



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

**Order No. FI-23-003**

**Re: City of Charlottetown  
(Charlottetown Police Services)**

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

**July 10, 2023**

**Summary:** An Applicant requested a review of the adequacy of the Public Body's search. The Public Body did not respond to our request for more information about their search. The Public Body did not meet their burden of proof that they conducted an adequate search. The Commissioner ordered the Public Body to conduct another search, and to provide affidavit evidence to our office and to the Applicant about their search.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act, R.S.P.E.I. 1988, Cap. F-15.01, subsection 8(1), and clause 66(3)(c)*

**Cases Considered:** Order FI-11-001, *Re: Department of Agriculture*, 2011 CanLII 91839 (PE IPC)

**Other Authorities:** *Government of PEI's FOIPP Guidelines and Practices Manual (Revised April 2023)*

## I. BACKGROUND

- [1] An applicant (the “Applicant”) made an access to information request to the Charlottetown Police Services, pursuant to section 7 of the *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, Cap. F-15.01 (the “FOIPP Act”). The access request was as follows:

Please provide all records related to the following:

1. All written records and correspondences from [named employee #1], [named employee #2], [named employee #3] and [named employee #4] related to a media inquiry email (subject line “Media request – CBC PEI) sent by [a named reporter] on September 4, 2021
  2. All written records and correspondences from [named employee #1], [named employee #2], [named employee #3] and [named employee #4] related to the CBC News stories that aired on November 16<sup>th</sup>, 2021 (“Rash of drink spiking incidents goes unchecked by police in Charlottetown”) and December 10, 2021 (“I felt very worthless”: 3 P.E.I share their experiences dealing with police after alleged druggings”)
- [2] Charlottetown Police Services is part of the City of Charlottetown, which is a public body under the *FOIPP Act*. The City of Charlottetown manages access requests made for records that would be in the control of Charlottetown Police Services separately from other records of the municipality. Charlottetown Police Services processes such access requests directly with their own FOIPP Coordinator/s rather than through the City of Charlottetown’s FOIPP coordinators. When I refer to “the Public Body”, it is understood that this means the City of Charlottetown as a whole, including the Charlottetown Police Services division.
- [3] The Applicant’s access request was for written records and correspondence from four named employees related to a media inquiry to the Charlottetown Police Services and two specified news stories. One of the named employees, named employee #4 (hereinafter the “Named Employee”), advised their FOIPP coordinator that they did not have any responsive records. The other named employees responded by providing

some records to the FOIPP coordinator. The Public Body issued a decision letter and disclosed 15 pages (unredacted) of records to the Applicant. The Applicant requested a review of whether the Public Body conducted an adequate search, in part because they claimed the Named Employee should have had at least one responsive record.

## **II. JURISDICTION**

- [4] Adequacy of search is a matter arising from an access request made to a public body and is related to a public body's duties under section 8 of the *FOIPP Act*. The Applicant made a request to the Charlottetown Police Services, which is a division of the Public Body. Therefore, I am satisfied I have jurisdiction in this matter.

## **III. ISSUE**

- [5] The issue in this review is whether the Public Body conducted an adequate search and complied with their duty to assist the Applicant, as required under subsection 8(1) of the *FOIPP Act*.

## **IV. BURDEN OF PROOF**

- [6] The *FOIPP Act* sets out obligations of public bodies, including the duty to respond to applicants openly, accurately and completely [subsection 8(1) of the *FOIPP Act*], which includes ensuring that a public body does an adequate search for responsive records. Previous decisions of our office have held that a public body has the burden to show that they complied with these duties.
- [7] The burden of proof in this review rests with the Public Body to establish that they conducted a reasonable search for responsive records, and responded to the Applicant openly, accurately and completely, as required under subsection 8(1).

## V. ANALYSIS

[8] The Applicant questioned whether the Public Body had conducted an adequate search, alleging that there should have been records of the Named Employee. To support their allegation, the Applicant presented evidence that someone had forwarded an email with the media request to the Named Employee.

[9] We asked for and received the Public Body's processing file. The FOIPP coordinator sent an email to all four employees named in the request notifying them of the request, the time for response, and that they would follow up with the employees in 14 days. The Named Employee responded to the FOIPP coordinator's email less than 10 minutes later, stating:

I had no written correspondence with any of the identified personnel relating to a media request sent by [a named reporter] on September 4, 2021 or CBC news stories that aired on November 16<sup>th</sup>, 2021 and December 10, 2021.

There was no other information in the Named Employee's email, such as confirming that they had searched their records, or where they had searched (eg. email, paper records).

[10] We asked the Public Body to give us more information about their search and to explain the discrepancy between the Named Employee's claim not to have any records and the evidence presented by the Applicant. In our correspondence we asked:

Please provide details of how the search for responsive records in this matter was conducted, including details about where and how searches were carried out (eg. email inbox/sent files, electronic files, paper records, etc., who conducted the search, dates searches were conducted, search terms used, etc.). We are also asking that your Public Body explain why the email of September 4, 2021 at 4:46 p.m. was not located.

[11] In the same letter, we asked the head of the Public Body to provide us with their submissions on why they believed they had conducted a reasonable search, and had responded to the Applicant openly, accurately and completely. We requested the

Public Body to give us their submissions and the additional information we were seeking by December 14, 2022. We also invited the Public Body to contact us if they needed any clarification about our requests.

[12] The Public Body did not respond. Over the next couple of months, we followed up twice by email to five employees of the Public Body. No one responded to our requests for further information and submissions. In one of the follow-up emails, we also requested an acknowledgement of receipt, but did not receive one.

[13] We are confident that the emailed correspondence and follow-up emails were received by the intended recipients, as we used the same email addresses for all of the recipients for all of our communications, and received automatic “out of office” replies from three of the recipients to one of the follow-up emails. As of the date of this Order, other than these automatic replies, we have received no communication from the Public Body in this review since receiving the processing file in August of 2022.

[14] Once a review is commenced, the parties are given notice of the proceeding and given the opportunity to be heard. The responsibility to participate in the process after that rests with the parties. The Commissioner has a duty to make a decision on the matter. If a party chooses not to respond to our communications or provide evidence or submissions on the issues, the matter is not discontinued. The review proceeds without the benefit of that party’s evidence and submissions, which could result in a finding adverse to that party’s position.

[15] One of the stated purposes of the *FOIPP Act* is to allow independent reviews of the actions and decisions made by public bodies on access to information and protection of privacy, to ensure public bodies are acting in accordance with the established laws. This is necessary to ensure that citizens’ rights are being protected and promotes transparency and confidence in the public bodies. A public body not participating in the review process defeats this purpose.

- [16] There could have been an explanation for why the identified record was not located and retrieved, and the Public Body could have conducted an adequate search. But without any submissions or the required information from the Public Body, I cannot assess whether the Public Body acted reasonably in conducting their search. Therefore, I must conclude that the Public Body has not met their burden of proof to establish that they conducted a reasonable search.
- [17] It is disappointing that the Public Body did not respond to our requests for information or submissions in this review. Public bodies have responsibilities under the *FOIPP Act* not only to applicants, but to the process as well. Once a review of a public body's decision is undertaken, public bodies are expected to participate in the review process. While a public body would no longer be responding to a request of an applicant once a review is undertaken, it would be responding to the Commissioner as part of the review. Responding to the Commissioner in a review process is implicitly a part of the duty to assist and the duty to respond openly, accurately and completely [see: Order FI-11-001, *Re: Department of Agriculture*, 2011 CanLII 91839 (PE IPC)].
- [18] Although the Public Body provided their processing file to us in the initial stages of this review, they did not respond to our office after that. In failing to respond to our requests for further information, and for submissions regarding the Public Body's search and their decision on the access request, the Public Body has not participated in this review process. Without participation by the Public Body in this review, the Public Body has not fulfilled its duty to assist or to respond openly, accurately and completely.

## **VI. FINDINGS**

- [19] Based on the above, I find that the Public Body has not met their burden of proof to establish that they conducted an adequate search, and responded openly, accurately and completely to the Applicant, as required under subsection 8(1) of the *FOIPP Act*.

- [20] I also find that the Public Body failed to participate in the review process with this office and therefore did not fulfill its duty to assist.

## **VII. RECOMMENDATIONS**

- [21] Under subsection 50(1) of the *FOIPP Act*, in addition to orders, the Commissioner is generally responsible for monitoring how the *FOIPP Act* is administered to ensure that its purposes are achieved. Among other things, the Commissioner may bring to the attention of the head of a public body any failure by the public body to assist applicants under section 8, and give advice and recommendations of general application to the head of a public body on matters respecting the rights or obligations of a head under the *FOIPP Act*.
- [22] Based on the above, I recommend that the Public Body include in their procedures for handling an access request that each person who searches for responsive records creates a record of their search, at the time of the search, with particulars of where they searched (email, electronic directories, files or other hard copy records), key words they used in electronic searches, and how long the search took to complete. The Province's Access and Privacy Services Office does not process this Public Body's access requests but has a template in their *FOIPP Guidelines and Practices Manual (Revised April 2023)*, which may be helpful to this Public Body in creating their own search records. Public bodies have the burden to show that they conducted an adequate search, and recorded information about their searches may assist the Public Body to defend the adequacy of their search in future reviews where adequacy of search is an issue.
- [23] I also recommend that the Public Body create procedures for making sure they are participating in reviews under the *FOIPP Act*, and responding to our office during reviews, to ensure that they are meeting their duty to assist, and responding openly, accurately and completely. If such procedures are already in existence, I recommend

the Public Body examine why they were not complied with in this case, and make such changes as may be necessary to ensure compliance in future.

## **VIII. ORDER**

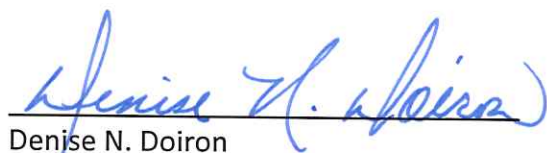
- [24] In consideration of my finding that the Public Body has not conducted an adequate search, I order the Public Body to search the records of all the employees named in the access request, including electronic and paper records.
- [25] If any responsive records are found as a result of this search, I order the Public Body to process these records for disclosure and disclose them to the Applicant, subject to any of the limited exceptions in the *FOIPP Act* that apply.
- [26] Whether further records are found or not, I order the Public Body to provide a new decision letter to the Applicant on their additional search and decision on disclosure of any records located. To be clear, this decision letter will be considered a new decision of the Public Body and will provide the Applicant with a new right to request a review.
- [27] I further order the Public Body to give affidavit evidence to our office, and to the Applicant, from the person who conducts this search, which shall include the following information:
- who conducted the search, their title, and a statement about their familiarity with:
    - i. the employee's records,
    - ii. the Public Body's records, and
    - iii. the subject matter of the search;
  - all locations where the Public Body searched (eg. in-boxes/sent emails, electronic directories searched, paper records, etc.);
  - the dates searches were conducted, and an estimate of how long it took to conduct the search;



- search terms used for searches of electronic records; and
- if no responsive records are found, the reasons the Public Body believes that no more responsive records exist than the ones that have been identified.

[28] The Public Body shall not charge any fee to the Applicant for complying with this Order and conducting the search or processing any records located. Under clause 66(3)(c) of the *FOIPP Act*, I may order a public body to refund a fee in appropriate circumstances. Accordingly, I order the Public Body to refund to the Applicant the application fee, if any, charged for making this access request. It does not appear that the Public Body charged the Applicant any fees related to the processing of the request or disclosure of the located records. However, if any such fees were paid by the Applicant in relation to this access request, I order that all such fees also be refunded to the Applicant.

[29] In accordance with section 68 of the *FOIPP Act*, the Public Body shall comply with this Order within 40 days of the date of the Order, but 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 the *Judicial Review Act*, R.S.P.E.I. 1988, Cap. J-3.



Denise N. Doiron  
Information and Privacy Commissioner