



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

Order No. OR-24-002

**Re: Office of the Premier
(OIPC File No. FI-20-335)**

**Maria C. MacDonald
Deputy Commissioner**

March 14, 2024

Summary: The Premier's Office (the "Public Body") received an access request for records but did not locate or retrieve any responsive records. The Applicant alleges that the Public Body did not comply with the duties under subsection 8(1) of the *Freedom of Information and Protection of Privacy Act* (the "FOIPP Act") because they did not conduct an adequate search and did not respond openly, accurately and completely. The Deputy Commissioner determined that the Public Body made every reasonable effort to identify and locate responsive records, and therefore conducted an adequate search. The Deputy Commissioner held that the Public Body responded openly, accurately and completely to the Applicant and complied with subsection 8(1) of the *FOIPP Act*.

Statutes cited: *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, Cap. F-15.01, subsection 8(1)

Archives and Records Act, RSPEI 1988, Cap. A-19

Civil Service Act, RSPEI 1988, Cap C-8, clause 38(2)(b)

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

Order FI-23-003, *Re: City of Charlottetown (Charlottetown Police Services)*, 2023 CanLII 62781 (PE IPC)

Order FI-21-003, *Re: Department of Economic Growth, Tourism and Culture*, 2021 CanLII 72816 (PE IPC)

Order FI-23-002, *Re: Department of Finance*, 2023 CanLII 62809 (PE IPC)

Order FI-20-007, *Re: Department of Economic Growth, Tourism and Culture*, 2020 CanLII 43897 (PE IPC)

CMT et al. v. Government of PEI et al., 2019 PESC 40 (CanLII)

CMT et al. v Government of PEI et al., 2020 PECA 12 (CanLII)

I. BACKGROUND

- [1] In 2019, an individual (the "Applicant") asked the Premier's Office (the "Public Body") for access to records of a former Premier that relates to three individuals. The Applicant requested:

All records in any form of Robert Ghiz sent to, or received by [Businessperson 1], or make mention of [Businessperson 2] or [the Chief of Staff].
May 1, 2011 to November 1, 2011.

- [2] I refer to the individual as the "Chief of Staff", but their full title was the Deputy Minister to the Premier and the Chief of Staff. This person had this role for most of the period of the access request, and was a private business person for about two weeks of the period of the access request.
- [3] The Public Body searched but did not find any responsive records, and the Applicant requested a review. The review commenced with former Commissioner Karen A. Rose. Commissioner Denise N. Doiron requested and received submissions and delegated this matter to me to complete.
- [4] When the Public Body received a copy of the Applicant's request for review, they conducted another search of electronic records because they did not search for two of

the people the Applicant referred to in their access request. The Public Body addressed this shortfall in their search early in the review, and I consider this initial issue to be resolved.

II. ISSUES

- [5] The Applicant alleges the Public Body failed to comply with two of the duties set out in subsection 8(1) of the *Freedom of Information and Protection of Privacy Act* (the “*FOIPP Act*”), which 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.

...

- [6] The Applicant's two concerns are about:
- a. the adequacy of the Public Body's search; and
 - b. whether the Public Body responded to them openly, accurately and completely.
- [7] Several decisions of our office confirm that subsection 8(1) of the *FOIPP Act* includes a duty to conduct an adequate search. The Applicant believes the Public Body did not conduct an adequate search because the Public Body did not find any responsive records. In their request for review, the Applicant asks why the former Premier would not have any records that even mentions their Chief of Staff.
- [8] The Applicant alleges that the Public Body did not respond to them openly, accurately and completely. The Applicant has a copy of instructions to the Information Technology Shared Services (ITSS) of the provincial government to delete the former Premier's email and network files. The Public Body denies it, but the Applicant believes that the Public Body deleted the former Premier's electronic records. The Applicant alleges that the Public Body violated subsection 8(1) of the *FOIPP Act* because they did not advise the

Applicant that responsive records had been destroyed, and electronic records were no longer accessible to be searched.

III. BURDEN OF PROOF

[9] First, I will address the burden and standard of proof on the adequacy of a public body's search. Then I will address the burden and the standard of proof on a public body's duty to respond to an applicant openly, accurately and completely.

[10] Our office has held that a public body has the burden to show that they conducted an adequate search. A public body's search does not have to be perfect, and they do not have to prove with absolute certainty that records do not exist, but they must show that they made every reasonable effort to locate responsive records. Although the burden of proof is on a public body, it is helpful for an applicant to give reasons to show 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) at paragraph 6].

[11] With respect to a public body's duty to respond to an applicant openly, accurately and completely, previous decisions of our office have held that a public body has the burden to show that they complied with subsection 8(1) of the *FOIPP Act* [see for example, Order FI-23-003, *Re: City of Charlottetown (Charlottetown Police Services)*, 2023 CanLII 62781 (PE IPC)]. A public body must show that they acted reasonably in the circumstances [see Order FI-21-003, *Re: Department of Economic Growth, Tourism and Culture*, 2021 CanLII 72816 (PE IPC)].

IV. ANALYSIS

[12] I will address the adequacy of the Public Body's search first, then whether the Public Body responded to the Applicant openly, accurately and completely.

[13] I read the Public Body's and Applicant's submissions and materials, but I will only refer to portions that are relevant to the issues under review.

Issue 1: Adequate Search

[14] The Applicant alleges that the Public Body did not conduct an adequate search because the Public Body did not find any responsive records. In the Applicant's request for review, they focused on records that mention the Chief of Staff. As an example, the Applicant refers us to a press release about the Chief of Staff that was issued within the period of the access request that quotes the former Premier. The Applicant states that they "specifically threw a very large net" when they asked for all records that even mention the Chief of Staff.

[15] It is possible that the former Premier had a record related to their quote in the press release. The former Premier's quote related to the Chief of Staff's involvement in political activities. Political activities are not work related. Employees are prohibited from conducting political activities during their hours of duty (clause 38(2)(b) of the *Civil Service Act*). Aside from political activities, in consideration of the working relationship, it is reasonable to expect the former Premier would have created or received a record that mentions the Chief of Staff within the six-month period of the access request. The Applicant has shown a reasonable basis to believe that responsive records existed at one time.

[16] Former Commissioner Karen A. Rose forwarded a copy of the Applicant's request for review to the Public Body and asked the Public Body questions about the search, including: who conducted the search, the scope of the search, and what steps were taken to identify locations of responsive records.

[17] The Public Body outlined their search efforts. A Recorded Information Management coordinator, who has knowledge of the former Premier's records, searched the physical files (210 minutes). A Correspondence Secretary familiar with how correspondence is managed, conducted the first and second electronic searches of the former Premier's email account, in-box, sent box, archived files, and computer directory (30 minutes).

[18] The former Commissioner also asked the Public Body for any reasons they believe no responsive records exist. The Public Body responded:

Reasons the Public Body believes no responsive records exist: While the Public Body does not disagree that the former Premier may have communicated with or made mention of the individuals named in the request, especially the former Chief-of-Staff (Individual 3), the fact of the matter is that no responsive records were located as a result of a reasonable search.

...

The Public Body notes that not all communications are exchanged in writing or by other recordable format. Further, the Public Body surmises that there would have been transitory email communications between the former Premier and the former Chief-of-Staff that are not required to be and were not retained. Outside of these observations, the Public Body is unable to definitively confirm why there are no written or recorded correspondences between this former Premier and the former Chief-of-Staff (Individual 3).

[19] In response to the Public Body's remark about transitory records, the Applicant states, in part:

There is only one person authorized under the *Archives and Records Act* to delete records, and that's the Provincial Archivist. There's also only one designated person within each department or public body who is legally authorized to provide records to the Provincial Archivist for disposition, and that is the Records Management Liaison Officer.

...

If the records indicated by [the head of the Public Body] once existed and were deemed to be "transitory," as [the head of the Public Body] says, then that determination would have to have been processed through the departmental RMLO; then recorded in a disposition schedule; then submitted to the Provincial Archives and Records Office (PARO); specifically, the Public Records Committee for disposition.

[20] The Applicant also referred to a (previous) Treasury Board Directive, and a 2007 policy on managing email records. The Applicant believes that only the Provincial Archivist can delete records, and only the Records Management Liaison Officer (RMLO) can give records to the Provincial Archivist for disposition. I do not agree with how the Applicant interprets the *Archives and Records Act* (current or earlier versions), policies, or how they describe records management. It is not reasonable or feasible for only a few people to review and delete all transitory records of a public body. An employee may delete transitory emails in their own email account¹.

[21] Our office has accepted that a public body does not have to keep transitory records. Public bodies must keep records related to official business but do not need to keep records that are not work related or are only required for a short amount of time [see Order FI-23-002, *Re: Department of Finance*, 2023 CanLII 62809 (PE IPC), at paragraph 15].

[22] Initially, the Applicant's primary concern was the lack of any records that mention the Chief of Staff. In response to the Public Body's description of their search efforts, the Applicant also asked why there were no records to or from Businessperson 1, or that mention Businessperson 2. The Applicant says they have personal knowledge that emails existed, and gave us copies of three records they believe illustrate there are other responsive records:

¹ In 2022, the Provincial Archives and Records Office updated the Email Management Guide, which employees can find among the provincial internal resources.

Appendix (A) One-page email from Businessperson 1 to Businessperson 2 and the Applicant that briefly outlines a tentative three-day agenda in May 2011 that includes business and social events, and includes a line that states "Premier Friday early afternoon";

Appendix (B) One page of an email chain and a three-page enclosure. The first email is from the Applicant to Businessperson 1, who forwarded it to Businessperson 2 with no message. Businessperson 2 replied to Businessperson 1 with no message, but included an attachment called "Premiers Briefing Notes.doc". The enclosure is an introduction of a business and includes short biographies of a few individuals but does not mention any of the individuals named in the access request. The Applicant states that they know the attachment was sent to the former Premier; and

Appendix (C) Record of Innovation PEI that indicates that Businessperson 2 worked on a project, and both Businessperson 2 and the Chief of Staff worked together with two others on another project. The Applicant states the Premier was receiving updates on these two projects.

[23] In response to these examples, the Public Body states:

Upon review of the emails in Appendices A, B and C to the letter of the Applicant, none of those emails appear to include [the former Premier's email address] as a sender, recipient, copy, or blind copy. While the Applicant states that he knows that Appendix B was sent to the former Premier, and states that the former Premier was receiving updates in relation to Appendix C, neither Appendix B nor Appendix C appear to establish those statements.

[24] The samples the Applicant provided are not responsive to the access request, and I agree with the Public Body that these three records do not establish that the Public Body ought to have located responsive records. The Applicant's access request mentions three people other than the former Premier. With respect to the first two people, I do not have enough evidence to persuade me that the former Premier ever had records to or from Businessperson 1, or that mentions Businessperson 2. Even if they existed at one time, I do not have enough evidence to find that the former Premier should have retained them.

[25] With respect to the third person, the Chief of Staff, it is plausible that the former Premier created or received records that mentioned their Chief of Staff during the six-month

period of the access request. But I do not have enough evidence to find that the former Premier should have retained them.

[26] I reviewed the search records in the Public Body's processing file, the Public Body's and the Applicant's submissions to assess whether the Public Body made every reasonable effort to identify and locate responsive records.

[27] I accept that the employees who conducted the searches were knowledgeable and experienced. The Public Body searched physical and electronic records. The searchers searched for three and a half hours (210 minutes) through the physical files of the six-month period, and a half hour through the electronic records, which falls within a reasonable range of time. The Correspondence Secretary used the individuals' names as keywords. I am persuaded that electronic responsive records would have been captured searching the names of the three individuals.

[28] On the balance of probabilities, I find that, in the circumstances, the Public Body made every reasonable effort to identify and locate responsive records and that the Public Body conducted an adequate search.

Issue 2: responding openly, accurately and completely

[29] The Applicant provided a copy of the employee removal request form for the former Premier. This is a form created by ITSS and used when an employee, or in this case an elected official, is no longer entitled to access the provincial network, their email account or other provincial information technology services. The Public Body instructed ITSS to delete the former Premier's network files and email account. The Applicant's position is that the Public Body deleted the electronic records of the former Premier. The Public Body advises that these electronic records were preserved prior to the employee removal process.

[30] The Applicant does not accept that the email records were preserved and searched. The Applicant alleges that the Public Body knows that the former Premier's email records were deleted and alleges that the Public Body is refusing to advise them of this. The Applicant refers to Order FI-20-007, *Re: Department of Economic Growth, Tourism and Culture*, 2020 CanLII 43897 (PE IPC). In that decision, the head of a different public body failed to respond to applicants openly, accurately and completely because they did not advise the applicants that some electronic records were no longer accessible to search. The Applicant believes a similar thing occurred here. I must conduct my review based on the evidence before me.

[31] I understand the Applicant's initial concern. The employee removal form instructs ITSS to delete the former Premier's email account and network files. We gave the Applicant a copy of the Public Body's submissions, in which they advise that the former Premier's electronic records were preserved before they submitted this form to ITSS. The Public Body advise that they searched the email account, computer directory, and former archived files (and the physical files). The Public Body is in a better position to explain their records. The Public Body's position is supported by their processing records which indicate that the Correspondence Secretary was granted proxy and searched the former Premier's email account, inbox, sent box, and archives and electronic files.

[32] Although they do not address the electronic network files, the PEI Supreme Court and the PEI Court of Appeal touched on the issue of whether the former Premier's email records were destroyed in *CMT et al. v. Government of PEI et al.*, 2019 PESC 40 (CanLII), at paragraph 626, and *CMT et al. v. Government of PEI et al.*, 2020 PECA 12 (CanLII), at paragraph 262. Although it is a different context, these decisions confirm that there was a back-up of the former Premier's email account.

[33] On the balance of probabilities, I find the employee removal form and process did not impede the Public Body's ability to search for responsive records. As such, the Public Body did not need to inform the Applicant about anything related to the employee removal form or process. I find that the Public Body responded to the Applicant openly, accurately, and completely under subsection 8(1) of the *FOIPP Act*.

V. FINDINGS and CONCLUSION

[34] I find that the Public Body made every reasonable effort to identify and locate responsive records and that the Public Body therefore conducted an adequate search.

[35] I find that the Public Body did not need to inform the Applicant about anything related to the employee removal form or process. Therefore, I find that the Public Body responded openly, accurately and completely to the Applicant and complied with subsection 8(1) of the *FOIPP Act*.

[36] In consideration of these findings, I make no orders or recommendations.

SGD MARIA MACDONALD

Maria C. MacDonald
Deputy Commissioner