



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

Order No. FI-22-007

Re: University of Prince Edward Island

**Prince Edward Island Information and Privacy Commissioner
Denise N. Doiron**

July 12, 2022

Summary: An applicant requested access to records relating to the relationship between the Public Body and the University of Canada, Egypt (UCE)/UPEI Cairo Campus. Some of the information in the responsive records related to a third party. The Public Body consulted with the Third Party and requested their views on the application of subsection 14(1) of the *Freedom of Information and Protection of Privacy Act* to their information, which requires public bodies to refuse to disclose third party business information if certain conditions are met. After considering the views of the Third Party, the Public Body decided that subsection 14(1) applied to some, but not all, of the Third Party's information. The Third Party requested a review of the Public Body's decision that subsection 14(1) did not apply to two paragraphs in the responsive records.

The Commissioner found that the Third Party did not demonstrate that all of the requirements of subsection 14(1) were met and confirmed the decision of the Public Body to disclose the two paragraphs.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, Cap. F-15.01, sections 7, 14, 65, 67.

Cases Cited: Order FI-16-001, *Re: Department of Economic Development and Tourism*, 2016 CanLII 23238 (PE IPC)

I. BACKGROUND:

[1] An applicant (the “Applicant”) made an access to information request to the University of Prince Edward Island (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*”), for:

... all records related to the development, implementation, and operations of the University of Canada, Egypt (UCE)/UPEI Cairo Campus including any contracts/agreements that shed light on the relationship between CanWell (Education Consultancy) and UPEI.

[2] The Public Body located and retrieved 29 pages of responsive records. The Public Body must consider whether any mandatory exceptions to disclosure apply prior to disclosing any records to an applicant. One of the mandatory exceptions to disclosure is section 14 of the *FOIPP Act*.

[3] Subsection 14(1) of the *FOIPP Act* requires a public body to refuse access to certain types of business information of third parties under certain conditions. Some of the information in the responsive records related to a business (the “Third Party”).

[4] As they are required to do, the Public Body notified the Third Party that they were considering disclosure of information about the Third Party and offered them the opportunity to state their position about disclosure, before making a decision on whether subsection 14(1) of the *FOIPP Act* applied to the information.

- [5] The Third Party provided their submissions to the Public Body, asserting that subsection 14(1) of the *FOIPP Act* applied to all of the Third Party's information contained in the responsive records, and objected to the disclosure of all of that information to the Applicant.
- [6] After consideration of the Third Party's submissions, the Public Body decided that subsection 14(1) of the *FOIPP Act* applied to some of the information identified by the Third Party but that the two paragraphs found at page 19 did not meet all of the criteria set out in subsection 14(1) for mandatory non-disclosure. As a result, the Public Body decided they were therefore not authorized to refuse disclosure of these two paragraphs to the Applicant, and notified the Third Party of their decision.
- [7] The Third Party requested a review of the Public Body's decision that subsection 14(1) of the *FOIPP Act* did not apply to these two paragraphs.

II. INFORMATION IN ISSUE

- [8] The only information in issue is the information contained in paragraphs 4 and 5 on page 19 of the responsive records, which the Public Body planned to disclose to the Applicant as they had determined subsection 14(1) of the *FOIPP Act* did not apply.

III. JURISDICTION

- [9] I am satisfied that the information in issue is part of a record as defined under section 1 of the *FOIPP Act*, and that it was in the custody and control of the Public Body, and that the *FOIPP Act* applies to it, pursuant to section 4 of the *FOIPP Act*. Therefore, I am satisfied I have jurisdiction in this matter.

IV. ISSUE

- [10] The only issue in this review is whether the Public Body properly decided that subsection 14(1) of the *FOIPP Act* does not apply to paragraphs 4 and 5 at page 19 of the responsive records.
- [11] The Public Body's decision that subsection 14(1) of the *FOIPP Act* applies to other information in the responsive records is not the subject of this review. The Applicant has requested a review of the Public Body's decisions to withhold other information in the responsive records pursuant to sections 14 and 15 of the *FOIPP Act*, but that request for review is a separate proceeding and will be dealt with in a separate order.

V. BURDEN OF PROOF

- [12] The *FOIPP Act* assigns the burden of proof depending on what provision is in issue. Section 65 of the *FOIPP Act* describes who bears the burden of proof and states, in part:

65. Burden of Proof

...

(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,

(a) in the case of personal information, it is up to the applicant to prove the disclosure of the information would not be an unreasonable invasion of the third party's personal privacy; and

(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.

- [13] As this review is in relation to a decision of the Public Body to give access to part of a record containing information about a third party for a reason other than personal privacy, clause 65(3)(b) of the *FOIPP Act* places the burden of proof in this review on the Third Party to prove that subsection 14(1) of the *FOIPP Act* applies to the information in issue.

VI. ANALYSIS

[14] Subsection 14(1) of the *FOIPP Act* is a mandatory exception to disclosure. A public body is required to refuse to disclose to an applicant certain types of business information of third parties, in defined circumstances. Subsection 14(1) of the *FOIPP Act* states:

14. (1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant information

- (a) that would reveal
 - (i) trade secrets of a third party, or
 - (ii) commercial, financial, labour relations, scientific or technical information of a third party;
- (b) that is supplied, explicitly or implicitly, in confidence; and
- (c) the disclosure of which could reasonably be expected to
 - (i) harm significantly the competitive position or interfere significantly with the negotiating position of a third party,
 - (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
 - (iii) result in undue financial loss or gain to any person or organization, or
 - (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[15] For subsection 14(1) of the *FOIPP Act* to apply, the information at issue must fulfill each of the three elements set out in subsection 14(1). Therefore, on a balance of probabilities, a third party must show the information in issue satisfies all of the following conditions:

- (a) The record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
- (b) The information must have been supplied to the public body in confidence, either implicitly or explicitly; and

- (c) The prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in clauses (i), (ii), (iii) and/or (iv) of subsection 14(1) will occur.

[16] If all three parts are met, it is mandatory that a public body withhold the information and access must be refused. If all three conditions are not met, a public body does not have authority to withhold the information, and they must release it to the applicant.

Clause 14(1)(a)

[17] I accepted that some of the information in issue is commercial or financial information about the Third Party, and therefore would meet the first part of the test, under clause 14(1)(a) of the *FOIPP Act*. I explained to the Third Party the three-part test, that all three parts need to be satisfied, and specifically requested the Third Party to provide submissions and evidence explaining how the information in issue would meet clauses 14(1)(b) and 14(1)(c) of the *FOIPP Act*.

Clause 14(1)(b)

[18] Clause 14(1)(b) of the *FOIPP Act* requires that the information be supplied, implicitly or explicitly, in confidence. We asked the Third Party for submissions on how clause 14(1)(b) of the *FOIPP Act* applied to the information in issue, and specifically requested they address how the information was “supplied” and, if the information was supplied, how it was supplied “in confidence”.

[19] The Third Party did not address how they had “supplied” the information to the Public Body. The Third Party’s submission to our office on how clause 14(1)(b) of the *FOIPP Act* applied to the information in issue consisted of the following statement:

...This was part of our confidential business information that we shared with UPEI in confidence and had understood would be protected from third parties.

[20] Respectfully, this is merely an assertion of their position, not evidence.

[21] The information at issue consists of two paragraphs within a negotiated contract. Generally, negotiated terms are not considered to be "supplied" by a third party, even where there is little or no actual negotiation preceding the agreement (see for example, Order FI-16-001, *Re: Department of Economic Development and Tourism*, 2016 CanLII 23238 (PE IPC), at paragraphs 32-33). However, there are two exceptions to this general rule:

1. where "immutable" information of a third party is added to the contract; 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.

[22] We brought this to the attention of the Third Party, and requested they provide us with evidence to show that one of these exceptions would apply. The Third Party did not provide any evidence about either of the two exceptions to the general rule.

[23] I have reviewed the information in issue and have no evidence that the information in issue is immutable information of the Third Party. Further, there is no evidence that disclosure of the information in issue would allow anyone to draw accurate inferences about confidential information supplied by the Third Party. The paragraphs contain obligations that were negotiable between the parties.

[24] For these reasons, I am not persuaded that the Third Party "supplied" the information, as required by clause 14(1)(b) of the *FOIPP Act*.

[25] Based on the above, I find that the Third Party has not met its burden to show that the Third Party supplied the information pursuant to clause 14(1)(b) of the *FOIPP Act*.

Clause 14(1)(c)

[26] The Third Party did not provide any evidence to our office about how the information was supplied “in confidence”. In their submissions to the Public Body when arguing why the Public Body should refuse to disclose the information in issue under subsection 14(1) of the *FOIPP Act*, the Third Party asserted that the information was provided implicitly in confidence, and stated:

In this case, [the Third Party] certainly expected that its business information was being supplied to UPEI in confidence. In fact, the records confirm that [the Third Party] was subject to significant legal obligations in relation to confidentiality. At all times, the parties to the records, including [the Third Party], understood that this business information was being supplied in confidence. By reaching an agreement with UPEI, [the Third Party] was not consenting to the disclosure of its business information to the applicant, the industry, or the world.

[27] On reviewing the record, we were unable to ascertain the “significant legal obligations in relation to confidentiality” as alleged by the Third Party. There are confidentiality obligations within the record, but they are in relation to other information, not information within the record or the information in issue.

[28] Before I reviewed the submissions and evidence of the parties to determine whether subsection 14(1) of the *FOIPP Act* applied to the information in issue, we wrote to the Third Party explaining that we were unable to determine the “significant legal obligations in relation to confidentiality” they alluded to in their submissions to the Public Body, and requested the Third Party to direct us to where we would find these obligations. The Third Party did not respond to our request.

[29] However, since the Third Party is required to establish that all three parts of subsection 14(1) apply to the information in issue, and I have found that the Third Party has not shown that the information was “supplied”, as required by clause 14(1)(b) of the *FOIPP*

Act, it is not necessary to go any further and examine whether the information was supplied explicitly or implicitly in confidence, or whether clause 14(1)(c) applies. The Third Party has not met its burden of proof to establish that subsection 14(1) of the *FOIPP Act* applies to the information in issue.

VII. FINDINGS

[30] I find that the Third Party has not established that subsection 14(1) of the *FOIPP Act* applies to the information in issue.

VIII. ORDER

[31] I confirm the decision of the head of the Public Body that subsection 14(1) of the *FOIPP Act* does not apply, and that they are not required or authorized to withhold paragraphs 4 and 5 of page 19 from the Applicant. I order the Public Body to disclose the information at issue to the Applicant.

[32] I thank the parties for their submissions in this matter.

[33] In accordance with section 67 of the *FOIPP Act*, the Commissioner's order is final. However, an application for judicial review of the Order may be made pursuant to section 3 of the *Judicial Review Act*, R.S.P.E.I. 1988, Cap. J-3.

Signed: Denise N. Doiron

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Information and Privacy Commissioner