



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

**Advice and Recommendation Report pursuant to section 51  
AR-21-001  
Re: Department of Agriculture and Land**

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

**January 5, 2021**

**Summary:** An Investigation Panel of the Island Regulatory and Appeals Commission was requested by the Minister of the Department of Agriculture and Land to conduct an investigation under the *Lands Protection Act*, R.S.P.E.I. 1988, Cap. L-5, and report to the Minister its findings and recommendations. The Public Body asked the Commissioner for advice and recommendations pursuant to section 51 of the *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, Cap. F-15.01, regarding proactive disclosure of the report of the Investigation Panel.

The Commissioner recommended that the Public Body not proactively disclose the Report of the Investigation Panel, and for the Public Body to process an access to information request that was submitted to the Public Body, and follow the requirements of the *Freedom of Information and Protection of Privacy Act* in processing the request. The Commissioner also recommended the Public Body consider certain mandatory and discretionary exceptions to disclosure.

**Statutes Cited:** *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, Cap. F-15.01, ss. 3, 8, 14, 15, 18, 20, 22, 28, 37, 51, 72, 73

*Freedom of Information and Protection of Privacy Act*, Revised Statutes of Alberta 2000, Chapter F-25

*Lands Protection Act*, R.S.P.E.I. 1988, Cap. L-5, s. 1

**Decisions Cited:** Order 99-035, *Re: Alberta Justice, Alberta Infrastructure*, 2000 CanLII 28718 (AB OIPC)

## I. BACKGROUND

- [1] The *Lands Protection Act*, R.S.P.E.I. 1988, Cap. L-5 (the “*LP Act*”) regulates land ownership and control in Prince Edward Island, and requires approval from the Lieutenant Governor in Council for individuals and corporations to acquire interest in land in excess of that set out in statute.
- [2] At the request of the Minister of Agriculture and Land (the “Minister”), the Island Regulatory and Appeals Commission (“IRAC”) conducted an investigation into a possible violation of the *LP Act* and prepared a Report of the Investigation Panel, which IRAC provided to the Minister. It is the Report of the Investigation Panel which is the record at issue in this matter.
- [3] The Department of Agriculture and Land is the Public Body. The Minister, as head of the Public Body, requested advice and recommendations from the Information and Privacy Commissioner (the “Commissioner”) pursuant to section 51 of the *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, Cap. F-15.01 (the “*FOIPP Act*”), for consideration when the Minister was making his decision about proactively releasing the record at issue.

[4] Section 51 of the *FOIPP Act* states:

51. (1) The head of a public body may ask the Commissioner to give advice and recommendations on any matter respecting any rights or duties under this Act.

(2) The Commissioner may in writing provide the head with advice and recommendations that

(a) state the material facts either expressly or by incorporating facts stated by the head;

(b) are based on the facts referred to in clause (a); and

(c) may be based on any other considerations the Commissioner considers appropriate.

[5] The Minister, on behalf of the Public Body, provided a copy of the record at issue, described below, and then provided a letter setting out the facts which they consider to be relevant.

## **II. RECORD AT ISSUE**

[6] The record at issue (“the Record”) is an investigation panel report, which includes the Investigation Panel Report and 29 tabs comprising some 43 attachments, prepared by IRAC regarding the investigation they conducted pursuant to the *LP Act*.

[7] The documents contained in the Record fall into the following general categories:

1) Investigation Panel Report and documentation associated with the investigation (6 documents);

2) Business documents relating to a named company (2 documents);

3) Business and other documents relating to private individuals (16 documents);

4) Correspondence between IRAC and counsel for various third parties relating to the investigation (7 documents);

5) Disclosure statements made pursuant to the *LP Act* (2 documents);

- 6) Property acquisition/holding documents relating to several named companies (5 documents); and
- 7) Legal authorities (6 documents)

### III. RELEVANT FACTS

[8] In or about late October, 2020, the Minister, as head of the Public Body, was asked about an investigation IRAC had conducted pursuant to the *LP Act* and the report IRAC gave to the Minister [the Record]. The Minister stated in the Legislature and to the media his intention to release the Record to the public, but that he would first seek the advice and recommendation of the Information and Privacy Commissioner. Initially, the Minister had indicated an intention to seek the permission of the Information and Privacy Commissioner to disclose the Record, which was not within the authority of the Commissioner to provide.

[9] By correspondence, dated October 30, 2020, the Minister formally requested, pursuant to section 51 of the *FOIPP Act*, recommendations and advice from the Commissioner respecting the release of the Record. More specifically, the Minister's request was:

“Please provide your advice on the release of the personal information, including names of third parties, and of third party business information contained in the report.”

[10] In correspondence dated November 30, 2020, the Minister confirmed the request as follows:

“The Public Body is requesting advice and recommendations with respect to disclosure of third party business information, and the statutory requirement to protect this information pursuant to section 14, as well as the obligations of the Public Body to not disclose third parties personal information pursuant to section 37 of the Act [*FOIPP Act*].”

[11] The Public Body provided facts it considered relevant in this matter, which we have paraphrased as follows:

- 1) IRAC provided the Record to the Public Body on October 16, 2020, and it is in the custody and control of the Public Body;
- 2) The Public Body intends to publish the Record on their website for public consumption and review;
- 3) The Public Body believes the publication of the report is important for public scrutiny of the Public Body;
- 4) Throughout the Record there are names of individuals who are involved with Island companies, which information, to the Public Body's knowledge, is not publicly available. The Public Body acknowledges there is also personal information in the Record about several individuals. The Public Body states lawyers for the individuals supplied the information to IRAC for the purposes of the investigation and the Public Body is not aware of the accuracy or reliability of the information, or whether it was supplied to IRAC in confidence;
- 5) The Record contains business information, which was provided to IRAC for the purposes of the *LP Act* and/or the investigation under the *LP Act*. The Public Body states it is unaware if the information was provided in confidence;
- 6) The Public Body is considering disclosing all third party business information contained in the Record;
- 7) The Record may be part of a "law enforcement matter", as defined under the *FOIPP Act*;
- 8) A judicial review of the Ministerial decision under the *LP Act* has been commenced by a third party business and an individual in their own right, which process has not yet been concluded; and
- 9) Affected third party businesses and individuals oppose the release of the Record, and question the authority of the Public Body to proactively release it to the public.

[12] The Public Body also provided to the Commissioner the communications between the Minister and counsel for third parties whose interests may be affected if all or part of the Record is disclosed.

[13] In addition to the facts that the Minister has set out, we also consider the following facts and considerations to be relevant:

- 1) The purpose of the *LP Act* is “to provide for the regulation of property rights in Prince Edward Island, especially the amount of land that may be held by a person or corporation”, in recognition of “singular challenges with regard to property rights” in Prince Edward Island “as a result of several circumstances” (s.1.1, *LP Act*). The *LP Act* establishes limits on the aggregate amount of land residents and non-residents of Prince Edward Island, whether individuals or corporations, are permitted to hold. Once an individual or corporation has reached the established limit on land holdings, that individual or corporation is only permitted to acquire additional landholdings with permission of the Lieutenant Governor in Council, up to a maximum aggregate amount as set out in the *LP Act*;
- 2) The IRAC investigation, from which the Record was generated, was undertaken by IRAC at the direction of the Minister, pursuant to provisions of the *LP Act*. IRAC provided the Record to the Minister after the completion of the investigation panel’s investigation;
- 3) The Minister issued a direction in relation to the subject matter of the Record, and has publicly stated an intention to pass the matter to the Crown for further prosecution, if further action is necessary. This decision is the subject of an on-going judicial review process;
- 4) In late October or early November, 2020, someone made an access to information request under the *FOIPP Act* for the Record;
- 5) Third parties whose interests could be affected by a proactive release were requested by the Public Body to make submissions respecting the proactive disclosure of the Record. No third party consultations were done in relation to the access to information request, pursuant to section 28 of the *FOIPP Act*; and
- 6) Some, but not all, of the information contained in the Record is publicly available.

#### **IV. DISCUSSION**

[14] The IRAC investigation was initiated at the request of the Minister, and the purpose was to investigate a land holdings situation, and make recommendations to the Minister regarding compliance with the *LP Act* requirements. IRAC gave the Record to the Minister and it appears IRAC asserts no rights or obligations in respect of the Record. The Public Body provided to us a copy of correspondence from IRAC stating their position that it is up to the Minister to determine if the Record is released to the public.

[15] The Minister has stated publicly it is his opinion that the Record should be released, and the Public Body has indicated the intention to release the Record by publishing it on the Provincial Government website.

[16] In the November 30, 2020 correspondence, the Public Body states its position as follows:

“...that there is no limit on the authority of Government to proactively release information which is in its custody and control, save limited and specific exceptions set out in the [FOIPP Act].”

[17] Respectfully, I disagree with the statement that there is no limit on the authority of Government to proactively release information which is in its custody and control. While the *FOIPP Act* provides for a right of access to information under the custody and control of a public body, this is not an absolute right, nor is it absolute authority given to public bodies. The *FOIPP Act* puts parameters around what information public bodies are authorized to collect, and what public bodies are authorized to do with that information, including placing limits on what can be disclosed and when. There are legal parameters around what a public body can do with information in its custody and control. These legal parameters indicate that the authority of Government to proactively release information is limited.

[18] The Public Body also refers to subsection 3(a) of the *FOIPP Act*, which states that the *FOIPP Act* “...is in addition to and does not replace existing procedures for access to information or records”, to support the intention to release the Record publicly and the assertion that such publication is authorized.

[19] Subsection 3(a) of the *FOIPP Act* does not support the Public Body’s assertion. Proactive disclosure is not an access to information procedure. The Public Body has not provided any information to indicate that there was any other procedure already in place (ie. existing) at the time the *FOIPP Act* was proclaimed that speaks to making information such as the Record generally available to the public. Therefore subsection 3(a) of the *FOIPP Act* does

not apply.

- [20] Section 3 of the *FOIPP Act* is not intended to provide Public Bodies with a licence to release any information at any time. Rather, Section 3 enhances the public's access to information by not requiring people to make a formal access to information request under the *FOIPP Act* when there is already a process in place to access those records outside of the *FOIPP Act*, whether it be by virtue of a provision allowing access under other legislation or a process that makes information generally available to the public. Section 3 is not meant to circumvent the *FOIPP Act* provisions otherwise in place.
- [21] Section 73 of the *FOIPP Act* [records available without request], authorizes the head of a public body to specify categories of records that are in the custody or under the control of the public body and are available to the public without a request for access under the *FOIPP Act*. This section also indicates that the general discretion to release records applies to records that do not contain personal information.
- [22] The Public Body has provided no information to indicate that the Record is part of any category of records the head of the Public Body has specified as being available to the public without a request for access under the *FOIPP Act*. Further, the Record contains personal information which would exempt it from being generally available to the public in any event.
- [23] To support its intention to proactively disclose the Record, the Public Body also submits that prior to the *FOIPP Act* coming into force, "Government, from time to time, made proactive disclosures of information for public consumption and Government continues to do so today."
- [24] Respectfully, although Government may have made proactive disclosures from time to time prior to the *FOIPP Act* coming into force, the requirements changed when the *FOIPP Act* was proclaimed. Any proactive disclosures made since the *FOIPP Act* came into force, and any being made currently, must be in compliance with the *FOIPP Act*.



- [25] As indicated, the Record does not appear to fall into any of the categories to which disclosure to the public or the general public having access to the Record would apply. Under section 73 of the *FOIPP Act*, the Record would appear to be exempt from proactive disclosure by virtue of the Record containing personal information.
- [26] Records containing personal information may be made available to the public if there is a legislative provision that authorizes or directs a public body to do so. In such instances, the legislation also provides any potentially affected individual with notice of the public access, so the provision of the personal information to the Public Body is done in an informed way.
- [27] However, no such other legislative provision exists that is applicable to the Record. The *LP Act*, under which the investigation was initiated and information was supplied or collected, does not permit (or prohibit) disclosure of personal or other information, and there are no other legislative provisions that would apply outside of the *FOIPP Act*. Therefore it is the *FOIPP Act* provisions that govern disclosure of any information supplied or collected through the investigative process, and the Record itself.
- [28] The *FOIPP Act* provides a right to access information and a right of protection of privacy. Openness and transparency of government is desirable, but not at any expense. A public body has an obligation to balance the desire for openness and transparency and the right of access to information with the right of privacy, and the *FOIPP Act* provides the mechanism to achieve that balance.
- [29] For the reasons stated above, I recommend that the Public Body not proactively release the Record.

#### Access to Information Request

- [30] The recommendation against the proactive public release of the Record is not a direction that the Record not be released. An access to information request for access to the Record has been made, and the *FOIPP Act* requires that the Public Body make a decision about whether to disclose or withhold it, or any part of it.

- [31] As someone has submitted an access to information request, I recommend that the Public Body process the request as required under the *FOIPP Act*. The *FOIPP Act* sets out the parameters of a decision, and the determination of what, if any, of the Record should be released should be made through the access to information process set out in the *FOIPP Act* for this purpose.
- [32] Processing the access to information request will subject the Record to the scrutiny and critical analysis that is required, such as considering what information, if any, is subject to the mandatory exceptions to disclosure. It will also require the Public Body to make a determination of whether any information is subject to a discretionary authority regarding disclosure, and allow the Public Body to decide whether to exercise discretion in favour of, or against, disclosure of such information.
- [33] Further, if the Public Body is considering disclosing information about any third parties, the Public Body is required to notify any such third parties that it is considering disclosing information to the applicant that may be business or personal information of the third party, and give the third parties the opportunity to make submissions to the Public Body regarding the release of any information that is about them. The Public Body can take the submissions of the third parties into consideration when making a decision on whether the mandatory exceptions to disclosure apply.
- [34] More importantly, the processing of the access to information request will permit any affected third party, or applicant, the opportunity to seek to have the decision reviewed by the Information and Privacy Commissioner, to ensure that any exceptions to disclosure were properly applied.
- [35] If the Public Body were to proactively release the Record outside of an access request under the *FOIPP Act*, this removes the right of any affected individual, whether a third party or an applicant, to have the decision reviewed by the Information and Privacy Commissioner, as an independent oversight of the Public Body's decisions in relation to the access to information.

[36] For the reasons stated above, I recommend the Public Body process the access to information request following the requirements of the *FOIPP Act*, rather than proactively release the Record to the public generally.

[37] In its request letter, the Public Body mentioned specifically sections 14 and 37 of the *FOIPP Act*, but other information provided in the letter also opened the issue of potential discretionary exceptions to disclosure. In processing the access to information request, I advise that the applicable mandatory and discretionary exceptions to disclosure set out below must be considered.

### Mandatory Exceptions

#### **Personal Information**

[38] The Public Body has acknowledged that the Record contains personal information of third party individuals. Personal information is defined in the *FOIPP Act*. Section 15 requires a public body to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy, and sets out when a disclosure is presumed to be an unreasonable invasion of a third party's personal privacy.

[39] Under section 37 of the *FOIPP Act*, a public body is only permitted to disclose personal information if it meets certain criteria as set out in subsection 37(1). Clause 37(1)(a) indicates a public body can only disclose personal information if it is permitted under Part I of the *FOIPP Act*. Clause 37(a.1) confirms that a public body's authority to disclose personal information is restricted if the disclosure would be an unreasonable invasion of a third party's personal privacy under section 15 of the *FOIPP Act*.

[40] In making its decision regarding disclosure, the Public Body should be evaluating the information contained in the Record to ascertain what information meets the definition of "personal information", and considering all relevant circumstances to determine whether disclosure would be considered an unreasonable invasion of the affected third party's personal privacy.

## **Business Information**

- [41] The Public Body has acknowledged that the Record contains business information respecting third parties' business interests. Section 14 requires a public body to refuse to disclose information to an applicant if such disclosure could reasonably be considered to be harmful to the business interests of a third party. Section 14 sets out what must be considered, and provides a three-part test to determine if a disclosure would be harmful to the business interests of the third party.
- [42] If the Public Body is considering giving access to a record that may contain information that affects the interests of a third party under section 14 of the *FOIPP Act*, the Public Body is required under section 28 to notify the affected third party of the Public Body's intention and give the third party the opportunity to either consent to the disclosure or provide submissions on why it objects to disclosure.
- [43] The Public Body has indicated it is unaware of whether the business documents in the Record were provided in confidence for the purpose of the investigation for which the Report was generated, which is one aspect of section 14. However, this is only one of the criteria which must be assessed, and the purpose of the consultation under section 28 is for the public body to gather more information before making its determination.
- [44] If, after consultation with the affected third party, all three parts of the test are met, the Public Body must refuse to disclose the information to an applicant.

## **Cabinet Confidences**

- [45] The Public Body indicated the investigation was undertaken by IRAC at the direction of the Minister, under the *LP Act*, and the *LP Act* provides for decision-making about land acquisitions and holdings to be made by Executive Council.
- [46] Section 20 of the *FOIPP Act* requires a public body to refuse disclosure to an applicant of information that would reveal the substance of deliberations of the Executive Council or any

of its committees, including among other things, any advice or recommendations submitted or prepared for submission to the Executive Council or any of its committees.

- [47] It is unclear from the information provided by the Public Body whether this exception would apply, but because it is a mandatory exception, the Public Body is required to turn its mind to this and make a determination if this mandatory exception to disclosure would apply to the Record or any information contained within it.

### Discretionary Exceptions

#### **Disclosure Harmful to Law Enforcement (Section 18)**

- [48] The Public Body has indicated that there is an on-going regulatory process under the *LP Act* in relation to land acquisition/holdings of one or more parties to which the Record relates, as well as a recently filed Judicial Review which is also still in progress. Both of these would meet the definition of “law enforcement” as set out in the *FOIPP Act*.
- [49] Because, on the face of it, the Record appears to relate to law enforcement, the Public Body is required to consider whether disclosure of the Record, or information contained in the Record, would be harmful to law enforcement. Section 18 of the *FOIPP Act* sets out when disclosure could reasonably be expected to be harmful to law enforcement and, if any such factors apply, then the Public Body must make a decision regarding whether the harm to law enforcement outweighs the public interest in disclosing the Record, or information contained within it which is not subject to mandatory exceptions to disclosure.
- [50] In making the evaluation, factors to consider would include, but not be limited to: a) that the law enforcement matters are in progress; and b) whether disclosure of the Record, or any information within the record not otherwise subject to a mandatory disclosure exception, might be detrimental or otherwise prejudicial to the interests of any of the parties involved, including the affected third parties or the Government/Crown.

### **Advice from officials (section 22)**

- [51] Section 22 of the *FOIPP Act*, and more specifically clauses 22(1)(a) and 22(1)(g), provide a discretionary exception to disclosure if the disclosure could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body, a member of the Executive Council or the staff of a member of the Executive Council, or advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council.
- [52] Because the investigation was conducted by IRAC at the request of the Minister, and the purpose of the investigation and the Record was to provide advice to the Minister and/or Executive Council in respect of the regulation of land acquisition and holdings pursuant to the *LP Act*, section 22 might be a relevant consideration when determining whether to disclose the Record, or any information contained within it not subject to a mandatory exception, to the applicant.
- [53] Again, as this is a discretionary exception, and the Public Body must exercise its discretion reasonably, there must be a balancing between the applicant's right of access to information and the interests of Government in preserving the confidences afforded to Government in obtaining fulsome advice from officials for decision-making purposes.

### Section 8 [Duty to Assist]

- [54] The fact that someone has made an access to information request for the Record also raises the issue of the duty of a Public Body to assist an applicant, as set out in section 8 of the *FOIPP Act*. I would encourage the Public Body to consider whether the Minister's intention of proactively disclosing the Record is in compliance with the Public Body's duty to assist the applicant who has made the access to information request in respect of the Record.
- [55] To assist the Public Body in this assessment, I would direct the Public Body's attention to a decision of the Alberta Information and Privacy Commissioner (Order 99-035, *Re: Alberta*

*Justice, Alberta Infrastructure*, 2000 CanLII 28718(AB OIPC)), which held that if a public body responds to an access request by proactively disclosing documents, it may violate its obligation to respond to the applicant openly, accurately, and completely. As the Prince Edward Island *FOIPP Act* is closely modeled after the Alberta *FOIP Act*, we often look to Alberta's decisions to inform the process in Prince Edward Island.

## **V. SUMMARY OF ADVICE AND RECOMMENDATIONS**

[56] While the Minister did publicly state he was requesting the permission of the Commissioner to release the Record, respectfully this is not within the authority of the Commissioner to provide. The Commissioner can provide recommendations and advice but, ultimately, the decision about whether the mandatory exceptions to disclosure apply, and how to exercise discretion for discretionary disclosure exceptions, is up to the head of the Public Body.

[57] In summary, my advice and recommendations to the Minister in this matter are as follows:

1. I recommend that the Record not be proactively disclosed, as there is information contained in the record that is subject to mandatory non-disclosure under the *FOIPP Act*;
2. I recommend that the access to information request in relation to the Record be processed in the usual manner;
3. In the event the Public Body decides to release the Record, or any portion of it, pursuant to the *FOIPP Act*, the Public Body is obligated to withhold information that is subject to mandatory non-disclosure under the *FOIPP Act*;
4. I recommend the Public Body consider whether the Record is part of law enforcement, whether the disclosure of the Record or any portion of it may jeopardize law enforcement or potentially prejudice any party to law enforcement proceeding(s), and whether the Record, or portions thereof, should be withheld pending the completion of the law enforcement proceeding(s);
5. I recommend the Public Body consider whether the Record is subject to any other discretionary exceptions to disclosure, and assess and determine whether any such discretionary exceptions should be exercised in favour of disclosure;

6. Prior to any decision being made in relation to release of any information in the Record that pertains to a third party, whether an individual or a business, each affected third party be notified, pursuant to section 28 of the *FOIPP Act*, that the Public Body is considering giving access to a record that may contain information about them, and be given the opportunity to provide consent to the release of any of their information, or provide submissions regarding why it should not be released; and
7. In the event there is no consent to the release of a third party's information, and the Public Body decides to release the information, the third party has the right to request a review by the Information and Privacy Commissioner. If a review is sought, the information is prohibited from being released pending the review completion.

[58] One final observation I would make is that the Minister has publicly expressed an opinion that he wishes to proactively release the Record. I encourage the Minister to consider whether this could be perceived as an appearance of bias. If so, the Minister may wish to consider getting the Deputy Minister to make any decisions relating to this access to information request, or delegating to another individual the authority to make the decision about whether to release or withhold the Record or any portion of the Record, as authorized by section 72 of the *FOIPP Act*.

[59] I have not made any recommendations specific to any information in the Record, and I did so deliberately. It is reasonably foreseeable that any decision made by the Public Body in relation to disclosure of the Record or any information contained within it could be disputed. With this in mind, I did not want to provide an opinion on specifics, recognizing the potential for a third party or parties or the applicant to seek a review of the Public Body's decision by this office.

All of which is respectfully submitted this 5<sup>th</sup> day of January, 2021 by

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Denise N. Doiron  
Information and Privacy Commissioner