[*This ruling was modified on judicial review. See: S1 GS-23769]*

OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI-10-007

Re: Island Investment Development Inc.

Prince Edward Island Information and Privacy Commissioner

Judith M. Haldemann, Acting Commissioner

June 4, 2010

Summary:

Four applicants submitted access to information requests in respect of the PNP. The four files were combined for the purposes of this order. The Public Body refused to disclose the information requested, relying on subsections 14(1), 15(1) and 15(4) of the FOIPP Act. Submissions were received from the Applicants, Public Body, and hundreds of Third Parties. The Commissioner found that section 15 of the Act did not apply to companies (all of the Third Parties), and therefore personal information was not at issue. The Commissioner found that the three-part test of subsection 14(1) was met, and therefore the Public Body was correct in its refusal to disclose the information requested.

Sections considered: *Freedom of Information and Protection of Privacy Act*, subsection 14(1).

I. BACKGROUND

This review arises from a decision of the Deputy Minister of the Department of Innovation and Advanced Learning, the designated head of the Public Body, Island Investment Development Inc. ("Public Body"), to refuse to disclose information in respect of four separate access to information requests ("access requests") submitted by the Applicants pursuant to the *Freedom of Information and Protection of Privacy Act* ("FOIPP Act"). The Applicants made access requests using various wording for essentially the same goal – who applied for, or received, funding under the Provincial Nominee Program ("PNP").

The four files were combined, as all of the access requests dealt with the PNP, asking for names of companies that received PNP units or funding, amounts and the nature of the business receiving funding, or the names of companies that paid an application fee under PNP. The access requests made by the Applicants were stated as follows:

1. The name of the individuals/companies that received units under the Provincial Nominee Program; and the number of units each received.

2. This is a request, by a public interest, non profit applicant, for a list of the corporations, and their publicly available list of directors, the amounts of funds they received, and the nature of the business they were in, as firms that participated in the Provincial Nominee Program. This should include firms from the past three years. This information is preferred in database format.

3. All information relevant to a list of names of all the companies that received funding under the Provincial Nominee Program.

4. All corporate/business names that paid an application fee for the Prince Edward Island Provincial Nominee Program.

The Public Body refused to disclose the information requested, arguing that disclosure would be an invasion of the Third Parties' privacy pursuant to subsections 14(1), 15(1) and 15(4) of the FOIPP Act.

The Public Body's decision was based in part on detailed submissions received from the Third Parties. The Public Body's opinion, supported by a majority of the Third Parties, was that a company name is personal information, the number of units received by each company is financial information, and the disclosure of this information would not only violate the personal privacy of the companies and the immigrant investors, but would also harm their reputation due to the negative media coverage and public outcry of the program, and result in undue financial loss to the Third Parties.

II. RECORDS AT ISSUE

The information at issue consists of the names of the individuals or companies that paid an application fee under the Provincial Nominee Program, or that received units under the PNP, and the number of units each received.

III. BURDEN OF PROOF

Section 65 of the FOIPP Act deals with the burden of proof. As noted in previous orders of this office, the initial burden of proof lies with different parties, depending on which exception to disclosure under the FOIPP Act is relied on by the public body. In accordance with subsection 65(1) of the FOIPP Act, if a decision has been made to refuse an applicant access to all or part of a record, the head of the public body must prove that the applicant has no right of access to the record or part of the record. In some cases, the burden of proof that the record or part of a record should be disclosed shifts to the applicant, as set out in subsection 65(2) or (3) of the FOIPP Act.

IV. ISSUE

Subsection 14(1) – Commercial information that could harm significantly the competitive position of a third party

Was the head of the Public Body correct in refusing to disclose information to the Applicants on the grounds that disclosure would reveal commercial information that could reasonably be expected to harm significantly the competitive position of a third party within the meaning of subsection 14(1) of the FOIPP Act?

V. ARGUMENTS OF THE PARTIES

The arguments in this case include submissions by the Applicants, the Public Body, and numerous Third Parties affected by the access requests. In all, there were several hundred pages of argument that were received by this office, although in the case of the Third Parties, there was much duplication of argument.

Public Body Arguments

> It is important to note that IIDI has not offered any public monies to any participant in the PNP and that no public monies have been given, loaned or otherwise made available to any party involved with PNP. The monies invested through PNP are private monies invested pursuant to individual contracts between Immigrant Partners, privately owned businesses and their owners. IIDI is not a party to any of these contracts and it assumes no obligations nor receives any financial benefit from any of the contracts.
>
> By reason of having established the PNP, IIDI has received a significant volume of commercial, financial and personal information about Immigrant Partners, businesses and their owners throughout the Province.
>
> As well, as with many Government programs and activities, there has been broad public interest and discussion about the nature, operation and impact of the PNP. Notwithstanding this public discussion and indeed, because of such discussion, it is important that the principals underlying the privacy rights of persons dealing with IIDI be protected and respected.
>
> ...
>
> A "third party" is defined by section 1(m) of FOIPP to mean "a person, a groups of persons or an organization other than the applicant or public body".
>
> ...

... the *Interpretation Act* ... defines “person”as:

> 25(2) In an enactment words importing male persons include female persons and words importing a female person include a male person, **and in either case include a corporation.**
>
> ...

“Financial Information” ... defined by A.P.C. Rose in *Re: Department of Agriculture, Fisheries and Aquaculture [PEI Order 06-007]* at pp. 7-8 as follows:

> ...
>
> **“Financial information” - Information regarding the monetary resources of a third party, such as the third party’s financial capabilities, and assets and liabilities, past or present. Financial information is not limited to information relating to financial transactions in which the third party is involved. [Emphasis added]**

In accord with the above noted definitions of persons, ... and financial information, it is submitted that the information being sought is therefore personal information of the third party, specifically the third party companies and the third party Immigrant Partners, and as such should not be disclosed.

...

The Immigrant Partners are third party investors who are directors and shareholders of the third party companies. If the name of the companies were disclosed the Applicant could then use the Corporate Registry to determine information about the third party Immigrant Partners including identities, addresses, approximate immigration date into the Province, nationality or ethnicity together with information respecting their investments including the number of shares issued by the company.

If the name of the Companies were disclosed, the applicant could obtain information from the Corporate Registry such as its annual statement; Memorandum of Association (Constitution of the Company); Articles of Association (By-laws); special resolutions (could attach terms and conditions of new share classes); capital of the company; names and addresses of shareholders and directors; the amount of shares each person was issued and holds.

...

Likewise the information regarding the number of investments made by Immigrant Partners and or received by the companies and the amount of such investments is obviously financial information which is personal information of the third party companies and Immigrant Partners and should not be released.

...

The IIDI is governed by the *Island Investment Development Act* ... which states at section 11 the following,

> The members of the board, the Executive Director and the employees of the Corporation **shall preserve the confidentiality of information received in respect of the business of any client of the Corporation in the course of their duties in carrying out the objects of the Corporation and shall not disclose that information to any person except under the specific or general direction of the board... [Emphasis added]**

The *Island Investment Development Act* was originally known as the *Enterprise PEI Act*.... Its name was changed to the IIDI on September 9, 1993, which is the same date it was proclaimed. FOIPP was proclaimed in 2002 and does not contain any provision that is in conflict with the aforesaid section of the IIDI.... Therefore, the IIDI is bound by the confidentiality provision in its Act.

The disclosure of any information is explicitly prohibited by the IIDI as the board and employees are subject to a statutory obligation of privacy....

Alternatively, the information forwarded to the IIDI is also implicitly confidential. The third party companies and Immigrant Partners provided information, which is not available from any other public source to the IIDI in confidence.

...

IIDI was receiving financial information from third party companies and Immigrant Partners in an effort to determine if they could participate in the PNP. IIDI is akin to the Public Body such as those administering student loans where the information respecting the amount of money received and the name of the recipient are never made public. In this instance we are not dealing with public funds as the investments are made by private individuals and private companies with the information being provided to IIDI in confidence to ensure compliance with PNP.

In respect of harm that could follow from the release of the information requested, the Public Body submits that

> Disclosure of the information requested can be reasonably expected to cause harm to the third party companies participating in PNP as it will invite a public disclosure and examination of the very private business activities, affect their business relationships with their banks, investors, employees and clients and provide competitors with detailed operations about the capital requirements and

injections received by the third party companies. This personal, commercial and financial information will provide information to the public which can affect the negotiating position of the third party companies and may result in financial loss because of the inability to negotiate, finance or complete transactions.

For the Immigrant Partner disclosure of the requested information will result in the significant invasion of their privacy and personal financial affairs. The disclosure of their status as Immigrant Partners and of the nature and kind of investments will affect their personal relationships with others, cause them to be identified as immigrants participating in the PNP, and result in their financial affairs being scrutinized in the context of their private investment in a third party companies.

For IIDI the release of the requested information results in a breach of its statutory duty which clearly states that information provided to it by third parties will remain confidential. Being unable to rely on IIDI's undertakings of confidentiality could impede its opportunities to deal with others in the private sector in the development of the economy of the Province and can result in third parties no longer wishing to provide information to IIDI thereby impeding the opportunity for economic growth and job creation in the Province.

Applicant Arguments

Applicant

However, in terms of s. 14(1)b, I note the commissioner's decision of F1-10-001, where it ruled, "determining how much money will be lent or granted to a company under a government program is not information, in the language of clause (b), that is supplied explicitly or implicitly 'in confidence' by a third party to a public body." The information requested by this applicant is similarly not the detailed information supporting its claims for access to this capital under the program. As F1-10-001 notes, the "amount approved was the decision of the Public Body only and therefore the amount was not something supplied by the Third Party to the Public Body." The government decided the number of units, and hence this decision and amount is its information, and there is no implicit or explicit guarantee of confidentiality.

Just as with a loan or grant application, the businesses may seek a certain amount of funding under this program, but the decision on the figure provided lies with the public body. This figure is therefore from the public body. In revealing the figure, the government doesn't reveal the name of the immigrant investor, nor necessarily, is it revealing the amount applied for. It is the amount the Public Body has decided upon and approved by an unknown immigrant investor.

All that is revealed is the name of the company that receives the funds. I would argue therefore that s. 14(b) isn't satisfied because the information wasn't "supplied implicitly or explicitly in confidence" to the Public Body. The Public Body has *created* this figure through *its decision*.

...

The competitor knows the firm has gained some revenue, but absent the complete corporate picture, this is of little use, other than to be aware their competitor has received some funding through a government-operated program. We must assume the drafting of this legislation chose the word *significant* with care. It is not merely some possible, conceivable harm. It is something that will have a significant impact on the balance of probabilities.

Applicant

In addition to the arguments previously put forward concerning discretionary spending on the behalf of our provincial government, I would also like to bring to your attention that our request for information relevant to the policy and guidelines regarding the PNP have failed to provide any substantive policy governing this program. In the absence of any definitive policy our argument that the PNP program was administered entirely at the discretion of the provincial government is even stronger.

...

Most people agree that there is something inherently wrong with the Canadian government selling immigration status at any price. The immigration program being administered by the Provincial government had many pitfalls, the greatest being that a democratically elected government was administering the immigrant program as a financial investment program where $525 million was eventually collected from potential immigrants. Worse, the program was being administered without the knowledge or approval of the electorate. From the outset it was clear the program that was undeliverable because the requirements were changed from active investors to passive investors to allow for a greater influx of money, not immigrants. Our government was collecting money and assuming responsibilities and liabilities they could not and cannot discharge. It became clear that our government made great efforts to keep the program from the public domain and thought they could successfully run the program without the electorates' knowledge or participation. The entire program has the appearance of being created for the benefit of a select few, many of whom were/are in positions of public trust.

Applicant

... Subsection 14(1) of the FOIPP Act requires the Public Body to satisfy all three elements of the provisions of (a), (b) and (c). I argue that it doesn't satisfy any of them. I am not looking for information that (a) would reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party; AND (b) is supplied explicitly or implicitly, in confidence **[I argue that the PROVINCE decides which companies to approve...and that's the information I'm requesting – I am NOT asking for any financial information supplied TO the government by third parties. As well, the actual amount approved, and the number of units given by the Public Body to the Third Party was the decision of the Public Body only, and therefore the amount was not something supplied by the third party to the Public Body]** AND (c) would be reasonably expected to result in one or more of the outcomes listed in clause 14(1)(c)

Under clause 14(1)(c) I argue that the Public Body has not shown proof as required under Section 65 of the FOIPP Act that disclosure would reasonably be expected to:

(i) harm significantly the competitive position or interfere significantly with the negotiating position of a third party,
(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
(iii) result in undue financial loss or gain to any person or organization, or
(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

Therefore, since I believe the Public Body has not met ALL three criteria of (a) AND (b) AND (c), the Public Body's entire argument on subsection 14(1) fails.

The Public Body also raises the argument that the Immigrant Partner's personal information would be made public if the records were released.

... I am NOT asking for the name, or any personal or financial information about the Immigrant Partners. Also keep in mind that, although an Immigrant Partner may invest 200 thousand dollars per "unit", much of that money does NOT go to the PEI third party business. It goes to intermediaries and lawyers, among others. As well, the amount going to each PEI third party business varies... The Public Body determines the amount. The third party business does NOT determine the amount... so once again, the information I'm looking for does not come from the third parties. And I am not looking for any dollar amounts... just the number of PNP units the province approved for each company.

...

The Public Body also raises a concern that if "a third party company name was disclosed, it would lead to disclosure of personal information about both the companies and Immigrant Partners, which is known as the Mosaic effect."

...

The Public Body further states that if the names of the companies were disclosed, "the Applicant could then use the Corporate Registry to determine information about the third party Immigrant Partners, including identities, addresses, approximate immigration date into the province, nationality or ethnicity together with information respecting their investments, including the number of shares issued by the company."

I submit that anyone can already find much of this information on the province's public website: Corporate/Business Names Registry. For example, look up a company that's already publicly stated it received PNP units, such as Make-A-Reservation Inc. You will note the names of four Asian investors, including their countries of origin.

Applicant

... What my request contemplates is disclosure of the corporate and business names of parties who paid an application fee to the public body in respect of the Provincial Nominee Program .... It does not contemplate disclosure of the applications themselves or supporting information, or the ultimate success or rejection of any such application. The information sought cannot be reasonably be construed to be confidential, or even financial in nature. The application fee paid to Government represents revenue received by the public body; disclosure of the sources of that revenue, and nothing more, cannot be said to infringe subsection 14(1) of the Act.

... Disclosure of the information sought in these circumstances does not infringe [s. 15] and cannot be considered an unreasonable invasion of a third party's privacy. Information relating to incorporated bodies is public in the Province of Prince Edward Island; any person can attend at the Corporations Division in the Office of the Attorney-General and access that information. There are good and sound public policy reasons for that being the case. The disclosure that an individual can obtain about any given company in this province at the Corporations Division goes well and truly far beyond the information sought in this request.

The Deputy Minister goes on at length to assert that the PNP Program related to private contracts between private individuals, utilizing private capital. My request for information does not relate to any of those matters. Instead, my request, which the Deputy Minister does not actually ever address, relates only to corporate/business names which paid an application fee to the Public Body (an arm of the Government of Prince Edward Island) in respect of the PNP Program.... Consequently, my request relates to monies paid unto the Public Body, and not in any way to the issues raised by the Deputy Minister.

Third Party Arguments

Third Party

I feel it would be no benefit for anyone to know who or how many units a company received. I was pleased to be a part of this program, but for some citizens and businesses if the names were identified it would put a negative mark on your business.

I am from a rural community and gossip runs high. Being from a rural community, the community will often call you for jobs first, this may have an affect.

If any customer or contractor knows my business was involved they may decide to go with another business....

Third Party

1. The disclosure is not desirable for the purpose of subjecting the activities of the Government of PEI or a public body to public scrutiny. It is simply a witch hunt meant to harass all participants in the Provincial Nominee Program.

2. The third party will be exposed unfairly to financial or other harm. Given the fact that the public have very strong, and generally negative, opinions with regard to the Provincial Nominee Program, it is very likely that if my company's name is associated with this program, the viability of my business may suffer.

3. The personal information has been supplied in confidence, if not explicitly, then implicitly.

4. The personal information is likely to be inaccurate or unreliable. The only information on the public body's record is that each investor invests $200,000. That information would mislead the public.

5. The disclosure may unfairly damage the reputation of any person referred to in the record. See # 2.

6. I, as the third party, am not in agreement with any disclosure and do not consent to any disclosure of the information requested.

7. The applicant is not required to maintain the confidentiality of personal information once it has been released to them. In fact, the applicant is most likely seeking this information in order to make it public.

8. The nature and contents of the record are highly confidential. Personal information and financial information is generally accepted as confidential information.

9. The applicant has no pressing need of this third party information. This information covers subjects far outside the need for public scrutiny.

...

This request has nothing to do with maintaining transparency or accountability of the Government and its collection or use of information or of taxpayers funds. It has nothing to do with individuals accessing their own records or correcting inaccurate information. It has everything to do with trying to access personal financial information in order to publicly harass individuals who have participated in a Government coordinated program in good faith. All innocent participants will be publicly tarred with the same brush as any bad apples or even perceived bad apples.

Third Party

FOIPP addresses two concerns: one public and one private. A privacy commissioner must weigh both concerns when making any determination under this FOIPP. It remains my position that the private right outweighs the public interest in this case.

In previous Orders such as: FI-09-004 and FI-10-001, a large concern was the use of the taxpayers money. As previously stated, this investment was NOT taxpayers money....

Third Party

We seriously question the wisdom of revealing all of this information to the general public. We were of the understanding that these negotiations were confidential.

Given the media coverage surrounding the program, we feel that being publicly named in the media could have negative repercussions for our business. We feel that, in our case, the process was legal and above board. We met with the immigrants and they visited our business.

As far as we are concerned, we feel that we have upheld our responsibilities as we understand them. If down the road, this process goes awry through no fault of ours - why should we be made to look as if we were doing something shady?

If I had no knowledge of the program other than what I reaped from the media - I would assume that Island businesses were receiving $200,000.00 each to invest in their businesses. In reality - after legal and administrative fees and taxes, we actually received less than $41,000.00 to invest in our business - a bonus we appreciate in these economic times....

Third Party

I would like to focus on the two principle parties involved in the process, the nominee and the company. The money exchanged under the Program, was money that was exchanged between “private individuals” and the information pertaining to the transaction is none of the publics business.

At some point, a representative from the Government must step forward and express this concept to the portion of society that is thirsting for gossip.

... I firmly believe that the information pertaining to companies that received funding under the Program is not public knowledge....

Third Party

I do not consent to the disclosure of the information pertaining to my business because it is of a financial nature and I provided this information in confidence. This Program, as far as I am concerned, is a private individual investing in a private Company and therefore feel this would be an unreasonable invasion of my Company’s privacy.

As per Section 15(5)e, I also feel that if the public is made aware of the financial investments of my Company, it could possibly have a detrimental affect on such things as collecting accounts receivables and therefore be unfairly exposed to financial harm.

Also, this Program, whether justified or not, has received very negative media coverage. As per Section 15(5)h, I now feel that disclosure of involvement in this

Program might unfairly damage the reputation of my Company. If anyone feels that a Company received funds under false pretenses, that Company should be investigated on an individual basis. I cannot see what purpose would be served in a public display of the Companies involved....

Third Party

We wish to go on record that NO we do not feel it is anyone's right to delve into the affairs of private business owners for the following reasons:

- This is not public money we are dealing with.
- This is a private transactions between immigrants and private business owners.
- It should be no one's concern as to how we choose to operate and finance our business.
- Disclosure of information could be a competitive disadvantage to have information about our company made public.

Third Party

Our Business feels that if our company's name were to be made public, it would bring undo hardship to our business. With the media and all of the bad publicity, we feel that people would look different at our business. We believe at a time when the economy has slowed down, this information could put our company at great risk for more hardship. We would like to request that this information not be made public.

Third Party

The following are the reasons for our position:

1. This is a deal between shareholders. The public has no right to the information other than what is available on the corporation's website.

2. I further believe that the information requested will be an unreasonable invasion of my privacy, the privacy of my partner and all of our investors.

3. We were never told through the process that public disclosure was required. All of this comes as quite a surprise.

4. Due to all the negative publicity attached to the Program our customers may not want to do business with us as we participated in this Program. Perceptions are dangerous and we cannot afford to be grouped in with any fallout from future investigations....

Third Party

... I do not wish to have my information shared. Unless, the freedom of information is going to release and publish, for all the world to see, all the names and the amounts of money received by Islanders from government pensions, housing grants and inheritance, or any other government subsidies, then we can talk about PNP, which by the way is not government money.

Third Party

We are a small privately-owned business who has taken the opportunity offered to us, to upgrade our business and develop new products through this generous programme. Concerns for privacy are paramount to us and disclosure of our private information could be detrimental to our small business. Large corporations take huge amounts of grants and loans and can absorb this kind of scrutiny, whereas human nature being what it is, there will be considerable fall-out where small businesses are concerned.

We wish to continue to be a part of business on this Island and are very concerned about back lash from small businesses that were not as successful as ourselves in gaining these units. We have lived on Prince Edward Island long enough to know what kind of impact this will have on our spirit to continue growing our business into the first-class operation that it is.

... This further request by unknown persons, for access to information under the FOIPP Act is once again causing my wife and I concern.

It is difficult to understand what will be achieved by these persons, if they receive personal information on up to 400 companies on Prince Edward Island who have benefited from this tremendous programme, which we were all legally approved to access.

My apprehension lies in the possibility of this information being used by potential clients in their decision making with regards to who they do business with. With all the negative publicity this program has received it is conceivable that consumers may feel we have somehow received "**free**" money and therefore choose to do business with a competitor. Consumers may feel that in retaliation

against Government they will not business with companies that received units....

I fully understand that these reasons may not seem relevant to those seeking to access these files, but I can assure you that they are relevant to small companies such as ours.

Third Party

The Provincial Nominee Program was promoted as a "win-win-win" investment opportunity for all involved – the immigrant, Island small businesses and the provincial government. And so it should be. Unfortunately, developments in the media and government have "tainted" the perception of the program and anyone associated with it. I run a small family business in a small rural community. The continued success of my business and as an employer is dependent on financial contracts and public perception, especially continued loyalty from my clients and customers.

The province government should be protecting the rights of private business to operate without publically disclosing sensitive, private and personal details of their financial operations, when such businesses are operating within the laws of this province.

Third Party

... the PNP approval process, as confirmed in writing by the Province, did not guarantee an investor placement would be made. The placement of investors with companies was arranged through intermediaries and was **an entirely private transaction** between investor and company. Those private transactions are subject to specific contractual confidentiality obligations of the investors and the company relating to the investment itself, the existence or terms of the investment agreement, and various documents ancillary to and arising from the private agreement between the parties. As such, any decision for the government to disclose the information may have further legal ramifications to all concerned.

... This disclosure will without doubt impact our go forward position directly as we approach new opportunities, growth and investment and likely lead to undue financial loss. In comparison, **if the Company received private investment monies outside of this program, no one would be entitled to this information,** as to the amounts and other details;...

Third Party

There was an assumption of privacy when the various transactions took place; it was all private money – no taxpayer was asked to shoulder any burden on my behalf; FOIP requests are for the reasonable management of government information.... I see no reason why any details ought to be disclosed. Additionally, I see no reason why my financial details are released to someone who has not asked me (and identified themselves to me).

Third Party

If this controversy continues, and is further aggravated by the present, successful, and I would argue unwarranted requests under the Act, companies planning on re-locating to PEI will have been more than adequately warned that doing business in this Province is a risky business. This could adversely negatively impact the future economy of the Province.

I agree that if improprieties have been committed, they should be investigated. I would also strongly suggest that this could be accomplished by employing a more suitable and just medium.

Third Party

The Provincial Nominee Program was a government sponsored program in which a company and immigrant investor was approved to participate in the Program. PEI Business Development Inc. approved our company as an eligible company within the guidelines of the program but did not match us with an actual immigrant investor. This was done by third party consultants. The share subscriptions and investment agreements are private contracts between the immigrant investor and our company. We do not believe that this private contract should be consider public information. We entered into this program with the understanding that this was a private transaction and that PEI Business Development Inc. was only administering the program within certain guidelines to ensure fairness in the process. We did not believe that we were entering into a public transaction. If we had been aware of this we would not have applied to the program.

Our company operates in a ... community in which we employ a number of people. Our employees are not aware that we participated in this program. The recent publicity of this program has painted a very negative picture of those involved and many people feel that the monies received is a government handout or “free money”. If our employees become aware of this, it could cause significant human resource issues. Some employees may feel that they should be “entitled” to

some of this free money which could lead to efficiency issues in their work habits or possible fraud situations such as the use of company assets for person gain. Some employees may even [quit] to go work elsewhere as they may not feel fairly compensated or that they do not want to work for someone who was involved with this program.

The shareholders of our company are very well known within the community.... The release of their involvement in this program could have a negative impact on their relationships and their family's relationships with others in the community and their [involvement] with community groups.

Third Party

1. To qualify for units we were required to supply information about our net worth. If information is disclosed to the public it is a simply mathematical formula to determine a minimum net worth of business owners. This can result in increased requests from charitable organizations and subtle backlashes in small rural communities. This could put us at a disadvantage when requesting estimates for local services because the trade or service assume you can afford it. The average citizen does not understand the risk that small business assumes everyday and they must invest and plan very wisely for the long term because there is no guaranteed pension plans. Most small business persons must increase their net worth to insure their futures because no one else supports them. Information about our private financial affairs could be very harmful.

2. Privacy of the foreign investor is being infringed upon. If this information is publicly disclosed it would also be available in the immigrant investors country of origin. I think it is the government's responsibility to think beyond our small provincial borders. Disclosure of this information could expose strong hints about their personal wealth and business affairs. A simple mathematical formula would tell you they have enough money to invest which could stimulate increased requests for investments from other companies here and abroad. In their home country it could stimulate a backlash and provide information about their investment approach to their competitors and community.

3. In conversation with ... your department and ... our accountant, it was our absolute understanding that all information supplied was completely confidential. There was no government money invested into our company so it is no different than any other investor who would purchase shares in our company. Our understanding was the role of the provincial government was to facilitate and encourage new foreign investment into island businesses so it's role was to regulate and create an environment of trust with the parties to enhance our island economy. Disclosure of information under the Freedom and Protection of Privacy

Act undermines this fundamental understanding. On the global perspective it would be very unwise of the government to bend to the requests of some journalists hot for a story and create an environment [where] foreign investors are hesitant to invest in small business in PEI when we so desparately require their resources and should welcome their new visions....

Third Party

... The Company's directors and shareholders also include the immigrant investor. The indirect disclosure of the identity of the immigrant investor will allow several inferences to be drawn about the immigrant investor (i.e., his ethnic origin, which can be derived from his foreign name, his recent immigration to PEI, his financial interest in our client, his minimum net worth, and other qualifications the investor needed to immigrate under the PNP). This is highly sensitive "personal information" of the immigrant investor under section 1(i)(i), (ii) and (vii) of *FOIPP*.

Third Party

... The intent of the Freedom of Information and Protection of Privacy Act is to protect personal privacy, not corporate privacy. My reading of the act leads to the conclusion that there is no legal rationale to prohibit the release of a complete list of PNP recipients and the number of units received.

Corporations obviously deem their financial affairs private. The PNP program is predominately a business-to-business relationship. However, it is a relationship that could not occur without the blessing and direct involvement of the provincial government . Government generated millions of dollars for general revenue through its championing and control of the program. This proves government involvement.

Disclosure will not result in specific financial information being released. There is a wide range of net dollars paid to each business depending of [on] fees charged. This bottom line figure will not be disclosed. Nor will disclosure result in a trade secret being released.

My understanding is the request is simply for the names of corporations and the business sector in which they operate and the number of units received. How can this possibly be considered privacy information as defined by the act?

Contracts with government exist under the Provincial Nominee Program. As part of its oversight capacity, government must ensure that the follow up requirements of those contracts are met. Government approved every company receiving PNP

funds. Government cannot argue an arms length relationship. It was involved in every step of the program.

Many corporations have either voluntarily released their PNP participation or found themselves the subject of media reports. If there is an unfair component to this issue it is that a small percentage of total PNP recipients are left to carry the burden of disclosure. The only fair remedy is to disclose all recipients and the number of units each received.

Third Party

... Apart from the explicit assurances of accountants, advisors, intermediaries, Program representatives, and lawyers, the very nature of the investment transaction implies a commitment to confidentiality. Each of the above noted roles is accompanied by a duty, or at the very least an understanding, that matters that come before individuals in these positions are confidential. This need for confidentiality is highlighted by the treatment of solicitor-client communications by the judicial system; the typical confidentiality policies of accountants and advisors; and the confidentiality requirements found in the governing legislation of Island Investment Development Inc. The need for confidentiality in these circumstances is of an even greater magnitude given that the information to be disclosed would amount to identifiable information (i.e. the information would not be released in anonymity but would rather be traceable back to the Company specifically).

The investment documents, which form a private contract between the Company, its principals, and the Program investors, routinely provide strict confidentiality clauses offering further reassurances that the sensitive information that is to be exchanged under the Program is to be kept strictly confidential.

It has certainly been the Company's understanding that all information submitted in connection with the Program was to be kept confidential and at no time was the Company notified that this information was subject to release outside the parameters of the Program. The Company has made every effort to maintain the confidentiality surrounding its participation in the Program and at no time did it waive this confidentiality.

The test for confidentiality is whether there is an expectation of privacy that an objective bystander would regard as reasonable. Based on the foregoing, it is our position that the expectation of privacy held by the Company, and its principals, would certainly be considered reasonable through the eyes of an objective bystander.

...

Island businesses often pride themselves on being Island owned and operated, and sometimes even family owned and operated. These businesses cater to a clientele that oftentimes are loyal because of this “home grown” perception and who often pride themselves on supporting small Island businesses. If there is a perception that the Company is receiving “easy money”; is largely based on foreign investment; is departing from its roots; or, is involved with a tarnished program, there will likely be a backlash against it along with a loss of goodwill and consumer loyalty. Competitors will benefit from the loss of goodwill and support of participating companies, which will create an unfair windfall to non-participants and will certainly act to the detriment of the Company and its principals.

...

The only role of Island Investment Development Inc. in implementing the Program was with respect to eligibility and confirming that a legitimate investment was made under the Program. No government body nor representative was a signatory to the investment agreements and therefore are, respectfully, in no position to disclose the contents or existence of these agreements nor are they at liberty to waive the confidences expressed in these private business investment documents.

...

The information that is being requested arose from a private commercial transaction. Investment matchmaking between investors and companies was solely done through the efforts and negotiations of the Company, its principals, the investors, and the intermediaries and agents involved. Island Investment Development Inc. was not involved in the placement of investments and in fact was clear that investment was not guaranteed under the Program. This was the responsibility of the participants. The release of the requested information would be contrary to contractual obligations and expectations of the actual parties to the investment.

...

The need for government accountability is real; however, public scrutiny can be fulfilled in a more controlled environment by allowing a defined set of accountable individuals access to the requested information for the purpose of compiling the provincial auditor’s report. Public scrutiny does not necessitate the mass disclosure of this very private personal information, which would negatively affect a large number of companies, principals, investors and others....

VI. ANALYSIS

The 2009 Report of the Auditor General to the Legislative Assembly notes at paragraph 3.2 that the PNP was governed by the Federal/Provincial Cooperation Agreement on Immigration and by the Regulations made under the *Immigration and Refugee Protection Act* (Canada). Incorporated companies that wished to obtain funding under the Provincial Nominee Program were required to apply to the Public Body for approval under various categories. After a company submitted the required documentation, the Public Body determined whether or not to issue approval to a company to receive up to four units of investment from Immigrant Partners. Once that approval was granted, the focus shifted to negotiating and executing a private contract between an approved company and an Immigrant Partner, with the assistance of a private intermediary. No government money was disbursed under the PNP.

The Auditor's General's Report of 2009 ("AG Report") was very useful in presenting a concise description of the PNP. I am quoting some of the AG Report in point form, as it is useful to have some background knowledge of the PNP before considering the issues raised by this review:

> Paragraph 3.11 – Under this Agreement the Province is responsible for developing criteria, assessing applicants against those criteria and making a formal nomination to the Federal authorities....
>
> Paragraph 3.12 – **Immigrant Partner** – where a principal applicant proposes to make an investment in a PEI company and take an active role in that company as a director or senior manager.
>
> Paragraph 3.16 – ... Under the Immigrant Partner Category an immigrant who has a net worth of at least $400,000 makes a $200,000 preferred share investment in an eligible Island business and takes on a role as a director or senior manager of the company.
>
> Paragraph 3.17 – Financing of a portion of the investment is allowed.... in general the immigrant pays $110,000 and borrows $90,000 to make the preferred share investment of $200,000....
>
> Paragraph 3.18 – From the $110,000 received from the immigrant an intermediary

> pays an immigration agent in the foreign country, retains a portion as a fee and passes on net proceeds of approximately $55,000 to the Island business. The business pays legal and accounting expenses, IIDI processing fees... the following assumptions:
>
> - $90,000 financed portion in each case;
> - $55,000 financed proceeds to the business after agent and intermediary fees; and
> - legal and accounting fees of approximately $3,800 per investment unit.
>
> Paragraph 3.34 – By the end of 2006, IIDI required financial statements and projections to assist in the assessment of eligibility....
>
> Paragraph 3.35 – Another key policy change included the requirement set in October 2006 that each business receive at least $55,000 from each unit under the financing structure....

The Public Body and the Third Parties argued that sections 14 and 15 of the FOIPP Act apply to this case.

Section 15 of the FOIPP Act

Subsection 15(1) of the FOIPP Act says

> 15(1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

The rest of section 15 of the Act comes into consideration if subsection (1) is relevant. The salient phrase of subsection 15(1) of the Act for the purposes of this review is "unreasonable invasion of a third party's personal privacy". The Public Body argues that personal information of Third Parties is involved for the purposes of both section 14 and section 15 of the FOIPP Act. The Public Body reasons that the definition in the FOIPP Act of "third party", the definition of

"financial information" in a previous order of this office [PEI order 06-007] and the definition of "person" in the *Interpretation Act* lead to the conclusion that the disclosure sought by the Applicants is personal information of the Third Parties. The Public Body's argument fails, however, in an important point. The Public Body, in considering definitions of relevant phrases, failed to consider the most pertinent definition of all; the definition in the FOIPP Act of "personal information". Instead of arriving at what "personal information" means by putting together other definitions from the FOIPP Act, another Act, and a previous order of this office, the Public Body had only to look firstly and lastly at the statutory definition of the term "personal information" found at clause 1(i) of the FOIPP Act. Clause 1(i) of the Act says

> 1(i) "personal information" means recorded information about an identifiable individual, including [name, address, etc.]

No distillation of other statutory provisions is necessary to determine the meaning of "personal information" as defined in the FOIPP Act.

It is necessary to determine to whom or what the definition of "personal information" in clause 1(i) of the FOIPP Act applies. This clause includes a carefully chosen word, which vitiates the Public Body's argument. Personal information means recorded information about an identifiable individual. An "individual" is, in common usage, a single person or item as distinct from a group. In my opinion, the word "individual" means a single human being rather than a company, which is a group of persons. A company is a person by definition under the *Interpretation Act*, but a company is not an individual. Section 15 of the FOIPP does not apply to the Third Parties in this case because they are all companies. I will not be considering further argument by any of the parties on section 15. Further elaboration on section 15 of the Act as it relates to individuals can be found at PEI Order No. FI-10-001, at page 10.

Section 14 of the FOIPP Act

This case is a difficult one. It is clearly not a cut-and-dried path – from the access requests – to

section 14 – to the impact on several hundred third parties. By itself, the large number of third parties is not a relevant consideration, but the impact of disclosure on them must be taken into consideration in determining the outcome of this review.

In the ordinary course of access requests respecting money approved by government to be paid to private companies, the entire argument turns on whether or not each of the elements [clauses (a), (b) and (c)] of subsection 14(1) of the FOIPP Act are met. If so, the information is not disclosed; if not, the information is disclosed. The conundrum in this case is presented by the fact that the money invested by the immigrant investors is their own money, not government money. This fact creates confusion because an access to information request is a request for government information, not private information related to the Third Party companies or to immigrants. The question that must be answered is whether it makes any difference that the Public Body collected information for a program that, instead of bestowing government money on successful applicants, gave approval to successful applicants to enter into a private contract between an immigrant seeking immigration approval and a local company seeking financing for its private sector business.

I have looked at the specific wording of section 14 for guidance in determining the issues that must be decided. This case does not fall into any of the ordinary FOIPP categories: it is not a linear progression in the usual sense of the relationship between applicant and public body and third party, where one would follow the money from public body to third party to the information required to be disclosed. The question that attracts attention in this case is "Whose money is it?" We know it is not government money and we know that the money never came into government hands. Conversely, we know that when the money changed hands it went directly from the immigrant to the company that received units. The controversy surrounding PNP focused largely on the money – who received it, how much, how was approval determined, etc. In the final analysis though, is the question about money, or is the question about what information is the Public Body required to disclose?

Another approach to this file is to ask, of the information requested, what information falls within the FOIPP Act and what does not. The parties to a FOIPP access request include the person who makes the access request, a public body, and sometimes third parties. The underlying principle of disclosure is the right to access information held by a public body, which often involves following public money. The public aspect of the case is the requirement that private companies and immigrants cannot be matched unless the Public Body approves the private company to receive units (of immigrant investor monies). However, in this case, the money is private money under private contract. Interestingly, the reason for provincial government involvement in the PNP is not public money. The reason, in essence, is compliance with federal immigration laws. At the point of approval, the focus shifts to non-public intermediaries matching private company to investor, and the preparation and signing of a contract between the two private parties: company and immigrant investor. Clearly, with regard to the contract between the company and the immigrant investor, there is no application of the FOIPP Act.

Section 14 of the FOIPP Act is the section on which the legal arguments for this case revolve. Subsection 14(1) of the Act says

> 14. (1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant information
>
> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of a third party;
>
> (b) that is supplied, explicitly or implicitly, in confidence; and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of a third party,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization, or
>
> (iv) reveal information supplied to, or the report of,

> an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

Subsection 14(1) of the FOIPP Act is a mandatory exception that requires a public body to refuse the disclosure of a record, or part of a record, if all of the components of subsection 14(1) of the Act are met. The test set out in subsection 14(1) of the Act requires that a record, or part of a record, must satisfy the whole of subsection (1); i.e., the provisions of (a) and (b) and (c) must be met. In other words, the information that the Public Body must refuse to disclose under section 14 of the FOIPP Act must be information that, (a) would reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party; and (b) is supplied, explicitly or implicitly, in confidence; and (c) would be reasonably expected to result in one or more of the outcomes listed in clause 14(1)(c). The important thing about subsection 14(1) of the FOIPP Act is that all three of these elements must be present. This requirement is inherent in the wording of the section because the word "and" after the second-last clause of the section means that each clause must be satisfied on the facts of the case. This point was considered by me earlier in PEI Order FI-10-001.

Clause 14(1)(a) – Information would reveal financial information of a third party

In order to satisfy clause 14(1)(a) of the FOIPP Act, the information requested must contain information that would reveal trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party. The number of units for which a company qualified could reveal financial information and the level of pre-existing assets of the company, since the financial information required to be given by the third parties to the Public Body for the approval process is the basis of that approval. An obvious inference from the requirement to provide financial information as a part of the approval process is that each company must demonstrate financial viability as a qualification for approval under the PNP. It is not necessary to go into other elements of clause 14(1)(a), since only one of them is necessary. I am satisfied that clause (a) applies because financial information was provided by each of the

Third Parties to the Public Body.

Clause 14(1)(b) – Information supplied, explicitly or implicitly, in confidence

Clause 14(1)(b) of the FOIPP Act requires that a public body refuse to disclose information that is "supplied, explicitly or implicitly, in confidence". In order for a public body to satisfy this clause, the public body must submit the explicit or implicit reasons that the information was supplied in confidence by a third party. This clause is often a stumbling block for a public body because information that is considered confidential is not necessarily information that was supplied in confidence.

One of the Applicants argues that PEI Order FI-10-001 applies. In that case, considering clause 14(1)(b) of the FOIPP Act, the amount of a loan or grant provided under a government program was found not to be information supplied in confidence because the "amount approved was the decision of the Public Body only and therefore the amount was not something supplied by the Third Party to the Public Body". In that case, the public body was approving public money to be granted or lent to a third party. In the present case, financial information was provided by Third Parties to the Public Body to prove eligibility to receive investment units under PNP. The Applicants argue that they want to know how many units were approved to the Third Parties, submitting that the information in itself would not reveal financial information about the Third Parties. I disagree. Each Third Party was required to submit financial information to show that they were eligible for PNP units. Eligibility consisted of, among other things, proof of financial viability at a particular minimum level. In my opinion, it is reasonable to assume a minimum net worth of a company based on the approval of one or more PNP units. In order to come to that assumption, the calculation is a matter of simple mathematics. For that reason, I cannot agree that revealing the number of units per Third Party would be as innocuous as the Applicants argue. One of the Third Parties (who is in favour of disclosure) submits (after mentioning that some PNP recipients have been revealed) that "a small percentage of total PNP recipients are left to carry the burden of disclosure". Having invited the several hundreds of Third Parties to make

submissions, I must correct that assumption because the small percentage involved actually relates to those companies whose participation in PNP has been revealed.

There is a striking difference in this case from most access requests where the issue involves public money and a public body: the money that is eventually invested in the Third Party companies is not money that is being dispensed from government coffers. This point is succinctly described by one of the Third Parties, saying that "no taxpayer was asked to shoulder any burden on my behalf". This striking difference is important because the money involved was disbursed from one private party to another private party. Stated in another way – the Public Body received financial information about a company, decided that it met certain criteria within the federal rules, approved the company, and referred it to a private intermediary. Under the rules of the PNP, the Public Body was no longer involved in the process once approval was given. I am not considering later agreements made with the Public Body related to compliance with the rules or the use of the funds, because those matters fall outside my purview and are left to the Auditor General or to others who may have jurisdiction on those issues. In addition, later audit or control devices used by the Public Body are irrelevant to the fact that the information requested in these files is related to the names of applicants to PNP or money disbursed under PNP.

The fact that the Public Body referred an approved company to the private sector to enter into a private transaction is an anomaly. This anomaly is an important element of the PNP that distinguishes it from the ordinary grant or loan business of the Public Body. The result of the anomalous nature of the transaction is that I must conclude that the financial information submitted to the Public Body by each of the Third Parties was submitted, in many cases explicitly and in all cases at least implicitly, in confidence. I cannot conclude otherwise because any other conclusion would, in my opinion, defy common sense. This means that clause 14(1)(b) of the FOIPP Act is also satisfied.

One final point needs to be made to clarify my position that the lack of government money is important. Many people may consider that the issue of money, government or not, is secondary to

the issue of process. While I recognize that the process of the PNP program and perceived favouritism and lack of transparency are matters that were brought forward as concerns regarding PNP, these are not matters that fall within my jurisdiction. A Commissioner must look at the legal issues that arise in a review of the FOIPP Act, not at issues that arise outside the Act in the court of public opinion. I raise the issue of government money vs. private money because it is central to my decision in this case which is based only on the legal issues that arise from the FOIPP Act. The decision making process used by the Public Body is not within my purview and there is no mandate under the Act to investigate that process. In the final result, I am concerned only with analyzing the file in light of subsection 14(1) of the FOIPP Act and drawing conclusions on my findings. The public scrutiny that has been on-going in respect of PNP will not be resolved by my narrow approach under the Act. I must also make it clear that although trips by government officials to distant countries and the obvious haste to receive applications shown by the Public Body near the end of the program drew strong criticism of the handling of the program, these are matters that do not fall within my jurisdiction.

Clause 14(1)(c) – disclosure reasonably expected to harm significantly

The third element that must be satisfied under subsection 14(1) of the FOIPP Act is clause (c) regarding the harm that could ensue from the disclosure. This element is the most contentious one in this case. The Applicants argue that harm has not been proved by the Public Body or the Third Parties. I quoted at length from various submissions by Third Parties because these provide evidence of the harm that is anticipated if the information requested were disclosed. As there were several hundred Third Parties, these quotes are a representative sampling of their submissions.

The Applicants further argue that the Public Body has not proved the harm that would be caused to the Third Parties, particularly since they are not asking for Third Party financial information. Order PO-2690 *Ministry of Training, Colleges & Universities*, 2008 CanLII 36507 (ON I.P.C.) deals with clause 17(1)(c) [equivalent to our clause 14(1)(c)] and says

> To meet this part of the test, the party resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient. *[Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* 1998 CanLII 7154 (ON C.A.), (1998), 41 O.R. (3d) 464 (C.A.)]

In Order 03-41 *Vancouver Health Coastal Authority, Re*, 2003 CanLII 49220 (BC I.P.C.), the BC Information and Privacy Commissioner discussed the "mosaic effect" of re-identifying information from non-personal information. The Commissioner said

> ... the VCHA stresses the risk of re-identification – the so-called 'mosaic effect' – which arises where disclosure of what might appear to be non-personal information should be treated as a disclosure of personal information because the seemingly non-identifiable information can be combined with information from other sources to re-identify the disclosed information.
>
> ...
>
> I also acknowledge that the mosaic effect can be relevant in deciding whether seemingly non-personal information is in fact identifying information.
>
> ...
>
> The applicant's argument that disclosure of the requested records will not identify individuals any more they have already been identified by the summary is not compelling. On the contrary, the disclosure of more detailed information that matches with the incident numbers, dates and facilities already disclosed in the summary, would make the connecting of incidents to identifiable individuals much more likely.
>
> ...
>
> ... I am satisfied that the VCHA and the interveners are right to be concerned that disclosure of the requested records can reasonably be expected to identify or re-identify residents involved in the reported incidents. The small size of the facilities makes the identification or re-identification of workers as likely as the identification or re-identification of residents. The applicant does not want information that identifies residents, but information is blended in the narrative descriptions of incidents such that information which it is reasonable to expect to identify or re-identify workers or witnesses can also reasonably be expected to identify or re-identify residents.
>
> ...
>
> As I see it, regardless of the VCHA's confidence in the effectiveness of its own operations, the public and the media have legitimate roles to play in ensuring the VCHA's accountability and that of the provincial authorities overseeing the licensing system for community care facilities. The point is to find the balance, under the Act, between the applicant's right of access to information about

> reported incidents and the important right of individuals, especially residents in the circumstances of this order, to personal privacy.

Of course, the difference in this case is that the information requested is not directly information about individuals; however, the similarities between this case and the VCHA case are obvious and compelling. The case illustrates that combining information where a small community is involved is more likely to produce the mosaic effect of re-identifying individuals. In this case, disclosure of only the names of the companies which applied under PNP is enough to make an easy connection to the company owners and the immigrant investors. The simple method of completing that next step was described by the Public Body as quoted earlier, through information provided to the public by the Corporate Registry of the province. The number of units granted to each participant company would lead directly to information about the Third Parties' financial viability, minimum net worth, sources of funding, etc. As well, I agree that such information would also lead to inferences about the immigrant investors' minimum net worth, as well as personal information related to their immigration to Canada. Although I have found that section 15 of the FOIPP Act does not apply to the Third Parties because they are companies, I cannot condone personal information being made easily available about them and their immigrant investors as a result of information disclosed indirectly by a failure of the intent of section 14 of the Act. In my opinion, the protection of personal information is paramount, and even though, as is the case here, the personal information does not come within the protection of section 15 of the Act, I find that the mosaic effect has been demonstrated to apply to this case. There is a clear and simple process available in our small province to add the names of participants in PNP to other readily available databases to easily discern personal information about the business persons and the immigrant investors. I find that the harm described in clause 14(1)(c) of the FOIPP Act has been amply proved by the submissions of the Public Body and the Third Parties. I note, too, that some of the Applicants have acknowledged the effect of a Corporate Registry search on disclosing personal information related to the company owners and immigrant investors.

I am persuaded by the arguments of the Third Parties that the majority of the Third Parties would

suffer significant harm to their business if any information about their involvement in PNP were to be made public. It is clear that the ballooning nature of the controversy over PNP has taken its toll on the peace of mind of many of the owners of the Third Party businesses. In my opinion, it is appropriate in this case to acknowledge reality by "piercing the corporate veil" to confirm that the principals of most of these companies are really small business people who incorporated as part of the PNP requirements. The arguments of the Third Party parties are a poignant testimony to an untenable position that they find themselves in; in the words of one of the third parties:

> As far as we are concerned, we feel that we have upheld our responsibilites as we understand them. If down the road, this process goes awry through no fault of ours – why should we be made to look as if we were doing something shady.

Overall, the numerous detailed letters sent by Third Parties were characterized to a large extent by pathos. It became clear to me after reading these submissions that a large number of Third Parties were suffering from an entirely reasonable and foreseeable prospect of significant harm to their business if their participation in PNP was "found out". In respect of damage to the business interests and reputations of Third Parties in the communities in which they do business, I find that the Third Parties' arguments are cogent and compelling evidence of such harm under clause 14(1)(c) of the FOIPP Act.

In addition, I agree with the Public Body's submission that

> IIDI does not need to establish proof of harm under Section 14(1)(c) of FOIPP; it is only required to establish, on a balance of probabilities, that the disclosure could reasonably be expected to harm ... the interests of a third party.

I am satisfied that a large number of Third Parties reasonably expect significant harm to occur within the meaning of clause 14(1)(c) of the FOIPP Act and, as a result, all of the criteria of subsection 14(1) of the Act have been met in order for the Public Body to be successful in its argument that it was required to refuse disclosure to the Applicants.

To clarify, if any Third Parties disclose their involvement in the PNP or consent to have that information released, that is not in any way against this order. Such information belongs to the Third Parties and they may reveal it if they wish. The Public Body is reminded that clause 14(3)(a) of the FOIPP Act states that subsection 14(1) and (2) do not apply if the third party consents to a disclosure. In addition, I noted when reviewing the submissions of the Third Parties, that some Third Parties did consent to their involvement in the program being disclosed. However, some Third Parties indicated personally that they would consent, while their representative lawyer or accountant made submissions on their behalf refusing consent to disclosure. The Public Body must sort this out by locating those consents or the conflicting submissions and determining to what extent disclosure may be authorized by some of the Third Parties. Consent was indicated by a small number, but the Public Body is required to ensure that these consents are followed through.

The Public Body brought up an argument under section 5 of the FOIPP Act submitting that the confidentiality provision of section 11 of the *Island Investment Development Act* ("IIDI Act") prevailed over the FOIPP Act. That argument fails. The FOIPP Act is, in itself, inconsistent with the IIDI Act because the FOIPP Act requires that information be disclosed by a public body in accordance with the provisions of the FOIPP Act and subject to the exceptions contained in it. In the absence of a statutory overriding provision or a regulation made under the FOIPP Act, any disclosure of records held by a public body is subject in all respects to the FOIPP Act, and any refusal by a public body to disclose records must fall within the provisions of the FOIPP Act. In other words, there are circumstances under which a public body is required by the FOIPP Act to disclose records despite the confidentiality provisions of the IIDI Act. The authority for this interpretation is found in section 5 of the FOIPP Act. Section 5 of the Act says

> 5. (1) [Repealed]
>
> (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.
>
> (3) [Spent, 2004]

The IIDI Act does not have a provision whereby it expressly prevails over the FOIPP Act and there is no regulation under the FOIPP Act which states such a purpose. Therefore subsection 5(2) of the FOIPP Act makes it clear that section 11 of the IIDI Act does not apply to this case, nor to any issue involving an access request for information made under the FOIPP Act. Thus, the FOIPP Act prevails over the IIDI Act.

Finally, an important point that must be made clear is that this case is unique and will rarely, if ever, occur again. In order to invoke subsection 14(1) of the FOIPP Act there must be clear and convincing evidence that harm may reasonably ensue. As can be seen by earlier orders of this office and other jurisdictions, subsection 14(1) arguments may often fail. This Order is a response to one-of-a-kind circumstances that are not likely to be repeated. Every review by the Commissioner under the FOIPP Act must be decided on its own merits.

VII. FINDINGS

Four applicants made access requests using various wording for essentially the same goal – who applied for, or received, funding under the PNP. These four files were combined by me, because they all concern access to information requests made in respect of the PNP. These are the findings that flow from the above analysis:

1. I find that section 15 of the FOIPP Act applies only to individual human beings. Therefore, section 15 of the Act is not applicable to these access requests.

2. I find that subsection 14(1) of the FOIPP Act applies to the access requests on the grounds that (a) disclosure would reveal financial information of a third party; (b) the information was

supplied in confidence; and (c) disclosure could reasonably be expected to harm significantly the competitive position of a third party or result in undue financial loss to a third party.

3. I find that some Third Parties consented to disclosure to some extent. I find that the Public Body did not do enough to follow up on consents to disclosure or contradictory submissions by or on behalf of some Third Parties in respect of consent to disclosure. Any disclosure arising from such a consent must be carefully limited by the Public Body to only the specific information for which consent is given.

4. I find that the Public Body was correct in its refusal to disclose the records sought by all four of the Applicants, under subsection 14(1) of the FOIPP Act, subject to the concerns expressed in paragraphs 2 and 3.

VIII. ORDER

Thank you to the parties for their submissions, and for their useful and detailed arguments.

Based on the above findings,

1. I order the Public Body to provide to the Applicant that requested the names of persons paying application fees paid in respect of PNP, the aggregate amounts of application fees paid to it for each month in the calendar years 2007 and 2008, without the name or other information regarding these persons who applied under the PNP.

2. I order the Public Body to review the submissions of the Third Parties in respect of consents that may have been given to disclosure of some information as specified. Such disclosure must be carefully limited after checking with the Third Parties involved.

3. Subject to paragraphs 1 and 2, I order the Public Body to refuse to disclose information in relation to any of the four access requests dealt with by this order.

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.*

_____

Judith M. Haldemann
Acting Information and Privacy Commissioner