



**OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island
Re: City of Charlottetown**

Order FI-23-001

**Maria C. MacDonald
Deputy Commissioner**

April 4, 2023

Summary: An applicant asked a municipality for access to records about short-term rentals. The Public Body refused access to some records, relying on clause 22(1)(f) of the *FOIPP Act* [pending budget or policy issue], but when the review began also raised provisions of section 21 and other provisions of section 22. The Applicant opposed the Public Body's raising new issues and claimed that the Public Body should have severed information from the records as opposed to withholding the whole record.

The Deputy Commissioner allowed the Public Body to raise new issues, but held that they had not properly relied on clauses 21(1)(a) [draft resolution], 21(1)(b) [substance of deliberations of a closed meeting], 22(1)(b) [information related to contractual or other negotiations], or 22(1)(f) [disclosure of a pending policy or budgetary decision]. The Deputy Commissioner also held that the Public Body properly applied clause 22(1)(a) [consultations or deliberations] to some of the information, but that they did not consider all relevant circumstances, and ordered the head of the Public Body to reconsider the exercise of their discretion.

The Deputy Commissioner found that the head of the Public Body could have reasonably severed information that the Applicant was not entitled to receive and that they could have disclosed the rest of the record.

Statutes Considered:

Freedom of Information and Protection of Privacy Act, RSPEI 1988, c F-15.01, subsection 5(2), section 6, subclause 10(1)(c)(i), section 21, section 22, subsection 65(1), clause 66(2)(b), and subsection 77.1(a)

Municipal Government Act, RSPEI 1988, c M-12.1, section 92, subsection 116(2), clause 119(1)(e), subsection 119(4) and 119(5)

Decisions Considered:

Order FI-19-005, *Re: Department of Workforce and Advanced Learning*, 2019 CanLII 32855 (PE IPC)

Order F2013-23, *Re: City of Lethbridge*, 2013 CanLII 52667 (AB OIPC)

Order F13-10, *Re: District of North Saanich*, 2013 BCIPC 11 (CanLII)

Order 06-006 *Re: Eastern School District*, 2006 CanLII 39089 (PE IPC)

Order F2008-008, *Re: Alberta Employment and Immigration*, 2008 CanLII 88742 (AB OIPC)

Review Report 158-2020, *Re: Saskatchewan Health Authority*, 2021 CanLII 56436 (SK IPC)

Review Report 20-170, *Re: Nunavut Housing Corporation*, 2020 NUIPC 7 (CanLII)

Order FI-19-012, *Re: Department of Justice and Public Safety*, 2019 CanLII 93498 (PE IPC)

Other sources: *Black's Law Dictionary*, 7th Ed. 1999, *Sub verbo*, “officer”, and “pending”

I. BACKGROUND

[1] An Applicant made the following access request to the City of Charlottetown, (the “Public Body”):

Please provide any and all records pertaining to the regulation of short-term rentals in Charlottetown now under the control of or in the custody of the City of Charlottetown, including:

- a) correspondence with the public, the province, short-term rental operators and platforms;
- b) internal research, surveys and survey results including all information created by/for obtained from, or presented to City Council;
- c) inter-office memoranda, letters, and emails, including but not limited to all records created by or sent to [four named individuals] and employees of Planning and Heritage Department; and members of the Planning and Heritage Committee.

Date range for Record Search is from June 19, 2019 to October 25, 2019.

- [2] The Public Body located and retrieved records from councillors and employees. They disclosed approximately 170 pages of records from which they withheld information under section 15 of the *Freedom of Information and Protection of Privacy Act* (the “*FOIPP Act*”) [disclosure of personal information would be an unreasonable invasion of personal privacy]. The Applicant had no issue with the Public Body’s decisions to withhold personal information and this order does not address section 15 of the *FOIPP Act*. The Public Body also withheld 57 records (in whole) of various lengths. The Public Body advised the Applicant that they were withholding these records under clause 22(1)(f) of the *FOIPP Act* [pending policy or budgetary decision].
- [3] The Applicant requested a review of the Public Body’s decisions to withhold information under clause 22(1)(f) of the *FOIPP Act* [pending policy or budgetary decision]. The Applicant remarked in their request for review that the Public Body appears to have omitted records created, presented and discussed in closed meetings of council and committees. If so, the Applicant believes that these meetings were not appropriately closed to the public.
- [4] Former Commissioner Karen Rose delegated this matter to me to investigate, and if necessary, conduct an inquiry and issue an order.

[5] I requested and reviewed a copy of the Public Body's processing records. The Public Body claims the following provisions:

- a. Clause 21(1)(a) of the *FOIPP Act*, a public body may withhold information if disclosure could reasonably be expected to reveal a draft resolution, bylaw or other legal instrument by which the public body acts;
- b. Clause 21(1)(b) of the *FOIPP Act*, a public body may withhold information if disclosure could reasonably be expected to disclose the substance of deliberations of a closed meeting. The Public Body also cites clause 119(1)(e) of the *Municipal Government Act*, RSPEI 1988, c M-12.1, which authorizes a municipality to hold a closed meeting to discuss a matter still under consideration, on which the council has not yet publicly announced a decision, if discussions in public would likely prejudice a municipality's ability to carry out its negotiations;
- c. Subclause 22(1)(a)(i) of the *FOIPP Act*, a public body may withhold information if disclosure could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body;
- d. Clause 22(1)(b) of the *FOIPP Act*, a public body may withhold information if disclosure could reasonably be expected to reveal positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the public body; and
- e. Clause 22(1)(f) of the *FOIPP Act*, a public body may withhold information if disclosure could reasonably be expected to result in disclosure of a pending budgetary or policy decision.

[6] The Applicant was unaware that the Public Body had also relied on these provisions and opposed the Public Body adding these provisions. The Applicant also claims that the Public Body did not comply with subclause 10(1)(c)(i) of the *FOIPP Act* which requires that, when a public body is refusing access, they must advise the applicant of the reasons for withholding information and the provision on which they rely.

- [7] In their submissions, the Applicant asks if there is information in a record that they are not entitled to receive under the *FOIPP Act*, if the Public body could sever that information, and disclose the rest of the record to the Applicant. The Applicant made thorough submissions. I considered them but will not repeat or address all the Applicant's submissions.

II. ISSUES

- [8] The issues in this review are:
- a. Whether the Public Body should be permitted to raise alternate or additional provisions to withhold information that were not cited in their decision letter to the Applicant;
 - b. If the Public Body is permitted to raise alternate or additional provisions, whether the Public Body properly apply provisions of section 21 of the *FOIPP Act* (public body confidences);
 - c. If the Public Body is permitted to raise alternate or additional provisions, whether the Public Body properly apply provisions of section 22 of the *FOIPP Act* (advice from officials); and
 - d. If the Public Body properly applied sections 21 and 22, whether the Public Body could reasonably sever information under subsection 6(2) of the *FOIPP Act*, so the Public Body may give the Applicant access to the remainder of the records.

III. INFORMATION AT ISSUE

- [9] The Public Body withheld approximately 57 records of various lengths, which include emails and enclosures, an internal survey of councillors and a summary of these results, and minutes of five closed meetings. The Public Body numbered some, but not all, of the records they withheld. Where the public body has numbered a record, I will use their reference number, and where they have not, I will describe it.

[10] At the beginning of the review, I prepared a list of responsive records that the Public Body had withheld. I had included in this list the agenda for a closed meeting of September 20, 2019, but I had misunderstood why the Public Body provided a copy of this record to us. The Public Body gave us a copy of the agenda to show that it did not include short term rentals as a discussion item, and the minutes of this meeting are not responsive to the Applicant's request. The Agenda is not responsive to the access request and is not a record at issue in this review.

IV. BURDEN OF PROOF

[11] In these circumstances, under subsection 65(1) of the *FOIPP Act* the Public Body has the burden to show that they have properly applied the exceptions to disclosure, sections 21 and 22 of the *FOIPP Act*. Subsection 65(1) of the *FOIPP Act* states:

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.

[12] Section 65 does not assign a burden of proof for subsection 6(2) of the *FOIPP Act*, regarding an applicant's right of access to the remainder of a record when part of the record is excepted from disclosure. When no burden of proof is assigned by the *FOIPP Act*, we must look at logical factors such as which party raised the issue and which party is best able to provide evidence.

[13] Although the Applicant raised the issue of whether the Public Body could reasonably have severed information under subsection 6(2) of the *FOIPP Act*, the Public Body is in a better position to provide evidence. The Applicant does not know what is in the

responsive records that the Public Body wholly withheld. Therefore, the Public Body has the burden to show that such information cannot reasonably be severed under subsection 6(2) of the *FOIPP Act*.

[14] With respect to whether to exercise my discretion to allow the Public Body to claim alternate or additional provisions to withhold information, both parties are equally able to provide submissions. The Public Body raised the new provisions after the review commenced, which the Applicant opposed. In these circumstances, I find it is a shared burden of proof. I asked both the Public Body and the Applicant to give me their respective positions.

V. ANALYSIS

Issue 1. Should the Public Body be permitted to raise alternate or additional provisions to withhold information that were not cited in their decision letter to the Applicant?

[15] In their initial letter to the Applicant, the Public Body advised the Applicant that they were withholding information under two provisions: section 15 [disclosure of personal information would be an unreasonable invasion of their personal privacy]; and clause 22(1)(f) of the *FOIPP Act* [disclosure could reasonably be expected to reveal a pending policy or budgetary decision]. When the Public Body provided the responsive records to our office, we learned that they had relied on alternate or additional provisions.

[16] The Applicant opposes the Public Body's reliance on alternate or additional provisions. Under subclause 10(1)(c)(i) of the *FOIPP Act*, when a public body is refusing access to information, they must inform the applicant of the reasons for the refusal and the provision on which the refusal is based. Subclause 10(1)(c)(i) of the *FOIPP Act* states:

10(1) In a response under section 9, the applicant shall be informed

...

- (c) if access to the record or to part of it is refused,
 - (i) the reasons for the refusal and the provision of this Act on which the refusal is based,

...

- [17] It is clear from the face of the record that the Public Body did not advise the Applicant that they were relying on the two clauses of section 21, and two additional clauses of section 22 of the *FOIPP Act*. I recommend that, in future, if the Public Body is refusing access to information to an applicant, the Public Body advise the applicant of the reasons for the refusal(s) and all of the provisions of the *FOIPP Act* on which they rely. Provisions of another law, such as the *Municipal Government Act* may be relevant and may be part of the reasons for the refusal, but the Public Body may only withhold information from an Applicant as authorized under the *FOIPP Act*.
- [18] The Applicant opposes the Public Body adding new provisions at the review stage because it would complicate and extend the time to conduct the review. The Applicant claims that if the review is delayed and not completed before the public consultations, it would impair the Applicant's ability to participate in public consultations.
- [19] We would encourage any party to reconsider their position(s) during a review, with a view of identifying any issues that could be resolved. It is possible that a public body may identify an alternate or additional provision that better applies to the circumstances.
- [20] When deciding whether to allow the Public Body to rely on alternate or additional provisions, I considered whether allowing the Public Body to add these other provisions would be fair, including whether it would prejudice the Applicant, including the possibility of delay, and the Public Body's explanation for not raising these provisions

earlier.

[21] The Applicant mentioned a previous decision of our office, Order FI-19-005, *Re: Department of Workforce and Advanced Learning*, 2019 CanLII 32855 (PE IPC), in which a public body raised a provision in their submissions that they had not initially relied upon. Although they did not provide any submissions, the applicant in that matter had an opportunity to respond to the alternate provision, and the decision held that they were not prejudiced by the late raising of an alternate provision. The Applicant says this decision suggests that “if an applicant does not raise any concerns about the late raising of an alternative provision, despite having an opportunity to do so, the applicant is not prejudiced”.

[22] The assessment of whether a party is prejudiced is not determined only by whether the applicant agrees or opposes the late raising of an issue, but whether it would affect an applicant’s rights, or is unfair. In this matter, the Public Body raised these issues at the beginning of the review. The Applicant had an opportunity to respond to the Public Body’s arguments about each exception to disclosure. As the Applicant was advised at the beginning of the review what the provisions were, and had an opportunity to speak to each provision, I find that the Applicant is not prejudiced by the Public Body raising the alternate or additional provisions.

[23] At the time of this access request, the Public Body was still inexperienced, and had only been subject to the *FOI/PP Act* for less than a year. The Public Body advises that they reviewed the provisions after the Applicant requested a review. The Public Body stated:

After reviewing the Applicant’s submissions to your office dated August 5, 2020, our Public Body would like to affirm that this access to information request was our largest request as of October 28, 2019, and our first request that involved meetings/minutes that were held in closed session as per

section 119 of the *Municipal Government Act*. After reviewing your letter to our Public Body dated March 4, 2020, we questioned whether we were using the correct provisions of the *FOIPP Act* to withhold the records. Since October we have gained an extensive amount of experience and feel that we could have better responded to this particular request.

[24] This was among the first access requests the Public Body processed. The *FOIPP Act* is lengthy and complex to interpret and apply. The Public Body was also applying and interpreting the *Municipal Government Act* which was enacted two years earlier and has some provisions relating to closed meetings. I accept the Public Body's explanation about why they did not initially identify all the provisions on which they rely to withhold information, and am convinced they acted and operated in good faith.

[25] I find that these circumstances warrant me exercising my discretion to allow the Public Body to claim these alternate or additional provisions. In this matter, I will allow the Public Body to claim alternate or additional exceptions to disclosure after its initial response to the Applicant, and I will consider whether those exceptions apply to the information in the responsive records.

Issue 2: Did the Public Body properly apply section 21 of the *FOIPP Act* (Public Body confidences)?

[26] The Public Body relies on section 21 of the *FOIPP Act*, which states:

21(1) The head of a public body may refuse to disclose information to an applicant

(a) if the disclosure could reasonably be expected to reveal a draft of a resolution, bylaw or other legal instrument by which the public body acts; or

(b) where an enactment authorizes a meeting of the officials or governing body of a public body or a committee of the governing body of the public

body to be held in the absence of the public, if the disclosure could reasonably be expected to reveal the substance of deliberations of the meeting.

(2) Subsection (1) does not apply if

(a) the draft of the resolution, bylaw or other legal instrument or the subject-matter of the deliberation has been considered in a meeting open to the public; or

(b) the information referred to in that subsection is in a record that has been in existence for 15 years or more.

[27] Reviewing the application of section 21 of the *FOIPP Act* has three steps:

Step 1. Subsection 21(1) of the *FOIPP Act* lists the two types of information to which section 21 applies. We consider whether either of these clauses applies. If not, the analysis stops and section 21 does not apply. If either of the clauses of subsection 21(1) apply, we move to the next step.

Step 2. Subsection 21(2) has two circumstances that limit the scope of the exception to disclosure. If either of these clauses applies, then the analysis stops and section 21 does not apply. If neither applies, then we move to the next step.

Step 3. Section 21 is a discretionary provision, and we review whether the head of the Public Body properly exercised their discretion to withhold the information.

Step 1. Do the clauses of subsection 21(1) of the FOIPP Act apply?

[28] The Public Body claims both clauses of subsection 21(1) of the *FOIPP Act* apply to different information.

Clause 21(1)(a) – draft of a resolution by which the public body acts

[29] The Public Body relies on clause 21(1)(a) to withhold two documents, PK-08 to PK-09, and PK-31. Both are emails between the Public Body and another municipality with enclosures. The enclosure of one email exchange is a draft resolution of the other

municipality, and the enclosures of the other email exchange is the same resolution after it was passed, and a draft scope of work. The other municipality posted a final version of the scope of work, which is not identical, and the passed resolution on their website.

[30] In their submissions, the Public Body describes the enclosures as being of another municipality and says that “this matter still has not been settled and no resolution has been passed by the City of Charlottetown”. The Applicant’s response position is that clause 21(1)(a) of the *FOIPP Act* applies to instruments by which the Public Body acts, not a different public body. I agree. It is foreseeable that a public body may send a draft instrument to a peer municipality. In that case, if the request for that record were transferred to the other public body (which did not occur in this instance), it is possible that the other public body may claim section 21(1)(b) of the *FOIPP Act*. But I do not need to decide this issue here. It does not appear that the Public Body is trying to protect the interest of the other public body. Disclosing these emails and enclosures would not “reveal” the resolution, as the other municipality passed the resolution and posted it publicly. The Public Body has not presented any evidence that this is a draft resolution of the Public Body. I find that the emails and enclosures are not draft resolutions of the Public Body and do not fall within the exception of clause 21(1)(a) of the *FOIPP Act*.

[31] The Public Body has not met their burden to show that they properly applied clause 21(1)(a) of the *FOIPP Act*, and I find that clause 21(1)(a) of the *FOIPP Act* does not apply to records PK-08 to PK-09 and PK-31.

Clause 21(1)(b) – substance of deliberations of a closed meeting

- [32] Clause 21(1)(b) of the *FOIPP Act* authorizes a Public Body to withhold information that would reveal the substance of deliberations of closed meetings. The Public Body did not rely on this provision to withhold minutes of the closed meetings. The Public Body relied on clause 21(1)(b) of the *FOIPP Act* for 41 of the 57 responsive records, which are emails and enclosures (Records GR-05 to GR-09, BD-01, PK-03, PK-04, PK-10 to PK-33, PS-01, PS-03 to PS-05, PS-09 to PS-16), an internal council survey (questions and responses), and a slide deck summarizing the internal survey results.
- [33] The Applicant refers us to two news articles that report that the Public Body had planned to discuss the issue of short-term rentals in a closed meeting but received legal advice that it should be held in public. The Public Body does not make any specific submissions about their authority to conduct closed meetings, but in the course of this review, the Public Body re-assessed their position on whether the subject matter of two email chains should have been discussed at a closed meeting. They decided that it should not have been discussed at a closed meeting and they disclosed two records of email chains to the Applicant, Records GR-10 to GR-12, and PS-02. As the Public Body continues to rely on clause 21(1)(b) of the *FOIPP Act* for the remainder of the records, they are implicitly claiming that the closed meetings were properly held.
- [34] This provision has not yet been considered in our jurisdiction, but similar provisions have been considered in other Canadian jurisdictions [see for example, Order F2013-23, *Re: City of Lethbridge*, 2013 CanLII 52667 (AB OIPC) at paragraph 50, and Order F13-10, *Re: District of North Saanich*, 2013 BCIPC 11 (CanLII) at paragraphs 7 to 10]. The wording of clause 21(1)(b) of the *FOIPP Act* contains three elements. The Public Body must show that:

- a. there was a meeting of the governing body of a public body or a committee of the governing body, held in the absence of the public;
- b. an enactment (e.g. an act or regulation) authorizes that meeting to be held in the absence of the public; and
- c. disclosure of the information could reasonably be expected to reveal the substance of deliberations of that meeting.

[35] Subsection 119(1) of the *Municipal Government Act* authorizes a municipal council or council committee, by resolution, to close a meeting to the public if a matter to be discussed is one of nine listed types of matters. The Public Body relies on clause 119(1)(e) of the *Municipal Government Act*, which authorizes a council to close a meeting to the public to discuss a matter under consideration if discussion in public would likely prejudice a municipality's ability to carry out its negotiations. Subsection 118(1) and clause 119(1)(e) of the *Municipal Government Act* state:

118(1) Subject to subsection (2) and section 119, all council meetings and council committee meetings shall be conducted in public and members of the public are entitled to attend.

...

119(1) Despite subsection 118(1), a council or council committee may, by resolution, close all or part of a meeting to the public, either in advance or at the meeting, where the matter to be discussed is, in relation to any of the following, confidential:

...

(e) a matter still under consideration, on which the council has not yet publicly announced a decision, and about which discussion in public would likely prejudice a municipality's ability to carry out its negotiations;

...

[36] With respect to the first element of clause 21(1)(b) of the *FOIPP Act*, council is the governing body of the Public Body, and council held meetings in the absence of the public. The Public Body also provided evidence that council moved into the closed meetings by resolutions.

- [37] With respect to the second element of clause 21(1)(b) of the *FOIPP Act*, subsection 119(1) of the *Municipal Government Act* authorizes the Public Body to hold meetings of council in the absence of the public in some circumstances. The issue is whether the circumstances warranted a closed meeting. Because the Public Body relied on clause 119(1)(e) of the *Municipal Government Act*, the question is whether discussion in public would likely prejudice a municipality's ability to carry out its negotiations.
- [38] In their request for review, the Applicant remarks that the municipality must demonstrate that there is some negotiation, stating: "if there is no negotiation, clause 119(1)(e) does not apply." I agree with this comment.
- [39] Although I asked for further information about the negotiations at issue, the Public Body did not provide further information about the nature of the negotiations, nor is it clear from the content of the records. Although the Public Body does not claim this, I considered whether the communications between councillors at a meeting of Council would be a "negotiation". I rejected this possible interpretation. The councillors are part of the same institution, and clause 119(1)(e) of the *Municipal Government Act* refers to prejudice to the municipality's ability to carry out its negotiations. I read this clause to relate to the municipality's negotiation position, not discussions between councillors. It would be an overbroad interpretation of clause 119(1)(e) of the *Municipal Government Act* to permit closed meetings for discussions between councillors.
- [40] As I have no evidence or submissions relating to any negotiations, I find that the Public Body has not established that it was authorized to hold closed meeting regarding the issue of regulating short-term rentals. As the Public Body was not authorized to hold meetings in the absence of the public, clause 21(1)(b) of the *FOIPP Act* does not apply.

There is no need to consider whether disclosure would disclose the substance of the deliberations.

[41] As I have found that clause 21(1)(a) and 21(1)(b) were not properly applied, it is not necessary to consider step 2, whether either of the exceptions in subsection 21(2) of the *FOIPP Act* apply, or step 3, to review the head of the Public Body's exercise of discretion.

[42] I will order the Public Body to disclose the records they withheld only under subsection 21(1) of the *FOIPP Act*. In addition to clause 21(1)(b) of the *FOIPP Act*, the Public Body claimed other provisions also applied to records GR-05 and GR-06 [clause 22(1)(b) and 22(1)(f)], and PK-03 [clause 22(1)(f)], which I discuss below.

Issue 3: Did the Public Body properly apply section 22 of the *FOIPP Act*?

[43] Public Body withheld information under the following clauses of subsection 22(1) of the *FOIPP Act*:

- a. Subclause 22(1)(a)(i) of the *FOIPP Act*, a public body may withhold information if disclosure could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body;
- b. Clause 22(1)(b) of the *FOIPP Act*, a public body may withhold information if disclosure could reasonably be expected to reveal positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the public body; and
- c. Clause 22(1)(f) of the *FOIPP Act*, a public body may withhold information if disclosure could reasonably be expected to result in disclosure of a pending budgetary or policy decision.

[44] As set out in other decisions of our office, the analysis of section 22 involves the following steps:

- Step 1: determine whether a clause of subsection 22(1) applies; and, if so,
- Step 2: determine whether a clause of subsection 22(2) applies – which is a list of exceptions to subsection 22(1); and, if not,
- Step 3: review whether the head of the Public Body properly exercised their discretion to withhold the information.

[45] I will consider first whether clauses 22(1)(a), 22(1)(b) or 22(1)(f) of the *FOIPP Act* apply to the withheld information. If so, I will then consider whether any exception under subsection 22(2) of the *FOIPP Act* applies, and if not, whether the Public Body properly exercised their discretion to withhold the information.

Step 1. Do the clauses of subsection 22(1) of the FOIPP Act apply?

Subclause 22(1)(a)(i) – consultations or deliberations

[46] The Public Body relies on subclause 22(1)(a)(i) of the *FOIPP Act* to withhold the following records:

- a. PK-01 and PK-02, an email chain which includes a journalist's question and an exchange between employees of the Public Body about responding to the journalist;
- b. PK-36, an email from an entity that is not a public body to an employee of the Public Body; and
- c. minutes of closed meetings of August 27, 2019, August 28, 2019, September 4, 2019, September 26, 2019, and October 1, 2019.

[47] Clause 22(1)(a) of the *FOIPP Act* states, in part:

- 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) consultations or deliberations involving
 - (i) officers or employees of a public body,
 - ...

[48] Former Commissioners have accepted the following definitions of “deliberations” and “consultations”:

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.

[49] 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. Further, the views must be for the purpose of doing something, such as taking an action or making a decision or a choice.

[50] I reviewed PK-01, PK-02, and PK-36 and the five sets of minutes of the closed meetings and will assess first whether disclosure would reveal any consultations or deliberations. Of those records that contain any consultations or deliberations, I will consider whether the consultation or deliberation information was:

- (1) sought or expected, or is part of the responsibility of a person by virtue of that person’s position;
- (2) directed toward taking an action; and
- (3) made to someone who can take or implement the action.

Records PK-01 and PK-02

[51] Records PK-01 and PK-02 are an email chain that includes a journalist’s question and an exchange between employees of the Public Body about responding to the journalist’s email. One of the employees is seeking the views about the appropriateness of a

suggested action and the other provided their views. I have not received any information about whether disclosure would reveal these deliberations or consultations but have no reason to believe that it is a matter of public record. I find that the two emails between employees contain a deliberation or consultation that would be revealed if the Public Body disclosed the emails between the employees, but the email from the journalist does not contain any consultation or deliberation.

[52] I find that clause 22(1)(a) of the *FOIPP Act* does not apply to the journalist's email in record PK-02.

[53] The views in record PK-01 and the employee's email in record PK-02 are part of the responsibilities of the employees, they were directed toward taking an action, responding to the journalist, and the views were sought or made to someone who can implement the action. I find that clause 22(1)(a) of the *FOIPP Act* applies to record PK-01, and to the employee's email in record PK-02.

Record PK-36

[54] Record PK-36 is an email from an entity that is not a public body, to an employee of the Public Body. The author of the email asks the employee of the Public Body a few questions and gives them an update about the activities of the other entity. The content of the email does not seek or give any input into any decision of the Public Body. This email does not contain either a consultation or a deliberation. I find that clause 22(1)(a) does not apply to any information in record PK-36.

Five sets of minutes of closed meetings

[55] Subclause 22(1)(a)(i) of the *FOIPP Act* deals with consultations or deliberations of

officers or employees. Before considering whether the records contain deliberations or consultations, I must consider whether municipal councillors are officers or employees. A previous decision of our office held that elected trustees of a school board are not employees as defined in the *FOIPP Act*, Order 06-006 *Re: Eastern School District*, 2006 CanLII 39089 (PE IPC). I am satisfied that, similarly, an elected councillor is not an employee. This is supported by section 92 of the *Municipal Government Act* which prohibits members of council from acting as an employee of the municipality.

[56] The *FOIPP Act* does not define “officer”, nor does the *Municipal Government Act*. As there is no statutory definition for the word “officer”, we should look at the ordinary dictionary meaning. Black’s Law Dictionary defines an “officer” as follows:

Officer. 1. a person who holds an office of trust, authority, or command. In public affairs, the term refers esp. to a person holding public office under a national, state, or local government and authorized by that government to exercise some specific function. In corporate law, the term refers esp. to a person elected or appointed by the board of directors to manage the daily operations of a corporation, such as a CEO, president, secretary, or treasurer.

[57] I accept this definition of officer, and I accept that elected members of council hold public offices of the municipality and, as such, are officers of the Public Body.

Minutes of a closed meeting held on August 27, 2019:

[58] Paragraphs 1, 2, 3, and 5 of the minutes of the closed meeting of August 27, 2019 reflect routine conduct of meetings and only record the decision. There are no consultations or deliberations recorded in paragraphs 1, 2, 3, or 5. I find that clause 22(1)(a) of the *FOIPP Act* does not apply to paragraphs 1, 2, 3, or 5 of the minutes of the closed meeting of August 27, 2019.

- [59] Paragraph 4 of the minutes of the closed meeting of August 27, 2019 has two items. The first item does not relate to the regulation of short-term rentals but is still part of a responsive record. The first item includes information presented by a business. The business raised a concern at the bottom of the first page, and the top of the second page. After the representative of the business left, an employee spoke to council about the business' concern, which resulted in a resolution which is posted to the Public Body's website. I am not persuaded that the first item of paragraph 4 contains any discussion for or against a measure, or the views of any individual about the appropriateness of a proposal or suggested action. There are no deliberations or consultations in the first discussion item of paragraph 4 of the minutes of closed meeting of August 27, 2019. I find that clause 22(1)(a) of the *FOIPP Act* does not apply to the first item of paragraph 4 of the minutes of the closed meeting of August 27, 2019.
- [60] The second discussion item, labelled as paragraph 4(d), relates to an amendment to the Tourism Accommodation Levy – Amendment Bylaw (as described in the minutes of the special meeting of council of the same date, open to the public). An employee attended the meeting and provided their views. Based on the content of the record, I am satisfied that the second sentence of the first paragraph of paragraph 4(d) of the minutes of the closed meeting of August 27, 2019 contain consultations or deliberations, specifically the reason for the request for an amendment. I have not received any information about whether disclosure would reveal these deliberations or consultations but have no reason to believe that these deliberations or consultations are a matter of public record. I find that, if parts of paragraph 4(d) of the minutes of the closed meeting of August 27, 2019 were disclosed, it would reveal deliberations or consultations of officers or employees of the Public Body under subclause 22(1)(a)(i) of the *FOIPP Act*.
- [61] The above-noted view of the employee is a part of the responsibilities of the employee,

was directed toward taking an action, and the view was made to someone who can implement the action. I find that clause 22(1)(a) of the *FOIPP Act* applies to parts of paragraph 4(d) of the minutes of the closed meeting of August 27, 2019.

Minutes of a closed meeting held on August 28, 2019

- [62] Paragraphs 1 and 4 of the minutes of the closed meeting of August 28, 2019 reflect typical conduct of meetings and only record the decision. There are no consultations or deliberations recorded in paragraphs 1 or 4. I find that clause 22(1)(a) of the *FOIPP Act* does not apply to paragraphs 1 or 4 of the minutes of the closed meeting of August 28, 2019.
- [63] Paragraphs 2 and 3 of the minutes of the closed meeting of August 28, 2019 records a discussion between councillors related to the agenda. Based on the content of the record, I am satisfied that the first sentences of paragraphs 2 and 3 of the minutes of the closed meeting of August 28, 2019 contain the requests related to the agenda and the reasons for the requests. These are discussions of the reasons for a measure, which is a deliberation. I did not receive any information about whether disclosure would reveal these deliberations or consultations but have no reason to believe these deliberations or consultations are a matter of public record. I find that if the first sentences of paragraphs 2 and 3 of the minutes of the closed meeting of August 28, 2019 were disclosed, it would reveal deliberations or consultations of officers or employees of the Public Body.
- [64] The above-noted views are part of the responsibilities of the officers or employees, were directed toward taking an action, and the views were sought or made to someone who can implement the action. I find that clause 22(1)(a) of the *FOIPP Act* applies to parts of paragraph 2 and 3 of the minutes of the closed meeting of August 28, 2019.

Minutes of a closed meeting held on September 4, 2019

[65] Paragraphs 1, 2, and 4 of the minutes of the closed meeting of September 4, 2019 record decisions relating to typical conduct of meetings and only record the decision. There are no consultations or deliberations recorded in paragraphs 1, 2, or 4. I find that clause 22(1)(a) of the *FOIPP Act* does not apply to paragraphs 1, 2, or 4 of the minutes of the closed meeting of September 4, 2019.

[66] Paragraph 3 of the minutes of a closed meeting of September 4, 2019 relates to a single discussion item. An employee gave a presentation to council of their research about regulating short-term rentals. Based on the content of the record, I am satisfied that paragraph 3 contains this employee's views and are consultations or deliberations. I have not received any information about whether disclosure would reveal these deliberations or consultations but have no reason to believe these deliberations or consultations are a matter of public record. I find that if the Public Body disclosed paragraph 3, it would reveal deliberations or consultations of officers or employees of the Public Body.

[67] The above-noted views are part of the responsibilities of the employee, were directed toward taking an action, and the views were sought or made to someone who can implement the action. I find that clause 22(1)(a) of the *FOIPP Act* applies to paragraph 3 of the minutes of the closed meeting of September 4, 2019.

Minutes of a closed meeting held on September 26, 2019

[68] Paragraphs 1, 3, and 5 of the minutes of the closed meeting of September 26, 2019 reflect typical conduct of meetings, but do not contain any consultations or

deliberations. Paragraph 2 reflects a decision about the agenda but does not contain any consultations or deliberations. As there are no consultations or deliberations recorded in paragraphs 1, 2, 3, or 5, I find that clause 22(1)(a) of the *FOIPP Act* does not apply to paragraphs 1, 2, 3, or 5 of the minutes of the closed meeting of September 26, 2019.

- [69] Paragraph 4 of the minutes of the closed meeting of September 26, 2019 includes two discussion items. The first discussion item relates to information that an outside organization presented to council but does not record any deliberations or consultations. Two employees joined the meeting for the second discussion item, which has a summary of the conclusion of the discussion but does not contain reasons for or against a measure or anyone's views about the appropriateness of a proposal or suggested action. There are no consultations or deliberations. I find that clause 22(1)(a) of the *FOIPP Act* does not apply to either discussion item in paragraph 4 of the minutes of the closed meeting of September 26, 2019.

Minutes of a closed meeting held on October 1, 2019

- [70] Paragraphs 1 and 5 of the minutes of the closed meeting of October 1, 2019 reflect typical conduct of meetings and only record the decision. There are no consultations or deliberations recorded in paragraphs 1 or 5. I find that clause 22(1)(a) of the *FOIPP Act* does not apply to paragraphs 1 or 5 of the minutes of the closed meeting of October 1, 2019.
- [71] Paragraph 2 of the minutes of the closed meeting held on October 1, 2019 has a brief discussion related to the agenda, and the reason for the decision, but does not contain any reasons for or against a measure or anyone's views about the appropriateness of a proposal or suggested action. There are no consultations or deliberations in paragraph

2 of the minutes of the closed meeting held on October 1, 2019. I find that clause 22(1)(a) of the *FOIPP Act* does not apply to paragraph 2 of the minutes of the closed meeting of October 1, 2019.

[72] Paragraph 3(a) and the first two items of paragraph 4 (labelled 4(b) and 4(c)) of the minutes of the closed meeting held on October 1, 2019 relate to discussion items which are not about regulation of short-term rentals but are still part of a responsive record. An employee attended the meeting and provided their views for item 3(a), and the Chief Administrative Officer led the discussions on items 4(b) and 4(c). The analysis on these discussion items is difficult as I received no submissions about the subject-matters and have no context of the issues. Based on the content of the record, I am satisfied that paragraph 3(a), and paragraphs 4(b) and 4(c) of the minutes of the closed meeting of October 1, 2019 contain consultations or deliberations. I have not received any information about whether disclosure would reveal these deliberations or consultations but have no reason to believe these deliberations or consultations are a matter of public record. I find that if the Public Body disclosed paragraph 3(a) and paragraphs 4(b) and 4(c), it would reveal deliberations or consultations of officers or employees of the Public Body.

[73] The above-noted views are part of the responsibilities of the officers or employees, were directed toward taking an action, and the views were sought or made to someone who can implement the action. I find that clause 22(1)(a) of the *FOIPP Act* applies to paragraphs 3(a), 4(b), and 4(c) of the minutes of the closed meeting of October 1, 2019.

[74] Paragraph 4(d) of the minutes of the closed meeting held on October 1, 2019 relates to the regulation of short-term rentals. A councillor made a request and gave their reasons for their request. I have not received any information about whether disclosure would reveal these deliberations or consultations but have no reason to believe that it is a

matter of public record. I find that paragraph 4(d) of the minutes of the closed meeting held on October 1, 2019 contains a deliberation or consultation that would be revealed if the Public Body disclosed this information.

[75] The above-noted views are part of the responsibilities of the officers or employees, were directed toward taking an action, and the views were sought or made to someone who can implement the action. I find that clause 22(1)(a) of the *FOIPP Act* applies to paragraphs 3(a), 4(b), 4(c), and 4(d) of the minutes of the closed meeting of October 1, 2019.

[76] In summary, I find that clause 22(1)(a) of the *FOIPP Act* applies to the following:

- email exchange between Public Body employees in records PK-01 and PK-02;
- parts of paragraph 4(d) of the minutes of the closed meeting of August 27, 2019;
- parts of paragraphs 2 and 3 of the minutes of the closed meeting of August 28, 2019;
- paragraph 3 of the minutes of the closed meeting of September 4, 2019; and
- paragraphs 3(a), 4(b), 4(c), and 4(d) of the minutes of the closed meeting of October 1, 2019.

[77] The Public Body has not met their burden to show that they properly applied subclause 22(1)(a) of the *FOIPP Act* to the other information, and I find that clause 22(1)(a) of the *FOIPP Act* does not apply to the following:

- a journalist's email on page PK-02;
- record PK-36;
- paragraphs 1, 2, 3, the first item of paragraph 4, and paragraph 5 of the minutes of the closed meeting of August 27, 2019;
- paragraphs 1 and 4 of the minutes of the closed meeting of August 28, 2019;
- paragraphs 1, 2, and 4 of the minutes of the closed meeting of September 4, 2019;
- the minutes of the closed meeting of September 26, 2019; and
- paragraphs 1, 2, and 5 of the minutes of the closed meeting of October 1, 2019.

[78] As I have found that the Public Body did not have the authority to withhold the journalist's email in record PK-02 or the email from an entity that is not a public body in record PK-36, I will order the Public Body to disclose this information. I found that clause 22(1)(a) of the *FOIPP Act* did not authorize the Public Body to withhold the minutes of closed meetings, but the Public Body also claimed clause 22(1)(f) of the *FOIPP Act* [pending policy or budgetary decision] authorized them to withhold the minutes, which I will address later in this decision.

Clause 22(1)(b) – information developed for contractual or other negotiations

[79] The Public Body relies on clause 22(1)(b) of the *FOIPP Act* to withhold information from the following records:

- a. records GR-05 and GR-06, email from an employee to council with a draft framework to regulate short term rentals; and
- b. records PS-06, PS-07, and PS-08, which is an email exchange between an employee of the Public Body and a third-party business. The Public Body describes these as a preliminary discussion on plans with a third party for data that was going to be presented at a closed meeting of council.

[80] Clause 22(1)(b) of the *FOIPP Act* states:

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

...

(b) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Prince Edward Island or a public body, or considerations that relate to those negotiations;

...

[81] This provision uses the expression “contractual or other negotiations by or on behalf of the . . . public body”. The Public Body did not provide any information about contractual or other negotiations, nor are any negotiations mentioned in the content of the records.

[82] As I have no evidence or submissions relating to the negotiations, I find the Public Body has not satisfied its burden to prove that they were authorized to withhold information from records GR-05, GR-06, PS-06, PS-07, or PS-08, under clause 22(1)(b) of the *FOIPP Act*.

[83] I find that the Public Body did not have the authority to withhold records PS-06, PS-07, and PS-08, therefore I will order the Public Body to disclose them. I found that clause 22(1)(b) of the *FOIPP Act* did not authorize the Public Body to withhold records GR-05 or GR-06, but the Public Body also claimed clause 22(1)(f) of the *FOIPP Act* [pending policy or budgetary decision] also authorized them to withhold these records, which I will address below.

Clause 22(1)(f) – disclosure of a pending policy decision

[84] The Public Body relies on clause 22(1)(f) of the *FOIPP Act* to withhold information from the following records, claiming that disclosing these records would disclose a pending policy decision:

1. records GR-05 and GR-06, email from an employee to council with a draft framework to regulate short term rentals;
2. record PK-03, an email from another municipality that refers to the enclosures;
3. record PK-05, PK-06, and PK-07, email chain and enclosure discussing a public service announcement;
4. record PK-34 (2 pages) email chain discussing a draft public service

- announcement;
5. record PK-35 enclosure to PK-34, the draft public service announcement (different announcement than record PK-07); and
 6. minutes of closed meetings. As I have already decided that clause 22(1)(a) applies to some information in these records, the remaining paragraphs at issue for clause 22(1)(f) are:
 - August 27, 2019, paragraphs 1, 2, 3, the first item of paragraph 4, and paragraph 5;
 - August 28, 2019, paragraphs 1 and 4;
 - September 4, 2019, paragraphs 1, 2, and 4;
 - September 26, 2019, paragraphs 1 – 5; and
 - October 1, 2019, paragraphs 1, 2, and 5.

[85] Clause 22(1)(f) of the *FOIPP Act* states:

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
...
(f) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision;
...

[86] This provision has not yet been considered in our jurisdiction. Other Canadian jurisdictions with similar provisions to clause 22(1)(f) of the *FOIPP Act* about a pending policy or budgetary decision, have held that the provision is intended to protect a decision that has already been made but not announced or implemented [see for example, Order F2008-008, *Re: Alberta Employment and Immigration*, 2008 CanLII 88742 (AB OIPC), at paragraph 57, Review Report 158-2020, *Re: Saskatchewan Health Authority*, 2021 CanLII 56436 (SK IPC), paragraphs 35-42, Review Report 20-170, *Re: Nunavut Housing Corporation*, 2020 NUIPC 7 (CanLII), page 7].

[87] The word “pending” is not defined in the *FOIPP Act*. Modern statutory interpretation encourages us to review the ordinary definition of a word used in an enactment, in the

statutory context in which they are found. The word “pending” is defined in the Black’s Law Dictionary as follows:

“**Pending:** *adj.* Remaining undecided; awaiting decision <a pending case>.”

[88] If a pending decision is not yet decided, the decision does not exist yet. I considered whether clause 22(1)(f) authorizes a public body to withhold a policy or budget matter that a public body was considering. If that were so, the Public Body had already disclosed to the public that they were considering regulating short-term rentals. But I do not think clause 22(1)(f) applies to just something a public body was considering. Interpreting a “pending” decision as a decision that had been made, but not announced or implemented, fits with other clauses of subsection 22(1) of the *FOIPP Act* that protect the earlier stages of the decision-making process. Clause 22(1)(a) of the *FOIPP Act* protects consultations and deliberations and clause 22(1)(g) of the *FOIPP Act* protects advice, proposals, recommendations, analyses or policy options. I accept that a “pending policy or budgetary decision” is a decision that has been made but not yet announced or implemented.

[89] Records GR-05 and GR-06, includes a regulation framework which the Public Body advises was not approved or even presented to council. As no decision had been made, disclosing this information would not disclose a pending policy or budgetary decision. In the record, it is described as a consensus, but that is not the decision-making model of the municipality, and other records from around the same time illustrate that the decision process was ongoing. The Public Body confirms the policy was not even in draft form. As there is no pending policy or budgetary decision, clause 22(1)(f) of the *FOIPP Act* does not authorize the Public Body to withhold these records.

- [90] Record PK-03 is an email from another municipality. It is a very brief email, and does not contain any proposed plans, policies or projects of the Public Body. As there is no pending policy or budgetary decision, clause 22(1)(f) of the *FOIPP Act* does not authorize the Public Body to withhold record PK-03.
- [91] Records PK-05, PK-06, and PK-07, PK-34 (2 pages), and PK-35 are email chains and drafts of two public service announcements. The Public Body advises they disclosed the final versions of these announcements to the Applicant. The decisions to release the public service announcements have been announced and implemented. There are no pending policy or budgetary decisions. As there is no pending policy or budgetary decision, clause 22(1)(f) of the *FOIPP Act* does not authorize the Public Body to withhold these records.
- [92] The remaining paragraphs of the minutes of closed meetings do not contain any information that, if disclosed, would reveal a pending policy or budgetary decision. I am aware that the second paragraph of paragraph 4(b) of the minutes of the closed meeting of September 26, 2019, uses the word “consensus”, but as noted above, the Public Body had not made any decision and the policy was not even in draft form at that point. The content of the records of the same period illustrate that the analysis and debate were not complete.
- [93] The Public Body has not met their burden to show that they properly applied subclause 22(1)(f) of the *FOIPP Act*, and I find that clause 22(1)(f) of the *FOIPP Act* does not apply, and the Public Body is not authorized to withhold the following:
- records GR-05 and GR-06;
 - record PK-03;
 - records PK-05, PK-06, and PK-07;
 - records PK-34 and PK-35;

- minutes of the closed meeting of August 27, 2019 (paragraphs 1, 2, 3, the first item of paragraph 4, and paragraph 5);
- minutes of the closed meeting of August 28, 2019 (paragraphs 1 and 4);
- minutes of the closed meeting of September 4, 2019 (paragraphs 1, 2, and 4);
- minutes of the closed meeting of September 26, 2019 (paragraphs 1 – 5); and
- minutes of the closed meeting of October 1, 2019, (paragraphs 1, 2, and 5).

[94] I will consider the next steps of whether any provisions of subsection 22(2) apply, and if not, review the head of the Public Body's exercise of discretion with respect to the following records, which I held contain consultations or deliberations under clause 22(1)(a) of the *FOIPP Act*:

1. Record PK-01 and part of record PK-02 (emails between two employees),
2. paragraph 4(d) of the minutes of the closed meetings of August 27, 2019,
3. paragraphs 2 and 3 of the minutes of the closed meeting of August 28, 2019,
4. paragraph 3 of the minutes of the closed meeting of September 4, 2019, and
5. paragraphs 3 and 4 of the minutes of the closed meeting of October 1, 2019.

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

[95] The Applicant had raised the issue of clause 22(2)(d) of the *FOIPP Act*, which does not permit a public body to withhold statistical surveys under section 22 of the *FOIPP Act*. But, as the Public Body did not claim section 22 applied to the survey and results, it is not necessary to consider the exception of clause 22(2)(d) of the *FOIPP Act*.

[96] I reviewed the exceptions in subsection 22(2) of the *FOIPP Act* and confirm that none of these circumstances apply. Next, I will review the head of the Public Body's exercise of discretion.

Step 3: Exercise of Discretion

[97] If section 22 of the *FOIPP Act* applies to any information an applicant has asked for, the head of the Public Body has discretion to provide or refuse access. I must now assess whether the head of the Public Body exercised their discretion reasonably. A decision is not reasonable if, for example, the head of a public body made a decision in bad faith or for an improper purpose, or considered irrelevant considerations, or failed to consider relevant considerations. The head of a public body must show that they considered all relevant factors for and against access in a balanced and judicious manner when making their determination [see for example, Order FI-19-005, *supra*, at paragraphs 70 to 74]. When I asked for submissions from the Public Body, I advised them that some potential considerations could include:

- a) the general purposes of the *FOIPP Act*, including that public bodies should make information available to the public, and individuals should have access to personal information about themselves;
- b) the wording of the discretionary exception and the interests which the exception attempts to balance;
- c) whether the applicant's request may be satisfied by severing the record and providing the applicant with as much information as is reasonably practicable;
- d) the historical practice of the public body with respect to the release of similar types of records;
- e) the nature of the record and the extent to which the record is significant or sensitive to the public body;
- f) whether the disclosure of the information will increase public confidence in the operation of the public body;
- g) the age of the record;
- h) whether there is a definite and compelling need to release the record; and
- i) whether Commissioners' orders have ruled that similar types of records or information should or should not be disclosed.

[98] Not all these circumstances will be relevant in every matter. The Public Body stated:

At the time of these very premature discussions staff and Council did not want the

public to assume which direction the City was going to possibly take when regulating short term rentals.

This remains a matter where a final decision has not been made. Last discussions were in March at the regular monthly Council meeting at which time I believe it was decided that there will be a public meeting held to discuss the options. This was postponed for the time being due to Covid-19.

These types of discussions, prior to coming under the *FOIPP Act*, were always considered to be “in-camera” topics under Section 119(1)(e) of the MGA.

[99] The Public Body’s submissions about their exercise of discretion are about all their decisions to withhold information. The consultations or deliberations are not all about the possible direction the Public Body was going to take when regulating short-term rentals as the Public Body describes. But I interpret the Public Body’s comments as saying that they considered the purposes of the exception(s) to disclosure, (item (b) from the list of potential considerations).

[100] The purpose of section 22 has often been described as enabling a public body to protect the decision-making process of a public body. However, it does not mean that consultations and deliberations of clause 22(1)(a) of the *FOIPP Act* should always be withheld by a public body. I find that this is an appropriate factor to consider when the head of the Public Body is exercising their discretion.

[101] It does not appear that the Public Body considered factor (a), [the general purposes of the *FOIPP Act*, including that public bodies should make information available to the public], or factor (e) [the nature of the record and the extent to which the record is significant or sensitive to the public body]. Some of the information that the Public Body withheld under clause 22(1)(a) of the *FOIPP Act* is not significant or sensitive. For example, some of the withheld consultations and deliberations relate to the agendas of meetings. In my opinion, the head of the Public Body did not consider all relevant

factors when exercising their discretion.

[102] The above-noted list of potential considerations is not exhaustive. I will also consider the following:

- i. that the public body appears to have taken a blanket approach to withholding all information that relates to all closed meeting discussions;
- ii. subsection 119(5) of the *Municipal Government Act*, a provision that the Public Body mentioned which prohibits disclosure of some information from closed meetings in some circumstances;
- iii. the Applicant says the Public Body acknowledged that the issue of regulating short-term rentals should not have been discussed in closed meetings;
- iv. subsection 119(4) of the *Municipal Government Act*, a provision mentioned by the Applicant which requires council to disclose some information from closed meetings when confidentiality is no longer required.

i. Blanket approach to withholding some information

[103] The Applicant remarked in their request for review that the Public Body had not provided any minutes of closed meetings. Initially, the Public Body did not consider the minutes of the closed meetings to be responsive and did not search these records. Also, although the Applicant asked for surveys, the Public Body did not search for an internal survey because it was later discussed in a closed meeting. The Public Body withheld all the information in these records without severing.

[104] The Public Body disclosed some records to the Applicant including emails to and from members of the public on the subject of regulating short-term rentals (with personal information severed), and internal emails regarding meetings open to the public. The

Public Body appears to have taken a blanket approach to withholding information that related to discussions that later or earlier occurred in closed meetings.

[105] Public bodies must review responsive records, line-by-line, to determine whether an exception to disclosure applies. If the head of a public body determines that a discretionary provision authorizes them to withhold information, the head of the public body must decide whether to withhold or provide access to the applicant. A blanket refusal to disclose shows that the head of a public body did not consider all relevant factors for and against access in a balanced and judicious manner.

[106] I find that the Public Body did not exercise their discretion reasonably as they took a blanket approach to withholding information from the Applicant

ii. Prohibition against disclosing some information under the Municipal Government Act

[107] Initially the Public Body did not provide copies of the minutes of closed meetings to our office. When we asked the Public Body about this, the Public Body provided a copy to our office and in their cover page mentioned subsection 119(5) of the *Municipal Government Act*. The Public Body stated, in part:

. . . These minutes were all held (we did not realize that these were to be included in the withheld documents) as they were of a closed session as per section 119(1)(e) of the MGA and not disclosed per section 119(5) of the MGA.

[108] Subsection 119(5) of the *Municipal Government Act* prohibits an employee from disclosing information they learned at a closed meeting, at least until the matter is dealt with at an open meeting. Subsection 119(5) of the *Municipal Government Act* states:

119(5) No council member, council committee member or employee of a municipality shall, subject to clause (2)(c), disclose or act on any information acquired at a closed meeting of council or a council committee respecting a matter or report disclosed or discussed at the meeting, prior to the matter or report being dealt with at an open meeting of council or the council committee.

[109] This prohibition is at odds with section 6 of the *FOIPP Act* which gives an applicant a right of access to records of a public body, subject to the exceptions from disclosure under the *FOIPP Act*. When there is an inconsistency or conflict between the *FOIPP Act* or another law, subsection 5(2) of the *FOIPP Act* states that the *FOIPP Act* prevails unless the other law, or the regulations under the *FOIPP Act* say that the other act prevails. Subsection 5(2) of the *FOIPP Act* states:

5. (2) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless

- (a) another Act; or
- (b) a regulation under this Act

expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

[110] Neither the *Municipal Government Act*, nor the regulations under the *FOIPP Act* say that the *Municipal Government Act* prevails. Therefore, the Applicant's right of access under section 6 of the *FOIPP Act* is paramount over subsection 119(5) of the *Municipal Government Act*.

[111] The Public Body mentioned subsection 119(5) of the *Municipal Government Act* but did not claim this is the reason they withheld information, and they did not respond to the Applicant's submissions that the *FOIPP Act* prevailed. It appears that the Public Body considered subsection 119(5) of the *Municipal Government Act*. I find that the Public Body considered an irrelevant consideration when exercising their discretion.

iii. Acknowledgment by the Public Body

[112] As noted above, not all the information that I have accepted are consultations or deliberations under clause 22(1)(a) of the *FOIPP Act* relate to the issue of regulating short-term rentals. But with respect to the information that does relate to regulating short-term rentals, at least two media outlets reported that a councillor acknowledged that the Public Body should not have discussed regulation of short-term rentals at meetings in the absence of the public. I found that, as there were no negotiations, the Public Body was not authorized to discuss this issue in closed meetings, but make no finding that the Public Body acknowledged that they should not have discussed regulating short-term rentals in closed meetings. In their submissions, the Public Body implicitly continued to assert that the issue of regulating short-term rentals was properly taken into closed meetings.

[113] If the Public Body acknowledged that they ought not to have discussed regulating short-term rentals in the absence of the public, the Public Body should have considered this as a relevant factor when exercising their discretion. But, as I have not made a finding that the Public Body acknowledged that they should not have discussed regulating short-term rentals in the absence of the public, I make no finding about whether the Public Body ought to have considered an acknowledgement when exercising their discretion.

iv. Requirement to disclose information when confidentiality is no longer required

[114] In their submissions, the Applicant refers to subsection 119(4) of the *Municipal Government Act* which requires council to disclose any matter that has been considered at a closed meeting when confidentiality is no longer required. Clause 119(4) of the *Municipal Government Act* states:

119(4) A council or council committee shall make public any matter which has been considered at a meeting closed to the public pursuant to subsection (1), when confidentiality is no longer required.

[115] The Public Body did not comment on the Applicant's submissions on this provision. It is an interesting provision, but there are two challenges to applying this to the exercise of discretion on an access request. The first is that it requires council to "make public any matter considered at a meeting closed to the public". It is not clear how much information council is required to make public. This may refer only to disclosing the subject and may not compel council to disclose every aspect of the discussions.

[116] The second challenge is that when a public body is a municipality, the head of that public body is the person or group of persons designated under subsection 77.1(a) of the *FOIPP Act*. Municipalities often designate an administrative officer to act as the head of a public body, as opposed to the council, which is an efficient and appropriate approach to managing issues under the *FOIPP Act*. The challenge is that, although an administrative officer may advise council, they do not have the power to compel council to act. If the head of a municipal public body is an administrative officer, they cannot compel council "to make public any matter which has been considered at a meeting closed to the public pursuant to subsection (1), when confidentiality is no longer required."

[117] I find that the head of the Public Body was not required to consider clause 119(4) of the *Municipal Government Act* when exercising their discretion to withhold or provide access to information to the Applicant.

[118] In summary, although the head of the Public Body considered a relevant factor (the

purpose of the exception to disclosure), I find that the Public Body did not consider some relevant factors and therefore did not exercise their discretion reasonably.

[119] Subsection 66(2) of the *FOIPP Act* lists the potential orders our office may issue on a review of a public body's application of exceptions to disclosure. Under clause 66(2)(b) of the *FOIPP Act*, when a public body is authorized under a discretionary provision to withhold information from an applicant, but I find they did not exercise their discretion reasonably, I cannot substitute my own decision. However, I may order the head of the Public Body to reconsider their decision. In these circumstances, I will order the Public Body to reconsider the exercise of their discretion and to consider the purposes of the *FOIPP Act* to make information available to the public, and to consider the significance and sensitivity of the information.

Issue 4: If the Public Body properly applied sections 21 and 22, could the Public Body reasonably sever information under subsection 6(2) of the *FOIPP Act*, so the Public Body may give the Applicant access to the remainder of the records?

[120] If a public body is required or authorized to withhold information, and that information can reasonably be severed from a record, then the applicant has a right to the remainder of the record. Subsection 6(2) of the *FOIPP Act* states:

6(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

[121] The Applicant questions whether the Public Body could have severed the records, pursuant to subsection 6(2) of the *FOIPP Act*. The Public Body severed personal information from other records and were aware of their obligation to consider severing.

[122] When I asked the Public Body for submissions on the issue of severing, I referred them to paragraph 80 of Order FI-19-012, *Re: Department of Justice and Public Safety*, 2019 CanLII 93498 (PE IPC), which states:

[80] . . . I adopt the standard set out by the Information and Privacy Commissioner of Ontario. Order MO-1928, *Re: Toronto Police Services Board*, 2005 CanLII 56390 (ON IPC):

The key question raised by section 4(2) is one of reasonableness. Where a record contains exempt information, section 4(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)].

[123] I also directed the Public Body to subsection 116(2) of the *Municipal Government Act*, which states:

116(2) Where a meeting is closed to the public pursuant to subsection 119(1), the contents of the minutes of the meeting that may be disclosed to the public under clause 147(1)(e) shall be restricted to the following:

- (a) the date of the meeting;
- (b) the names of those present at the meeting;
- (c) the type of matter under subsection 119(1) that was discussed during the meeting.

[124] The Public Body acknowledges that they could have disclosed some of the information from the minutes of the closed meetings under subsection 116(2) of the *Municipal Government Act*.

[125] I accepted that subclause 22(1)(a)(i) of the *FOIPP Act* (consultations and deliberations) applies to some of the information the Public Body withheld from the Applicant. I am ordering the Public Body to reconsider their exercise of discretion, and it is possible that the head of the Public Body may still decide to withhold this information. I reviewed the records to assess whether it is reasonable to sever the information that is subject to clause 22(1)(a) and disclose the balance of the records. I find that the Public Body could reasonably sever this information and provide the Applicant with the rest of the information. Disclosure of this information would not permit an individual to ascertain the content of the withheld information, nor would it lead to disclosure of only “worthless” or “misleading” information.

VI. SUMMARY OF FINDINGS

[126] I find that the Public Body did not comply with subclause 10(1)(c)(i) of the *FOIPP Act* as they did not advise the Applicant of the reasons for their decisions to refuse access and the provisions on which they relied.

[127] I find that the circumstances warrant me exercising my discretion to allow the Public Body to rely on alternate or additional provisions of the *FOIPP Act*.

[128] I find that the Public Body did not properly apply clause 21(1)(a) [draft resolution], 21(1)(b) [substance of deliberations of a closed meeting], clause 22(1)(b) [information of, or relating to, the Public Body’s negotiations], or clause 22(1)(f) of the *FOIPP Act* [pending policy or budgetary decision].

[129] I find that the Public Body properly applied clause 22(1)(a) of the *FOIPP Act* to the following:

- email exchange between two Public Body employees in records PK-01 and PK-02;
- parts of paragraph 4(d) of the minutes of the closed meeting of August 27, 2019;
- parts of paragraphs 2 and 3 of the minutes of the closed meeting of August 28, 2019;
- paragraph 3 of the minutes of the closed meeting of September 4, 2019; and
- paragraphs 3(a), 4(b), 4(c), and 4(d) of the minutes of the closed meeting of October 1, 2019.

[130] I find that the Public Body did not properly apply clause 22(1)(a) of the *FOIPP Act* to the following:

- a journalist's email on page PK-02;
- record PK-36;
- paragraphs 1, 2, 3, the first item of paragraph 4, and paragraph 5 of the minutes of the closed meeting of August 27, 2019;
- paragraphs 1 and 4 of the minutes of the closed meeting of August 28, 2019;
- paragraphs 1, 2, and 4 of the minutes of the closed meeting of September 4, 2019;
- the minutes of the closed meeting of September 26, 2019; and
- paragraphs 1, 2, and 5 of the minutes of the closed meeting of October 1, 2019.

[131] I find that, when exercising their discretion, the head of the Public Body considered a relevant factor, but that the Public Body did not consider some relevant factors and did not exercise their discretion reasonably.

[132] I find that the consultations or deliberations in the above-noted records at issue can reasonably be severed under subsection 6(2) of the *FOIPP Act*, and the Applicant has a right of access to remainder of the information in the records.

VII. RECOMMENDATION

[133] As I found that the head of the Public Body did not comply with subclause 10(1)(c)(i) of the *FOIPP Act*, I recommend that in future, if the Public Body is refusing access to information to an applicant, the Public Body advise the applicant of the reasons for the refusal and all the provisions of the *FOIPP Act* on which they rely, pursuant to subclause 10(1)(c)(i) of the *FOIPP Act*.

VIII. ORDER

[134] As I have determined that the Public Body is not authorized to withhold some information, I order the Public Body to disclose the records except:

- the email exchange between Public Body employees in records PK-01 and PK-02;
- the second sentence of the first paragraph of paragraph 4(d) of the minutes of the closed meeting of August 27, 2019;
- the consultations or deliberations in paragraphs 2 and 3 of the minutes of the closed meeting of August 28, 2019;
- the consultations or deliberations in paragraph 3 of the minutes of the closed meeting of September 4, 2019; and
- the consultations or deliberations in paragraphs 3 and 4 of the minutes of the closed meeting of October 1, 2019.

[135] As I have determined that the head of the Public Body did not consider relevant factors when exercising their discretion to withhold information, I order the Public Body to reconsider their exercise of discretion to withhold or disclose the information described in the above paragraph.

[136] I thank both parties for their submissions in this matter. In accordance with subsection 68(1.1) of the *FOIPP Act*, the Public Body shall not take any steps to comply with this

order until the end of the time period for bringing an application for judicial review of the order under section 3 of the *Judicial Review Act*, R.S.P.E.I. 1988, c J-3.

SGD MARIA MACDONALD

Maria MacDonald, Deputy Commissioner