OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI-21-003

Re: Department of Economic Growth, Tourism and Culture

Prince Edward Island Information and Privacy Commissioner
Denise N. Doiron

June 18, 2021

Summary:

An applicant requested access to all records exchanged between a former CEO and a named employee, and all records of the CEO that mention a named private contractor, or a named company, for a five month period in 2011. The Public Body provided the Applicant with responsive records, severing information under sections 15 (unreasonable invasion of personal privacy), and 22 (advice to officials) of the *Freedom of Information and Protection of Privacy Act* ("*FOIPP Act*"). The Applicant requested a review regarding the Public Body's decisions to withhold information, and with respect to their duties to applicants pursuant to section 8 of the *FOIPP Act*.

The Commissioner found that the Public Body properly applied the exceptions to disclosure when making their decision to withhold information from the responsive records.

The Commissioner found that the Public Body had complied with their duties to the Applicant pursuant to section 8 of the *FOIPP Act*.

Statutes Considered:

Freedom of Information and Protection of Privacy Act, R.S.P.E.I. 1988, Cap. F-15.01, sections 1, 4, 7, 8, 9, 14, 15, 22, 29, 50, 56, 65, 67.

Cases Cited:

Order FI-20-007, *Re: Department of Economic Growth, Tourism and Culture*, 2020 CanLII 43896(PE IPC)
Order FI-19-001, *Re Workers Compensation Board*, 2019 CanLII 7110 (PE IPC)
Order FI-11-001, *Re: Department of Agriculture*, 2011 CanLII 9139 (PE IPC)
Order FI-18-013, *Re: Office of the Premier*, 2018 CanLII 130518 (PE IPC)
Order FI-18-001, *Re: Public Schools Branch*, 2018 CanLII 3930 (PE IPC)
Order FI-18-004, *Re: Charlottetown Area Development Corporation*, 2018 CanLII 9505 (PE IPC)
Order FI-18-005, *Re: Office of the Premier*, 2018 CanLII 54181 (PE IPC)
Alberta Order F2004-026, *Re: Alberta Labour Relations Board*, 2006 CanLII 80886 (AP OIPC)
Order FI-20-002, *Re: Department of Agriculture and Land*, 2020 CanLII 33892 (PE IPC)

I. BACKGROUND:

[1] An applicant (the "Applicant") made an access to information request to the Department of Economic Growth, Tourism and Culture (the "Public Body"), pursuant to section 7 of the *Freedom of Information and Protection of Privacy Act,* R.S.P.E.I. 1988, Cap. F-15.01 (the "*FOIPP Act*"). The Applicant requested:

> "All records in any formats, electronic or otherwise, of [*a named employee of the Public Body*] – then CEO of Innovation – which were either sent to – or received from -- [*a named employee of the Public Body*], or make mention of [*a named private contractor*] or a company called [*name of a company*] from January 1, 2011 to June 1, 2011."

[2] This request was the subject of another review of our office relating to a different issue, specifically a deemed refusal. The Applicant made the request to the Public Body for access to information in May 2019. Three months later, the Applicant requested a review because the Public Body had not responded to their request for access within

the statutory timeframes and authorized extensions. Subsection 9(2) of the *FOIPP Act* states that if a public body does not respond to a request for access to a record within the statutory time frame, it is to be treated as a decision to refuse access. This is often called a "deemed refusal".

[3] At that time, the Public Body acknowledged they were in a deemed refusal position. By a Consent Order, the Public Body agreed to process the file by a specific date. The Applicant took issue with the Public Body's compliance with the Consent Order. Former Commissioner Rose dealt with the issue of compliance previously, and it is not an issue being addressed in the present review. For this reason, it will not be discussed further. It is mentioned here only for context.

[4] Subsequent to the Consent Order, the Public Body located and retrieved 106 responsive records. The Public Body disclosed 87 pages to the Applicant, on October 16, 2019, with some information severed. There was also information of third parties, and the Public Body had to conduct consultations with them. The Public Body advised the Applicant that they would issue a supplementary decision regarding the records containing information of third parties. The remainder of the records were disclosed in two sets over the following seven weeks, with a final page subsequently identified and disclosed to the Applicant almost two months later.

[5] The present matter was initiated as a result of a request by the Applicant to review the Public Body's decisions to withhold information from the responsive records on the basis of the following *FOIPP Act* provisions:

- subsection 15(1) [unreasonable invasion of third party personal privacy];
- clause 22(1)(a) [consultations or deliberations];
- clause 22(1)(b) [information relating to contractual or other negotiations];
- clause 22(1)(f) [pending policy or budgetary position]; and
- clause 22(1)(g) [advice to officials].

[6] In addition, the Applicant disputed the Public Body's explanations for the delay in providing the records that included information relating to third parties, and expressed a belief that the Public Body manipulated a record by removing one page, which the Public Body subsequently disclosed.

[7] During the course of this review, the Public Body reconsidered their initial decision, and disclosed some information that they had previously withheld pursuant to subsection 22(1) of the *FOIPP Act*. The Public Body continued to withhold some information on one page (page 58), pursuant to clause 22(1)(g) of the *FOIPP Act* [advice to officials].

II. INFORMATION AND RECORDS AT ISSUE

[8] The records at issue are emails and attachments to emails.

[9] The Public Body withheld personal information on 17 pages, pursuant to subsection 15(1) of the *FOIPP Act*, claiming that disclosure of this information would be an unreasonable invasion of the third parties' personal privacy.

[10] The Public Body also withheld information from two emails on page 58 of the responsive records, pursuant to section 22 of the *FOIPP Act*.

III. JURISDICTION

[11] Neither of the parties argued jurisdiction in this matter, but whether there is jurisdiction to hear and decide a matter should always be considered.

[12] The *FOIPP Act* defines a record as a "record of information in any form, including electronic form…". Section 4 states that the *FOIPP Act* applies to "all records in the custody or under the control of a public body, including court administration records, but does not apply to…" and lists several exceptions of records and information that are

in the custody or under the control of a public body but are not subject to the *FOIPP Act*.

[13] All of the records at issue are emails and attachments to emails, and which were in the custody and control of the Public Body. None of the records fall into any of the categories of exemption from application of the *FOIPP Act*. I am satisfied that all of the records in issue are "records" under the *FOIPP Act*, and that the *FOIPP Act* applies to them. For this reason, I find that I have jurisdiction to consider the records at issue in this review.

[14] The Applicant expressed concerns related to the Public Body delaying disclosure of two of the 106 pages of records, and a page missing from the record the Public Body delayed disclosing to the Applicant. These concerns relate to whether the Public Body has met their duty to assist an applicant and respond openly, accurately, and completely to an access request, pursuant to subsection 8(1) of the *FOIPP Act*.

[15] Section 50 of the *FOIPP Act* indicates the Commissioner is generally responsible for monitoring how the *FOIPP Act* is administered to ensure its purposes are achieved and, within that section, a public body's duty to an applicant under section 8 is specifically referenced. For this reason, I find that I have jurisdiction to consider whether the Public Body has met its duty pursuant to section 8 to assist the Applicant and respond openly, accurately, and completely.

IV. ISSUES

[16] In this Order, I will consider three issues. These are:

Issue 1: Did the head of the Public Body properly apply section 15 of the *FOIPP Act* to information withheld from responsive records?

Issue 2: Did the head of the Public Body properly apply section 22 of the *FOIPP Act* to information withheld from responsive records?

Issue 3: Did the head of the Public Body comply with their duty to assist an applicant, pursuant to subsection 8(1) of the *FOIPP Act*, with respect to disclosure of the final three pages of responsive records?

V. BURDEN OF PROOF

[17] The burden of proof in this review is shared between the parties. The *FOIPP Act* places the burden of proof on a specific party, depending on what provision is in issue. Section 65 of the *FOIPP Act* describes who bears the burden of proof during an inquiry and states, in part:

> 65. (1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.
>
> (2) Notwithstanding subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.
> ...

Because the records at issue here contain information that falls into each of these categories, each party has a burden of proof.

[18] The Public Body withheld information under section 22 of the *FOIPP Act*. Pursuant to subsection 65(1) of the *FOIPP Act*, it is the Public Body who bears the burden of proving that they properly applied section 22 in deciding to withhold that information.

[19] The Public Body withheld some information from the records at issue pursuant to section 15 of the *FOIPP Act*, claiming that disclosure would be an unreasonable invasion of various third parties' personal privacy. Once a public body establishes that the records at issue contain personal information and determines disclosure would be an

unreasonable invasion of personal privacy, if an applicant claims the information should still be disclosed, the burden of proof switches to the applicant to establish that disclosure would not constitute an unreasonable invasion of personal privacy of a third party.

[20] Here, the Public Body determined that some information in the records at issue was personal information of various third parties and decided that disclosure of that information would be an unreasonable invasion of those parties' personal privacy. As a result the Public Body applied section 15 and withheld that information. The Applicant claims the Public Body improperly applied section 15 to that information. It is therefore the Applicant who bears the burden of proving the Public Body did not properly apply section 15 in withholding that information from the responsive records.

[21] The Applicant has also expressed dissatisfaction about the process of disclosing the final three pages. I am considering this as part of a public body's duty to assist an applicant, as set out in section 8 of the *FOIPP Act*.

[22] The *FOIPP Act* does not expressly place a burden of proof on one party or another with respect to a claim about whether a public body met its duty to assist an applicant under section 8 of the *FOIPP Act*. However, previous decisions from this office have held that the burden of proof for whether a public body has met its section 8 duties rests with the public body. For example, in Order FI-20-007, *Re: Department of Economic Growth, Tourism and Culture*, 2020 CanLII 43896 (PE IPC), former Commissioner Rose commented on the burden of proof regarding a public body's duty to assist an applicant and to respond openly accurately and completely. At paragraph 6, Commissioner Rose stated:

> "Section 8 of the *FOIPP Act* establishes the duty of a public body to assist an applicant, and to respond to an applicant openly, accurately and completely. Under subsection (1) of the *FOIPP Act*, a public body's duties to an applicant are mandatory. Although an applicant must have a basis for requesting a review of a public body's duties, the burden of proof under section 8 of the *FOIPP Act* lies with the public body."

[23] I agree with the comments of Commissioner Rose that the burden of proof for a mandatory obligation of a public body is on the public body. It should be noted, though, that under section 8 of the *FOIPP Act*, the obligation of a public body to assist an applicant and to respond openly, accurately and completely, while mandatory, is not one of perfection. The public body must act reasonably. Because the duty is mandatory and it is the public body's obligation, it is the public body's responsibility to show that they acted reasonably with respect to their duty to assist an applicant and respond openly, accurately and completely. Although submissions from an applicant are also considered in making the assessment of whether a public body acted reasonably, the burden of proof regarding whether the public body met their duty under section 8 of the *FOIPP Act* lies with the public body.

VI. ANALYSIS

Issue 1: Did the head of the Public Body properly apply section 15 of the *FOIPP Act* to information withheld from responsive records?

[24] The Public Body relies on section 15 of the *FOIPP Act* to withhold various types of personal information from 17 pages of responsive records. The Public Body describes the personal information as being of the following types:

- health information (pages 23 and 29);
- employment information (pages 1, 15, and 75);
- family information (page 15);
- cell phone numbers (pages 54, 66, and 71); and
- names (pages 1, 17, 18, 20, 21, 53, 59, 60, 61, 68, and 75).

[25] For clarity, the cell phone numbers were personal cell phone numbers, and the names in the last category listed above were names associated with financial history, employment history, and opinions which were disclosed in a non-identifying manner.

[26] Prior to the close of submissions, former Commissioner Rose confirmed to the parties that the information the Public Body withheld is personal information as described by the Public Body. I have reviewed this information and concur with Commissioner Rose that the information the Public Body withheld is personal information as described by the Public Body.

[27] If information in a responsive record is personal information, and if the disclosure of the information would be an unreasonable invasion of a third party's personal privacy, section 15 of the *FOIPP Act* requires that the public body refuse to disclose it to an applicant.

[28] The focus of this portion of the review is whether disclosing this personal information would be an unreasonable invasion of the personal privacy of third parties. This analysis is set out in several previous orders from this office. One such order is Order FI-19-001, *Re Workers Compensation Board*, 2019 CanLII 7110 (PE IPC), which states at paragraph 23:

> "... if the information at issue is found to be personal information, it must be decided whether disclosure of the personal information would constitute an unreasonable invasion of personal privacy. This analysis may involve the other subsections of section 15 of the *FOIPP Act,* as follows:
>
> (a) If a party wishes to raise subsection 15(2), it should be dealt with first. This is a deeming provision, so that certain circumstances are deemed not to be an unreasonable invasion of a third party's personal privacy. If one of the exceptions in subsection 15(2) is found to apply, the analysis is at an end, and the information should be disclosed.
>
> (b) The next analysis involves subsection 15(4), and is only reached if subsection 15(2) does not apply. Subsection 15(4) contains examples of circumstances that are presumed to be an unreasonable invasion of privacy. If one or more of the presumptions listed in subsection 15(4) applies to the information at issue, then disclosure of that information is presumed to constitute an unreasonable invasion of privacy of the third party to whom the information relates. Despite any presumptions, however, a factor under subsection 15(5), or a combination of factors, including the other circumstances listed below, may rebut the presumption(s), and lead to disclosure of the information.

> (c) In all cases, even if no presumptions of subsection 15(4) apply, all relevant factors favoring disclosure must be balanced against those favoring nondisclosure, pursuant to subsection 15(5), so that a decision can be made regarding whether disclosure would constitute an unreasonable invasion of a third party's personal privacy."

[29] As set out in Order FI-19-001, subsection 15(2) of the *FOIPP Act* lists several circumstances where disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. If any of these apply to the information in the records at issue that the Public Body refused to disclose under section 15, then the information may not be withheld, except in the limited circumstance set out in subsection 15(3). If none of these circumstances apply, I must continue on to determine if any of the presumptions set out in subsection 15(4) apply, taking into consideration the circumstances referred to in subsection 15(5) of the *FOIPP Act*.

[30] I have reviewed the circumstances set out in subsection 15(2) and find that none of them are applicable in this matter. For this reason, I find that subsection 15(2) of the *FOIPP Act* does not apply. I will now proceed to review subsections 15(4) and 15(5) of the *FOIPP Act* in relation to the personal information withheld by the Public Body.

[31] The Public Body withheld the name of an individual at page 1 of 106 who, according to the text of the email, had resigned. In their submissions, the Applicant refers to a specific former employee of the Public Body with whom they had interacted, and stated that they were aware that this individual had resigned. The Applicant claims that, because they know who the former employee is, and that the employee resigned, disclosure of the name would not be harmful to the person's personal privacy. For clarity, the Applicant assumes that a former employee, who they know resigned from the Public Body, is the same individual whose name was withheld. The name on page 1 has not been disclosed to the Applicant.

[32] Clause 56(3)(a) of the *FOIPP Act* requires that I not disclose any information the head of a public body would be required or authorized to refuse to disclose. For this reason, I

can neither confirm nor deny whether the withheld name is the individual that the Applicant alleges. However, without identifying the individual, I can still assess whether any of the circumstances under section 15(4) apply to establish whether disclosure of the name would be presumed to be an unreasonable invasion of that person's personal privacy.

[33] Whether an individual resigned is information about the individual's employment history. Clause 15(4)(b) of the *FOIPP Act* states that disclosure of personal information that relates to employment history is presumed to be an unreasonable invasion of a third party's personal privacy. Therefore, the presumption is that disclosure of the name of the individual who, according to the text of the email, had resigned, would be an unreasonable invasion of that person's personal privacy.

[34] However, this presumption is a rebuttable one. That is, the presumption that disclosure would be an unreasonable invasion of the third party's personal privacy can be superceded. To make this determination, I must consider all relevant circumstances, including those set out in subsection 15(5) of the *FOIPP Act*, which is not an exhaustive list.

[35] Several other potential factors are listed in Order FI-11-001, *Re: Department of Agriculture*, 2011 CanLII 9139 (PE IPC), at paragraph 89. Many of the factors set out in subsection 15(5) of the *FOIPP Act*, like many of the additional factors listed in Order FI-11-001, are not applicable to the records currently under review. The factors I have taken into consideration include:

- the nature and content of the records;
- whether the personal information appeared to have been supplied in confidence;
- whether disclosure of the information would promote the objective of providing citizens of the province with an open, transparent and accountable government;

- the fact that the Applicant may know the identity of the individual to whom the personal information relates;
- a resignation is generally considered sensitive personal information; and
- whether disclosure of the personal information is relevant to the fair determination of the Applicant's rights.

[36] I am not persuaded that any of these factors outweigh the presumption that disclosure of an individual's employment history would be an unreasonable invasion of their personal privacy. The Applicant therefore has not met their burden of proving that disclosure of the personal information withheld at page 1 of 106 would not be an unreasonable invasion of the third party's personal privacy.

[37] In addition to the name withheld on page 1 of 106, the Public Body also withheld personal information that can be described as health information, family information, personal cell phone information, and names of individuals associated with financial history, employment history, and opinions. The Applicant claims that the Public Body applied section 15 of the *FOIPP Act* improperly to all of the information withheld pursuant to section 15. However, the Applicant did not address any of the other types of personal information that were withheld by the Public Body under section 15.

[38] The Applicant bears the burden of proof to establish that it would not be an unreasonable invasion of a third party's personal privacy for the Public Body to disclose the personal information. To meet the burden of proof, the Applicant has to provide some basis for this claim. As the Applicant has provided no basis for their assertion that the disclosure of the withheld health information found at pages 23 and 29, employment information found at pages 15 and 75, family information found at page 15, cell phone numbers found at pages 54, 66, and 71, and names associated with financial history, employment history, and opinions found at pages 1, 17, 18, 20, 21, 53, 59, 60, 61, 68 and 75, I find that the Applicant has not met their burden of proof to

persuade me that disclosure of this information would not be an unreasonable invasion of these individuals' personal privacy.

[39] I am persuaded that the Public Body conducted a thorough analysis of the information, and properly withheld personal information as they were required to do pursuant to section 15 of the *FOIPP Act*.

Issue 2: Did the head of the Public Body properly apply section 22 of the *FOIPP Act* to information withheld from responsive records?

[40] The Public Body submits that the information they withheld from page 58 of the responsive records falls under subsection 22(1) of the *FOIPP Act*, specifically, clauses (a) and (g), which state:

> 22. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal
>
> (a) consulations or deliberations involving
> (i) officers or employees of a public body,
> (ii) a member of the Executive Council; or
> (iii) the staff of a member of the Executive Council;
> …
>
> (g) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council;
> …

[41] This is a discretionary exception to disclosure, and subsection 22(2) of the *FOIPP Act* limits the scope of this discretion. The analysis of section 22, then, involves assessing:

- whether a clause of subsection 22(1) applies; and, if so,
- whether a clause subsection 22(2) applies; and, if so,
- whether the head of the Public Body properly exercised their discretion to withhold the information.

Clause 22(1)(a) – consultations or deliberations

[42] The Public Body submits there is a reasonable expectation that disclosure of information on page 58 of 106 of the records at issue could reveal consultations or deliberations involving officers or employees of the Public Body pursuant to clause 22(1)(a) of the *FOIPP Act*.

[43] In previous orders of this office, former Commissioners have accepted definitions of "deliberations" and "consultations" as follows:

> A *deliberation* is a discussion or consideration by a group of individuals of the reasons for and against a measure.
>
> A *consultation* is a very similar activity where the views of one or more individuals are sought about the appropriateness of particular proposals or suggested actions.

[44] Previous orders of this office have also held that the views expressed must be sought from the view-holder, or be part of the responsibility of the view-holder to provide such input. In addition, the views must be for the purpose of doing something, such as taking an action or making a decision or a choice [see for example: Order FI-18-013, *Re: Office of the Premier*, 2018 CanLII 130518 (PE IPC) at paragraph 24].

[45] Page 58 of 106 is an email exchange between two employees of the Public Body. The Public Body has disclosed the authors of the emails and some introductory and concluding context. The information the Public Body did disclose shows that the employee, after a few paragraphs of withheld text, invites the CEO to let them know if the CEO has any further questions. In their submissions, the Public Body describes the information as related to how to address a conflict between two third party companies within the province.

[46] I have reviewed the withheld information and am persuaded that, pursuant to the definitions of consultation and deliberation reviewed above, the withheld information constitutes the seeking and receipt of views that were part of the responsibility of the

person from whom it was sought, and was for the purpose of taking action, or making a decision or a choice. I find that the withheld information satisfies the definitions of a consultation or a deliberation involving officers or employees of the Public Body.

[47] Because I have found that the withheld information is a consultation or deliberation involving officers or employees of the Public Body, I find that clause 22(1)(a) of the *FOIPP Act* applies to the information at page 58.

Subsection 22(1)(g) – advice or recommendations

[48] It is sufficient that only one of the clauses under subsection 22(1) of the *FOIPP Act* applies. As I have determined that clause 22(1)(a) applies to the information at issue on page 58, it is not necessary for me to also consider whether clause 22(g) applies to the records at issue.

Subsection 22(2) – exceptions to subsection 22(1)

[49] Although I have found that clause 22(1)(a) of the *FOIPP Act* applies to the information withheld at page 58 of the records at issue, the analysis does not end there. Subsection 22(2) lists several types of information to which subsection 22(1) does not apply. If the information falls into a category of exception listed under subsection 22(2) of the *FOIPP Act*, it may not be withheld under section 22, even if a provision of subsection 22(1) has been satisfied in relation to that information.

[50] I have reviewed the information withheld at page 58, and the exceptions set out in subsection 22(2) of the *FOIPP Act*. I confirm that none of the exceptions set out in subsection 22(2) are applicable to the withheld information at page 58 of the records at issue.

Exercise of Discretion

[51] As mentioned earlier, section 22 of the *FOIPP Act* is a discretionary disclosure provision. In other words, a public body can decide at its own option whether to provide access to an applicant, or withhold the information. However, this discretion is not absolute. When exercising its discretion to withhold information under a discretionary disclosure provision, a public body is required to exercise their discretion reasonably. Therefore, I must now assess whether the head of the Public Body exercised their discretion reasonably.

[52] A public body's decision would not be reasonable if, for example, it can be established that the head of the public body made a decision in bad faith or for an improper purpose, or took into account irrelevant considerations, or failed to take into account relevant considerations. The head of a public body must show that all relevant factors for and against access were considered in a balanced and judicious manner when making their determination [see: Order No. FI-18-001, *Re: Public Schools Branch*, 2018 CanLII 3930, at paragraph 30; and Order FI-18-004, *Re: Charlottetown Area Development Corporation*, 2018 CanLII 9505 (PE IPC) at paragraph 29; and Order FI-18-005, *Re: Office of the Premier*, 2018 CanLII 54181 (PE IPC), at paragraph 37].

[53] There are several relevant factors that a public body should be considering when exercising their discretion. A non-exhaustive list of such factors can be found in Order FI-18-004, *supra*, at paragraph 31, including:

- the general purposes of the *FOIPP Act*, including that the public bodies should make information available to the public, and individuals should have access to personal information about themselves;
- the wording of the discretionary exception and the interests which the exception attempts to balance;
- whether the applicant's request may be satisfied by severing the record and providing the applicant with as much information as is reasonably practicable;

- the historical practice of the public body with respect to the release of similar types of records;
- the nature of the record and the extent to which the record is significant or sensitive to the public body;
- whether the disclosure of the information will increase public confidence in the operation of the public body;
- the age of the record;
- whether there is a definite and compelling need to release the records; and
- whether Commissioners' orders have ruled that similar types of records or information should or should not be disclosed.

[54] The Public Body submits that, in making the decision to withhold the information in the records at issue under section 22, they balanced a key purpose of the *FOIPP Act*, to allow any person a right of access to a record of a public body, with the purpose of the section 22 exception, to allow public bodies to engage in open and candid discussions without fear of outside scrutiny, before arriving at well-reasoned decisions.

[55] On a review of the records and submissions, there is no evidence to suggest the Public Body acted in bad faith or for an improper purpose. Further, it is apparent that the Public Body considered severing the records and providing the Applicant with as much information as was reasonably practicable.

[56] Initially, the Public Body had withheld information on 17 pages of the 106 pages of responsive records under section 22 of the *FOIPP Act*. During the course of this review, the Public Body reviewed all of the information they had withheld pursuant to the various provisions of section 22, and revisited the decision to withhold that information. After reconsidering their position, the Public Body chose to exercise their discretion in favour of disclosure for most of the information they had initially decided to withhold under section 22.

[57] After reconsideration, the Public Body disclosed the information on 16 of the 17 pages that they had initially withheld under section 22 of the *FOIPP Act*. The Public Body disclosed 14 of the 17 pages in their entirety, and withheld only personal information that the Public Body was required to withhold under section 15 of the *FOIPP Act* on the other two pages. In the final package of responsive records, only page 58 of 106 pages had information withheld pursuant to section 22 of the *FOIPP Act*.

[58] The Public Body describes the information that was withheld on page 58 as relating to a conflict between two third party companies that continue to operate in the province, and they consider this information to be sensitive. I have reviewed the information, and confirm this is a reasonable description of the information that was withheld.

[59] I am persuaded, based on a review of all the withheld information, that the Public Body is authorized to withhold all of the information that the Public Body withheld on page 58 of the responsive records, and that they did not sever any information that was not subject to clause 22(1)(a) of the *FOIPP Act*. The Public Body provided to the Applicant as much information as is reasonable.

[60] Based on all of the circumstances, I am satisfied that the Public Body considered relevant factors when exercising their discretion under section 22 of the *FOIPP Act*, and they did not take into account any irrelevant considerations. I find that the Public Body exercised their discretion reasonably under section 22 in deciding to withhold information from page 58 of the records at issue.

Issue 3: Did the head of the Public Body comply with their duty to assist an applicant, pursuant to subsection 8(1) of the *FOIPP Act*, with respect to disclosure of the final three pages of responsive records?

[61] The Applicant takes issue with the Public Body delaying disclosure of the final three pages of responsive records, and a missing page. The Applicant alleges that the delay

was unwarranted and intentional, and that the Public Body had deliberately manipulated the record by leaving out one page from disclosure.

[62] Although the Applicant did not specifically mention section 8 of the *FOIPP Act* in their request for review or submissions, I consider the issues the Applicant raises to be related to the duty of a public body to assist an applicant and the duty to respond openly, accurately, and completely, pursuant to subsection 8(1) of the *FOIPP Act*.

Delay

[63] Some of the records responsive to the Applicant's request contained business information about third parties, none of which were the company named in the Applicant's access request. Under sections 14 and 28 of the *FOIPP Act*, where a public body is considering disclosing records containing information about the business of a third party, they are required to notify the third party of this; permit the third party an opportunity to respond; and consider the third party's position before making a final decision on disclosure. The third party has 20 days to provide a response to the public body after the notice is given, and the public body is required to make a decision on disclosure within 30 days of providing the notice to the third party. If a public body decides to disclose the information about the third party, the public body must notify the third party of their decision and the third party has 20 days to request a review of the public body's decision by our office. This request for review period is a statutory requirement pursuant to subsection 29(3) and clause 61(2)(b) of the *FOIPP Act*.

[64] The Public Body delayed disclosure of 19 pages of the 106 pages of responsive records that contained information about third party businesses, while they completed consultations with the third party businesses.

[65] After completing the consultations, the Public Body decided section 14 of the *FOIPP Act* did not apply and they were obligated to disclose the information. The Public Body

advised the Applicant that they had decided to disclose the 19 pages that included information regarding third party businesses, but that they were waiting for the 20-day request for review period to expire before disclosing these pages to the Applicant.

[66] After the 20-day request for review period expired, the Public Body disclosed 17 pages to the Applicant. The Public Body did not include pages 9 and 10 of the 106 pages in this disclosure. In its decision letter to the Applicant, the Public Body explained holding back on disclosing pages 9 and 10 as follows:

> "To comply with section 29 of the Act, and in accordance with the Consent Order of October 9, 2019, we will provide you access to pages 9 and 10, if the third party does not submit a request for review to the Information and Privacy Commissioner on or before December 2, 2019. If a review is requested, we will continue to withhold the two pages until the review is dealt with in accordance with the Act."

[67] It is worthy of noting that the delay in disclosing these records was not a decision of the Public Body to withhold that information. The Public Body expressly advised the Applicant they had decided to disclose the records, but were waiting for the expiry of the request for review period to release them to the Applicant. The issue is also not whether the Public Body ought to have waited for the third parties' request to review period to have expired, as the request to review period is a statutory requirement under the *FOIPP Act*. Rather, the delay issue is about the delay in identifying and contacting the third party to whom pages 9 and 10 related, to notify them of the Public Body's decision, and whether such delay was reasonable.

[68] The Applicant questioned why these two pages were not disclosed at the same time as the others. The Public Body advised our office that they had difficulty identifying and contacting the third party business related to the information on these two pages. We advised the Applicant of the information provided to our office as follows:

> "…APSO advises that for one third party business, the only email address they had was "info@...". They did not receive any acknowledgement from this third party throughout the process, so they had no way of knowing whether the notice is getting through. So they mailed notices on November 12, 2019. They are therefore calculating the time from the mailed notice."

[69] The Public Body postponed disclosing pages 9 and 10 of 106 for a further 17 days, to ensure that the notice of the Public Body's decision to disclose the pages had been delivered. The Applicant opposes the Public Body's explanation for the delay in disclosure of these pages. The Applicant asserts that they (the Applicant) was the president and a director of the third party business to whom the information on pages 9 and 10 related, and the Public Body was aware of this because the Applicant authored these pages. For clarity, I will refer to the third party business to which pages 9 and 10 relate as "Business 1".

[70] There is nothing in the covering email (page 8), or in pages 9 or 10 themselves, that identified the Applicant as being involved with Business 1, or indicated that the Applicant may have been the author of the attachment at pages 9 and 10.

[71] We are not able to independently confirm that the Applicant is a director of Business 1. For the purposes of this review, we will accept this as a fact. The issue, however, is whether this was known, or ought to have been known, by the Public Body at the time they were conducting their third party consultations.

[72] As stated above, the Applicant claims that the Public Body knew, or ought to have known, that the Applicant was the president/director of Business 1 and had authored pages 9 and 10. The Applicant states:

> "Firstly, you would have to assume that the Public Body has never heard of [Business 1] despite dozens of FOIPs, Requests for Reviews, and continuous local media coverage on [identifying subject matter] over the last seven years.
>
> Secondly, a google search would be the easy way for quick search for the Public Body to look for additional information. Given the information contained in [page 8 of 106], obvious searches for [Business 1, and an acronym for Business 1] would be: [list of company names]."

[73] The Applicant suggests that the Public Body therefore ought to have known that the Applicant is the president/director of Business 1. The Applicant provides links to several news articles and websites to support their position. Most of these links refer to a

business whose name is very similar to, but not identical to, Business 1, and one refers to a business acronym, which could potentially refer to either Business 1 or the similarly-named company. There is nothing in these links that identifies the Applicant as the president/director of Business 1.

[74] Respectfully, the relationship between the Applicant and Business 1 is not as transparent or obvious as the Applicant suggests. There was no information contained in the covering email or pages 9 and 10 that would lead anyone to determine that the Applicant was in any way associated with Business 1, or that the Applicant was the person who should be contacted for consultation. Further, there was no information contained in the covering email or pages 9 and 10 that mentioned the Applicant or suggested the Applicant was the author of the record or participated in its creation.

[75] The Public Body became aware that Business 1 was often referred to interchangeably with another business, although they are different businesses with completely different names. I will refer to this other business as "Business 2". A FOIPP Analyst, on behalf of the Public Body, researched Business 2 and learned that it had been sold to another business, which I will refer to as "Business 3". In their submissions, the Public Body states:

> "With respect to the identified 3rd party at pages 9 and 10 the Public Body submits that the beginning sentence on page 9 identified the 3rd party and author of the document as [Business 1]. When a search was conducted for [Business 1] there was no contact information available. It was communicated by the record holder that [Business 2] and [Business 1] were often used interchangeably. [Business 2] was purchased by [Business 3] in September, 2013 and as such it was [Business 3] who were contacted."

[76] In response, the Applicant comments:

> "The [Business 2] transaction with [Business 3] is not a well known fact. The Public Body would have had to have undertaken significant and speculative due diligence to come to the conclusion that [Business 3] would be the appropriate source to answer about an email from 2011. In addition, this also brings into question who they even addressed it to at [Business 3]. Far less due diligence and time would have provided the fact that I am the President of [Business 1] and they intentionally ignored this to prevent damaging disclosures for our lawsuit against government."

[77] Contrary to the Applicant's suggestion, the acquisition of Business 2 by Business 3 was obtainable online. Our office was able to confirm this information through an internet search. There is no evidence to support that the Public Body knew or ought to have known that the Applicant was the president or a director of Business 1. However, it was logical for the Public Body to have concluded that, if Business 1 and Business 2 were used interchangeably, and Business 3 acquired Business 2 after the record was created but some years prior to the Applicant's access request, that Business 3 was the appropriate entity to contact in relation to Business 1 for the purposes of responding to the Applicant's access request. I therefore find it was reasonable for the Public Body to have contacted Business 3 to notify them of the decision in relation to disclosing the business information of Business 1 in response to the Applicant's access request.

[78] The Public Body did not receive a consultation response from Business 3 and the Public Body decided that section 14 of the *FOIPP Act* did not apply. After the expiry of the 20-day period for a third party to request a review of the Public Body's decision, the Public Body disclosed pages 9 and 10 to the Applicant. After the Public Body had disclosed these pages to the Applicant, Business 3 wrote to the Public Body acknowledging the delay in response and consented to the Public Body disclosing the record to the Applicant. What is significant, however, is that in their correspondence to the Public Body, Business 3 made no suggestion that they were not the appropriate business to have been consulted and notified.

[79] The Applicant alleges that the Public Body intentionally delayed disclosing these records. The Applicant claims that the record is significant to their litigation claims against government, and asserts the Public Body therefore deliberately delayed disclosing these records for the purpose of interfering with their litigation.

[80] I am not in a position to assess whether the record at issue is significant to the Applicant's litigation against government. Nor is the Applicant's claim that the record is significant to their litigation relevant to the determination of whether the Public Body

met its duty under section 8 of the *FOIPP Act*. Even if I were to accept the Applicant's claims as accurate, for the purposes of this review, the relevant factor is whether there is evidence to substantiate that the Public Body deliberately delayed disclosure of the record.

[81] There is an alternative mechanism to obtain records in a court proceeding, but I believe it is possible, in some circumstances, that delaying disclosing records through an access request could potentially impact a lawsuit and result in a failure of a public body's duty to assist an applicant. A decision from Alberta's Office of the Information and Privacy Commissioner held that a four-month delay in disclosure, without an explanation, was a failure in the duty to assist. Alberta Order F2004-026, *Re: Alberta Labour Relations Board*, 2006 CanLII 80886 (AP OIPC), at paragraph 26 and associated footnote 12 state:

> "[para 26] in its oral argument the Applicant argued that the Public Body's decisions relative to section 16 of the Act also constituted a failure in its duty to assist. Certain records that were withheld under this section were eventually provided. However, the Public Body did not agree to provide them until four months after that decision (after the consent of the third parties had been obtained). No explanation was given for this lengthy delay. I agree it was unwarranted, and that even though the documents were provided eventually, the delay constituted a failure in the duty to assist. [FN12]
>
> > [FN12] The delays in this case arguably fall under the other provisions in the Act that provide specified time limits for responding to access requests. Under section 31 of the Act, the Public Body is to make a decision within 30 days of notice to the third parties that it is considering giving access. However, again, the Applicant's complaint is not so much that the particular time lines were not met as that the response was given only a very long time after it would have been most useful to the Applicant. It says the Public Body's duty to assist included giving consideration to this fact. I agree that when the timing of a response has a particular importance, a public body's failure to take this factor into account can be, and was in this case, a breach of the duty to assist."

[82] Although I accept that it is possible for a delay to be a failure of a public body to assist an applicant, I am not persuaded that this occurred in the present matter. The facts in this matter do not mirror the circumstances of the instance in Alberta. The Public Body explained to the Applicant why there was a delay. I accept as reasonable the Public Body's explanation for their difficulty in identifying the third party to notify of their

decision to disclose the pages to the Applicant.

[83] I am also not persuaded that the Public Body intended to interfere with the Applicant's lawsuit. While the Applicant appears to believe there was some malicious intent on behalf of the Public Body, there is no evidence before me substantiating that the delay was for any reason other than the Public Body attempting to meet their obligations under the *FOIPP Act* for third party consultations, and having difficulty identifying and contacting the appropriate third party.

[84] Further, the publicly available information regarding the lawsuit is that some hearings related to the lawsuit heard by the Supreme Court of PEI were heard before this access to information request was submitted by the Applicant. Although there was also an appeal being heard by the Appeal Court of PEI, pages 9 and 10 were disclosed to the Applicant some five months before related hearings were heard by the Appeal Court of PEI. Given this timeline, it is unclear how a 17-day delay on the disclosure of pages 9 and 10 would have interfered with the Applicant's lawsuit.

[85] I am not persuaded that the delay in producing this record to the Applicant is a breach of the Public Body's duty to assist an applicant, or is not an open, accurate, and complete response to the Applicant's request for access to records.

Manipulation of Record

[86] When the Applicant received pages 9 and 10 of 106, they observed that the pages did not appear to be continuous. The Applicant recognized the document as one they had created, or contributed to creating, and observed that there was some information missing. The Applicant stated that "page 9 of 106 and 10 of 106 are clearly missing pages in between". Former Commissioner Rose reviewed the pages and agreed that they did not appear to be consecutive pages of the same document.

[87] After this was brought to their attention, the Public Body located the enclosure to the

email, discovered that there was one page missing from it, and provided a new copy of the document with all pages to the Applicant. The Public Body advised that:

> "It was an oversight on the part of the Public Body in not scanning in page two of three with respect to the record at page 9 and 10. The full three pages have now been provided to the Applicant…"

[88] The Applicant expressed the belief that the missing information was a manipulation of the record by the Public Body and a manipulation of the access to information process. The Applicant claims that the record was important to their lawsuit and alleges the Public Body intentionally manipulated the record, stating:

> "I don't believe in coincidences. The Public Body claims the missing page was a simple oversight. I don't believe this be this be true [sic]. Multiple files over the years have proven the Public Body's actions and responses have often been misleading and abusive. A number of these files are currently under review by your office now.
> …
>
> The missing page is a very important document for our lawsuit. This confirms the PEI Government was introduced to [a named individual], (then President CEO of [Business 2]) as officer of the [Acronym for Business 1] and led the management team."

[89] It should be noted that the missing page does not explicitly contain the information as claimed by the Applicant above. However, for the purposes of this review, I accept that it is possible that this record is important for the Applicant's position in their lawsuit.

[90] I acknowledge that the Applicant believes the missing page was deliberately left out when pages 9 and 10 were disclosed, and that this was an intentional action to frustrate the access to information process and interfere with the Applicant's litigation against government. However, the Applicant has provided no factual basis for this belief. There is no evidence to substantiate that the missing page was anything other than a clerical error, which the Public Body corrected when it was brought to their attention.

[91] The Applicant's assertions that the Public Body manipulated the record, to manipulate the access to information process and interfere with the Applicant's litigation, if substantiated, would go to the Public Body's duty to respond to an applicant openly,

accurately, and completely, as required under subsection 8(1) of the *FOIPP Act*.

[92] The test to determine whether a public body has satisfied their duty to assist an applicant under subsection 8(1) of the *FOIPP Act* is based on reasonableness. A public body is not held to a standard of perfection [Order FI-20-002, *Re: Department of Agriculture and Land*, 2020 CanLII 33892 (PE IPC)].

[93] While the initial disclosure of the attachment to the email found at page 8 of 106 was missing one of the pages and was technically inaccurate at the time, there is nothing before me to suggest it was an intentional act by the Public Body. Further, the Public Body corrected the error upon learning of it. The Public Body's explanation of the missing page is a reasonable explanation. The facts before me present no basis for a finding that the Public Body intentionally manipulated the record.

[94] I find that the Public Body has complied with subsection 8(1) of the *FOIPP Act* and met their duty to respond to the Applicant openly, accurately, and completely.

VII. SUMMARY OF FINDINGS

[95] I find that the head of the Public Body properly applied subsection 15(1) of the *FOIPP Act* to the personal information withheld from pages 1, 15, 17, 18, 20, 21, 23, 29, 53, 54, 59, 60, 61, 66, 68, 71, and 75 of the records at issue.

[96] I find that the head of the Public Body properly applied clause 22(1)(a) of the *FOIPP Act* to the information withheld from page 58 of the records at issue.

[97] I find that the head of the Public Body has complied with their duties under subsection 8(1) of the *FOIPP Act*.

VIII. ORDER

[98] Based on the above findings, I confirm the decision of the Public Body. As such, I make no order in this matter.

[99] I thank both parties for their submissions in this matter. In accordance with section 67 of the *FOIPP Act*, the Commissioner's order is final. However, I note that an application for judicial review of the order may be made pursuant to section 3 of the *Judicial Review Act*.

_____

Denise N. Doiron
Information and Privacy Commissioner

[98] Based on the above findings, I confirm the decision of the Public Body. As such, I make no order in this matter.

[99] I thank both parties for their submissions in this matter. In accordance with section 67 of the *FOIPP Act*, the Commissioner's order is final. However, I note that an application for judicial review of the order may be made pursuant to section 3 of the *Judicial Review Act*.

Signed: Denise N. Doiron

Denise N. Doiron
Information and Privacy Commissioner