



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

Order No. FI-21-001

Re: Department of Economic Growth, Tourism and Culture

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

January 18, 2021

Summary: An applicant made a request for access to information to a Public Body, the Department of Economic Growth, Tourism and Culture. Responsive records included information of third parties. The Public Body conducted the required third party consultations and decided to release the information to the applicant. Two third parties objected to the release of their information, and claimed that disclosure would be harmful to their business interests pursuant to section 14 of the *Freedom of Information and Protection of Privacy Act*, and requested reviews by the Commissioner. Third Party 1's request for review was abandoned or withdrawn prior to decision. The Commissioner determined that Third Party 2 did not meet the burden of proof establishing that all three parts of the test set out in section 14 were met, and confirmed the decision of the Public Body to disclose the information to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, Cap. F-15.01, sections 14, 65, 66, 68.

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

All records including emails, internal memos, documents and briefing notes of individual instances of designated employers through the Atlantic Immigration Pilot Program (AIPP) that have been disciplined or de-designated in Prince Edward Island between January 1, 2017 and September 20, 2019. Also, all records of employers that have been denied approval as "designated employers" through the AIPP program during the same time frame.

[2] The Public Body located and retrieved the responsive records and, as expected, observed that the records related to several businesses, referred to in the *FOIPP Act* as "third parties". In making a decision whether the Public Body was able to disclose the responsive records, the Public Body was required to consider whether any mandatory exceptions to disclosure were applicable to any information.

[3] Section 14 of the *FOIPP Act* prohibits a public body from disclosing some types of business information under certain circumstances. As they are required to do, pursuant to section 28 of the *FOIPP Act*, the Public Body notified the third parties that they were considering disclosing the records to the Applicant.

[4] The Public Body gave each of the third parties the opportunity to either consent to the disclosure, or to explain their position if they believed that any information in the records was subject to the mandatory exception to disclosure.

[5] The two third parties at issue in this review, whom I shall refer to as "Third Party 1" and Third Party 2", did not provide any response to the Public Body within the statutorily required time frame. The Public Body decided that section 14 of the *FOIPP Act* did not apply to the information related to Third Party 1 or Third Party 2, and that the Public

Body was therefore not authorized to withhold the records from the Applicant. The Public Body redacted names of a few individuals who were not part of the third parties' businesses.

[6] Pursuant to the statutory procedure set out in the *FOIPP Act*, the Public Body advised Third Party 1 and Third Party 2 of their decision before they planned to disclose the records to the Applicant. Third parties are given 20 days from when they are notified of a public body's decision to request a review by the Commissioner.

[7] Third Party 1 and Third Party 2 both requested a review by the Commissioner. Subsection 14(1) of the *FOIPP Act* has three conditions that must be met to require a public body to withhold records or information from an applicant. Subsection 14(1) is as follows:

14. Disclosure harmful to business interests of a third party

- (1) Subject to subsection (2) the head of a public body shall refuse to disclose to an applicant information
- (a) that would reveal
 - (i) trade secrets of a third party, or
 - (ii) commercial, financial, labour relations, scientific or technical information of a third party;
 - (b) that is supplied, explicitly or implicitly, in confidence; and
 - (c) the disclosure of which could reasonably be expected to
 - (i) harm significantly the competitive position or interfere significantly with the negotiating position of a third party,
 - (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
 - (iii) results in undue financial loss or gain to any person or organization, or
 - (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[8] In order for subsection 14(1) to apply, the third party must satisfy each part of the following three-part test:

- (a) The record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
- (b) The information must have been supplied to the public body in confidence, either implicitly or explicitly; and
- (c) The prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in clauses (a), (b),(c) and/or (d) of subsection 14(1) will occur.

[9] Both third parties were requested to provide submissions to the Commissioner regarding why section 14 of the *FOIPP Act* would apply to information about them and require the Public Body to refuse to disclose the records to the Applicant, including evidence regarding how the records would meet the three-part test set out above.

Third Party 1

[10] Correspondence to Third Party 1 was sent to both the local business address and email address provided by Third Party 1. Third Party 1 did not respond to any correspondence from this office. We then sent a letter by registered mail to Third Party 1's business address, indicating if we did not hear from Third Party 1 by a specified date, we would consider their request for review abandoned or withdrawn. Third Party 1 did not respond to the registered letter.

[11] Aside from the initial contact from Third Party 1 requesting a review, there has been no other contact from Third Party 1 to this office. As a result, Third Party 1's request for review was considered abandoned or withdrawn. In any event, for the same reasons set out below regarding Third Party 2, Third Party 1 failed to substantiate their claim that subsection 14(1) of the *FOIPP Act* applies to the information in the records at issue, as required by clause 66(2)(c) of the *FOIPP Act*.

Third Party 2

- [12] Third Party 2 provided submissions in relation to section 14, so Third Party 2's request for review proceeded. The remainder of this Order is in relation to Third Party 2's request for review.
- [13] Former Commissioner Rose initially asked Third Party 2 to provide submissions relating only to one of the three conditions, specifically clause 14(1)(b) of the *FOIPP Act*, regarding whether the information had been supplied in confidence. Although Third Party 2 appeared to be aware of the three required components of section 14, their submissions focused on clause 14(1)(b) of the *FOIPP Act*, as requested.
- [14] Former Commissioner Rose then requested additional submissions from Third Party 2, asking for further information and submissions respecting how Third Party 2 considered clauses 14(1)(a), which lists the types of information the exception applies to, and 14(1)(c), which lists the types of harm or outcomes, would apply to Third Party 2's information in the records.
- [15] Counsel for Third Party 2 advised they discussed the request for further information about clauses 14(1)(a) and 14(1)(c) of the *FOIPP Act* with their client, and their client elected to provide no further submissions or information.
- [16] We provided Third Party 2's submissions to both the Public Body and the Applicant, and offered the opportunity to reply. The Public Body provided a reply, and the Applicant chose not to do so.
- [17] In its reply to Third Party 2's submissions, the Public Body acknowledged that the records contained commercial information about Third Party 2, but noted that the

three-part test had not been met to establish that the exception to disclosure applied to Third Party 2's information.

[18] Pursuant to clause 65(3)(b) of the *FOIPP Act*, the burden of proof is on the third party claiming the exception to disclosure. That means it is up to them to provide sufficient information to demonstrate that all three parts of the test are met.

[19] While it is possible that some of the information in the 29 pages of records might be the type of information described in clause 14(1)(a) of the *FOIPP Act*, and it is possible that some of that information may have been supplied to the Public Body in confidence, as required by clause 14(1)(b) of the *FOIPP Act*, that is only a portion of what must be established by a third party seeking to have the exception apply. I did not pursue the analysis of whether these two provisions apply because I am not persuaded that disclosure of the information would cause any of the outcomes set out at clause 14(1)(c) of the *FOIPP Act*, which is also a required element.

[20] It is not necessary that I make a decision on all three points. As noted earlier, the mandatory exception to disclosure applies only if all three parts of subsection 14(1) of the *FOIPP Act* are established. Because Third Party 2 has not provided satisfactory evidence in relation to all of the portions of the test that are required to be established, I find that Third Party 2 has not meet its burden of proof, and therefore has not substantiated its claim that section 14 of the *FOIPP Act* applies to the information.

[21] Pursuant to clause 66(2)(a) of the *FOIPP Act*, I find that Third Party 2 has not substantiated its claim that subsection 14(1) of the *FOIPP Act* applies to the information in the records at issue. Therefore, I have determined that the head of the Public Body is not required nor authorized to refuse access to the Applicant, and I require that the

head of the Public Body give the Applicant access to the responsive records, as they had initially decided with any severances of personal information.

- [22] In accordance with subsection 68(1.1) of the *FOIPP Act*, the head of the Public Body shall not release the records until the end of the period for bringing an application for judicial review of the order under section 3 of the *Judicial Review Act*.

Signed: *Denise N. Doiron*

Denise N. Doiron
Information and Privacy Commissioner