

** Review was resolved through Judicial Review

*** Order includes four reviews from one Applicant

APPENDIX "B"

SUMMARY OF PRIVACY COMPLAINTS

December 1, 2003 - December 31, 2004

PUBLIC BODY	PRIVACY COMPLAINTS	RESOLVED OR CLOSED	ORDER ISSUED	ONGOING
Agriculture, Fisheries & Aquaculture				
Community and Cultural Affairs				
Development and Technology				
Education				
Environment, Energy & Forestry				
Health and Social Services	5		3	2
Tourism				
Transportation and Public Works				
Executive Council Office				
Office of the Attorney General	1*			1*
Office of the Premier				
Provincial Treasury				
Fathers of Confederation Buildings Trust				
Island Regulatory and Appeals Commission				
Island Waste Management Corporation				
Prince Edward Island Liquor Control Commission				
Prince Edward Island Public Service Commission	1*			1*

PUBLIC BODY	PRIVACY COMPLAINTS	RESOLVED OR CLOSED	ORDER ISSUED	ONGOING
Workers Compensation Board of Prince Edward Island	2		1	1
Workers Compensation Appeal Tribunal				
Commission Scolaire de langue francaise				
Western School Board				
Eastern School District				
Kings Health Region				
West Prince Health				
Queens Health Region	3		1	2
East Prince Region				
Provincial Health Services Authority	1*			1*
TOTAL:	13		5	8

* One privacy complaint involves three public bodies.