



# Prince Edward Island Île-du-Prince-Édouard

## Legislative Assembly

Information and  
Privacy Commissioner  
PO Box 2000, Charlottetown PE  
Canada C1A 7N8

## Assemblée législative

Commissaire à l'information et  
à la protection de la vie privée  
C.P. 2000, Charlottetown PE  
Canada C1A 7N8

PRIVATE AND CONFIDENTIAL

April 24, 2023

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Dear [REDACTED],

**Re: Request for review under the *Freedom of Information and Protection of Privacy Act***  
**Public Body:** Health PEI  
**Public Body's file:** 2022-48  
**Our file:** FI-22-498

Someone asked Health PEI for access to the following records:

Please provide

- 1) any and all agreements between
  - a) Health PEI and
  - b) private long-term care homes and/or private community care facilities, as the case may be, that relate to the provision and implementation of temporary financial support measures to offset COVID-19-related costs; and
- 2) all correspondence to or from Health PEI in relation to the agreements referenced above.

Health PEI consulted with [REDACTED] ([REDACTED]) on several records they considered responsive to this request, as a third party with potential business information in the records. However, it appears that [REDACTED] did not respond to Health PEI's request by the deadline, and Health PEI made its decision, based on the information it had. Health PEI decided that section 14 of the *FOIPP Act* did not apply to the information about [REDACTED] and that they were not authorized to withhold disclosure from the Applicant.

On November 23, 2022, we received your request to review Health PEI's decision to disclose records, specifically an agreement between Health PEI and [REDACTED] and the invoices [REDACTED] submitted relating to the Capital Replacement Fund.

One of the first things we do when we receive a request for review is determine whether there is any possibility of resolving the issues and whether a review is warranted. In this matter, we consider one of

your concerns, the invoices, to be resolved, and I do not consider your concerns about the agreement to warrant a review.

### Invoices

With respect to your concern about Health PEI disclosing invoices you submitted for the Capital Replacement Fund, it appeared these had been included in the records because they were attached to an email or emails that mentioned COVID-19, which were responsive to the access request. We advised the Applicant that there were some records that did not relate to the COVID-19 program, and the Applicant confirmed that they were not interested in receiving these records. These records are no longer at issue, and we consider this component of your request for review to be resolved.

### Agreement

The *FOIPP Act* permits me to refuse to conduct a review if the circumstances warrant. Not every request for review proceeds to an inquiry. You claim that subsection 14(1) of the *FOIPP Act* prohibits the Public Body from disclosing the agreement. I find that this claim does not have a reasonable chance of success.

All three clauses of subsection 14(1) of the *FOIPP Act* must be satisfied to require a public body to withhold information from an applicant. If any of the three clauses does not apply, then a public body is not authorized to withhold the information. Clause 14(1)(a) of the *FOIPP Act* requires that the information would reveal trade secrets or commercial, financial, or other specified information about the third party. I accept the agreement may be commercial or financial information about your business. Clause 14(1)(b) requires that the third party supplied the information in confidence to the Public Body. I am persuaded that you did not supply the agreement to the Public Body.

Negotiated terms in a contract are not considered to be "supplied" if they are negotiated, even where there is little or no actual negotiation preceding the contract. There are exceptions to this general guideline:

1. where "immutable" information of a third party is added to the contract. The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are vested contracts that include a profit margin, financial statements, underlying fixed costs and product samples or designs; and
2. where disclosure of the information in a contract would allow one to draw accurate inferences about confidential information supplied by a third party which is not contained in the contract.

The only potential financial information in the agreement is the *per diem* supplement amount. Health PEI entered into similar agreements with multiple long-term care facilities and community care facilities. The agreement states that the *per diem* supplement rates were determined on information submitted

by the facilities (plural), and each of the agreements for long-term care facilities have the same *per diem* supplement rate. There is no immutable information about your business in the agreement. It is not possible for anyone to draw accurate inferences about confidential information your client may have supplied to the Public Body.

For these reasons, the contract does not meet the requirements of subsection 14(1) of the *FOIPP Act*. As meeting all three requirements is mandatory, and you are not able to meet at least one on a *prima facie* basis, there is no reasonable chance of success. In my opinion, the circumstances do not warrant conducting a review in this matter, and, pursuant to clause 64.1(b) of the *FOIPP Act*, I am refusing to conduct a review.

Sincerely,



Denise N. Doiron

Information and Privacy Commissioner

C: Director, Privacy and Information Management, Health PEI (via email)