

ANNUAL REPORT

2012

**OFFICE OF THE
INFORMATION AND PRIVACY
COMMISSIONER**

PROVINCE OF PRINCE EDWARD ISLAND





Prince Edward Island Île-du-Prince-Édouard

Legislative Assembly

Assemblée législative

*Information and
Privacy Commissioner*
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*Commissaire à l'information et
à la protection de la vie privée*
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May 12, 2014

The Honourable Carolyn Bertram, MLA
Speaker of the Legislative Assembly
Province of Prince Edward Island
P.O. Box 2000
Charlottetown, PE
C1A 7N8

Dear Honourable Madam Bertram:

I am pleased to present to you my fourth annual report. The enclosed 2012 Annual Report of the Office of the Information and Privacy Commissioner, for the period January 1, 2012 to December 31, 2012, is the tenth report from this office and is submitted to you pursuant to subsection 59(1) of the *Freedom of Information and Protection of Privacy Act*.

Respectfully,

Maria C. MacDonald
Information and Privacy Commissioner

enclosure

MCM/ms



REPORT OF THE
INFORMATION AND PRIVACY COMMISSIONER
FOR THE
PROVINCE OF PRINCE EDWARD ISLAND

2012

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**OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER**

Commissioner's Message:

The *Freedom of Information and Protection of Privacy Act* (the “*FOIPP Act*”) came into force on November 2, 2002, and turned 10 years old in 2012. I am advised that the number of requests for access to information from our provincial public bodies increases each year. Public awareness of the right to access information and to protect privacy is constantly growing, so it is no surprise that people are exercising their rights more often.

DID YOU KNOW THAT... On December 2, 1975, a private members bill was tabled relating to access to information called *Access to Public Business Act*. [PE Journal of the Legislative Assembly 59th Leg, 3rd, Sess, 1995 *Report of the Special Committee on Access to Information* (19950309-0504) at 173] www.peildo.ca

In addition to continuing the 31 files carried over from previous years, I commenced 12 new reviews of public body decisions on access requests, and I issued one order. On top of these investigations and decision, 2012 was a year of assessment. I examined various aspects of the operations of the office to improving our efficiency, including an examination of its policies and procedures, resources and employee make-up.

With the present resources and office makeup, I am hard-pressed to accomplish the many responsibilities under my mandate, such as informing the public on the law, commenting on proposed laws and programs, or conducting proactive investigations into compliance (e.g. audits). Presently, the main focus of the Office of the Information and Privacy Commissioner (the “OIPC”) is adjudicating review files. Every decision must be reasonable and fair, be within the law and have a written explanation of the findings and reasons. The greatest and constant challenge of the OIPC over the past 10 years is to improve the timeliness of these reviews.

During 2012, I examined the demands on the office, its limitations and its requirements, and I continued to explore various avenues for additional solutions, over and above those previously implemented. One of the avenues I acted on was a request to the Standing Committee of Legislative Management for additional resources. I have a duty under the *FOIPP Act* to annually present “an estimate of the public money that will be required to be provided by the Legislature to defray the several charges and expenses of the Office of the Information and Privacy Commissioner in that fiscal year.” [s. 49]. I requested an increase to the OIPC budget to allow for the Commissioner’s position to become full-time and for an investigative officer position to be added to investigate and mediate existing files. The Standing Committee of Legislative Management denied my request due to fiscal challenges experienced by the Legislative Assembly and the province, as a whole. I accept the decision of the Standing Committee of Legislative Management. I believe it carefully considered my request and note that the budgets of a couple of the offices of the Legislative Assembly were reduced in 2012.

I applied to reclassify the administrative assistant position to incorporate investigation and mediation duties for early resolution of review files. Reclassification involves a detailed and thorough submission and analysis of the position's responsibilities, qualifications and duties and a comparison of them with other similar jobs in the government. The Standing Committee on Legislative Management partially accepted my request by considering the existing, expanded duties of the original position and reclassifying the position to administrative officer; however, it declined my request to reclassify the position to reflect an intended delegation of investigation and mediation duties.

The Administrative Officer plays a major role in keeping the operations and reviews of the OIPC running smoothly and efficiently. I acknowledge the challenge of this position. The Administrative Officer is committed to the important work of the OIPC and I thank her for her dedicated and professional service.

A public body can help itself if it helps the OIPC to understand its decisions on requests for access to information. If public bodies carefully consider each record on each request, and if they clearly set out and explain their decisions regarding access to each record, as required by law, they will be better prepared to defend their positions on a review by this office. Part of my examination of the operations of the OIPC identified work we are doing that public bodies ought to have completed while processing access requests. For example, we were frequently organizing and indexing records, finding that information public bodies withheld was publicly available and discovering policies, procedures and laws that directly relate to the matters before us.

This year, the Commissioner's Focus is a call for public bodies to assist the OIPC during a review. It is very difficult to review the decision of a public body if it provides little explanation or evidence in support of its own position. The province has policies and procedures relating to a public body's obligations under the *FOIPP Act*. Order FI-12-001 is an example of a public body that did not follow those procedures.

A significant anniversary is a time for celebrating past accomplishments and planning for future successes. The provision of adequate resources and continued training and education in the area of access and privacy will ensure that the obligations under the *FOIPP Act* are achieved.

Happy Anniversary!

Maria C. MacDonald,
Information and Privacy Commissioner

"The right of access to information is precious. No government should ever oppose it or impede it on the basis that it is too expensive, too time consuming or only the 'trouble-makers' use it. Accountable governments are better governments." - Frank Work, former Alberta Information and Privacy Commissioner, 2005

Overview of Activities of the Office of the Information and Privacy Commissioner:

Awareness Campaigns: Due to time constraints, I lessened my participation in the federal and international campaigns for awareness, including *Data Privacy Day* and *Right to Know Week*.



Data Privacy Day, an annual, international campaign held every January 28, focuses on the importance of limiting the amount of personal information shared online. Its 2012 slogan was, “*Less is more. Some things are better left unshared.*” The federal Office of the Privacy Commissioner supplied us with a variety of communication products to mark the day, including logo-bearing stickers, posters, collapsible water bottles and tablet sleeves that reflect the slogan. In addition, resource material was available on the federal Privacy Commissioner’s website for download and use. A 2012 calendar containing humorous cartoons and tips about topical privacy issues were also supplied for distribution. These resources were distributed to UPEI, Holland College, the Legislative Assembly, throughout the provincial government and offered on our website.

Right to Know Week, another annual, international campaign, was September 24-28, 2012. The OIPC promoted the importance of our right to know by posting various quotes about our rights to freedom of information and our democracy on the OIPC website and printing them on the bottom of emails.



Did you know that ... is a feature that was added to our website during 2012. We highlight important facts, current issues, interesting topics and links relating to access to information and protection of privacy of the province, the nation and internationally, that the public may find beneficial.

DID YOU KNOW THAT . . . A numerical password can be set on your electronic drug information and there is no cost! Your pharmacist will need access to the password in order to fill a prescription and you may be asked for your password at the hospital, but generally, the effect of setting a password is that access to your electronic medication record is limited to those persons you choose to share it with. The only exception, of course, is in the case of an emergency – the password can be overridden in an emergency.

The following is the link to the application form. Pick a strong password only known by you that is easy for you to remember, but hard for someone else to guess - even someone who knows you well. In otherwords, do not make your password your date of birth, phone number or address.

Pharmaceutical Information Program Application for Password

Speaking Engagements was limited to a presentation at Holland College to students in the Medical Support program. Together with Marina Fay, Privacy and Information Access Coordinator for Health PEI, we spoke about the *FOIPP Act* and privacy of health records.

Open Government: In 2011, the Canadian government committed to an international initiative promoting transparency, participation and collaboration. By joining this initiative, named the *Open Government Partnership*, our government agreed to create a national action plan. In response to the Treasury Board's online consultations on this plan, the federal, provincial and territorial Information and Privacy Commissioners and Ombudspersons made several recommendations in a joint letter dated January 19, 2012, to assist the government in developing its plan.

More information on Canada's Open Government is available at www.open.gc.ca. The joint letter is available on the Office of the Information Commissioner of Canada's website.

Recommendations of the Information and Privacy Commissioners and Ombudsperson of Canada on the Open Government Partnership Initiative

- Recommendation #1:** That the Government of Canada adopt "increasing public integrity" as one of its "grand challenges".
- Recommendation #2:** That the Government of Canada commit to increasing public integrity by modernizing the federal *Access to Information Act*.
- Recommendation #3:** That the Government of Canada commit to increasing public integrity by reversing the declining trends in compliance with federal access to information legislation.
- Recommendation #3.1:** That the Government of Canada support access to information and privacy professionals by providing sufficient resources and training.
- Recommendation #3.2:** That the Government of Canada commit to the rapid implementation of its records management policies.
- Recommendation #3.3:** That the Government of Canada implement a declassification process for government records.
- Recommendation #3.4:** That the Government of Canada implement a technology infrastructure based on national and international best practices.
- Recommendation #4:** That the Government of Canada commit to a multi-stakeholder consultation process that includes the public, civil society and Information and Privacy Commissioners.
- Recommendation #5:** That the Government of Canada's action plan include concrete commitments, specific timeframes, clear accountability and performance measures to facilitate self-assessment and independent oversight.

Bill C-30: Bill C-52, "*Investigating and Preventing Criminal Electronic Communications Act*", was a 2011 federal government initiative to amend the law that governs electronic search, seizure and surveillance by police and others. As reported last year, I joined my name, along with the other federal, provincial and territorial Privacy Commissioners and Ombudspersons, to a letter to the federal Deputy Minister of Public Safety Canada, expressing our concerns about the bill. The bill assigned an oversight mechanism to privacy officers responsible for organizations. Prince Edward Island does not have a federal or provincial privacy officer for our university, college or municipalities, including municipal police. I wrote a separate letter to the federal Deputy Minister of Public Safety Canada specifically about Prince Edward Island, advising that the bill contained a legislative gap in oversight for warrantless searches in Prince Edward Island. Parliament ended by prorogation before Bill C-52 received Royal Assent, so it died on the Order Paper.

On February 14, 2012, the federal government introduced another version of this legislation in the House of Commons as Bill C-30, “*An Act to enact the Investigating and Preventing Criminal Electronic Communications Act and to amend the Criminal Code and other Acts*” or “*Protecting Children from Internet Predators Act*”. Although the government made improvements to this next generation bill, serious privacy concerns remained. I wrote to the provincial Minister of Environment, Labour and Justice to share my concerns about Bill C-30, as it had substantially the same legislative gap for Prince Edward Island as did Bill C-52. I advised that, if passed, the provincial government would need to address the gap in oversight by provincial legislation. Given the public concerns and privacy issues, on February 11, 2013, federal Justice Minister Rob Nicholson announced that Bill C-30 would not proceed.

Perimeter Security: Following an announcement by Prime Minister Harper and President Obama of a new “perimeter security action plan” that will result in unprecedented cross-border information sharing, I joined my fellow Privacy Commissioners and Ombudspersons from across Canada in a detailed analysis of the plan from a privacy standpoint. In April 2012, we issued a joint resolution that provides guidance and recommendations for the federal government to ensure that the standards and values behind Canadian privacy laws do not diminish when developing the initiatives and to commit to finalizing joint privacy principles by May 30, 2012. The resolution is available online at www.priv.gc.ca.

Recommendations of the 2012 Joint Resolution of Privacy Commissioners and Ombudspersons of Canada include:

- Any initiatives under the plan that collect personal information should also include appropriate redress and remedy mechanisms to review files for accuracy, correct inaccuracies and restrict disclosures to other countries;
- Parliament, provincial Privacy Commissioners and civil society should be engaged as initiatives under the plan take shape;
- Information about Canadians should be stored on Canadian soil whenever feasible or at least be subject to Canadian protection; and
- Any use of new surveillance technologies within Canada such as unmanned aerial vehicles must be subject to appropriate controls set out in a proper regulatory framework.

Continuing Education of Staff: Mary-Lynn Smith, the OIPC’s administrative officer, completed the Conflict Resolution Certificate Program with the University of Prince Edward Island in June, 2012, obtaining a professional mediation designation. Ms. Smith applied for and received funding from the Legislative Assembly’s Employee Development and Training Fund to cover the costs of tuition.

I attended a continuing legal education workshop entitled “*From Facts to Findings, Effective Gathering and Presentation of Evidence*”. In addition, realizing that a large number of parties in reviews with the OIPC represent themselves without any legal counsel or assistance, I enrolled in a correspondence course offered by the Council of Canadian Administrative Tribunals entitled “*Literacy and Access to Administrative Justice in Canada*”. This course explains how weak literacy affects a proceeding, and it gives tips to help explain things in plain language that people can easily understand and apply.

During the spring of 2012, I attended French language training at Collège Acadie Î.-P.-É. I look forward to continuing my French language training in 2013.

Travel: The 7th Annual Maritime Access and Privacy Workshop, held June 6-7, 2012, in Halifax, Nova Scotia, was themed “*Advancing Maritime Access & Privacy Program*”. This was my first occasion attending the workshop. It was an opportunity for me to meet, network and share ideas with colleagues from the access and privacy community across the Maritimes. Dulcie McCallum, Nova Scotia Review Officer, Anne Bertrand, Q.C., New Brunswick Access to Information and Privacy Commissioner, and I participated in a question and answer forum called an “*oversight body bear pit*”. I appreciated listening to and learning from the many presenters at this two-day workshop. Topics included the challenges of access and privacy with municipalities; video surveillance; privacy, health care and health information legislation; privacy impact assessments; in-camera meetings; solicitor-client privilege; order-making powers of oversight bodies; technology solutions; balancing collaboration, privacy and security; building an access and privacy program; remedies for invasions of privacy; and IT security and cloud computing.

I returned to Halifax September 4-7 to attend the 2012 Federal/Provincial/Territorial Information and Privacy Commissioners’ Summit. This annual conference gives us an opportunity to share lessons learned and to collaborate on shared issues.

Canada Health Infoway is a federal/provincial/territorial group of health and privacy professionals coordinating electronic health records across Canada. I attended part of the November 2012 Infoway meeting held in Vancouver, BC, via teleconference.

The OIPC website posts expense claims for travel by employees of the OIPC under “*Proactive Disclosure*”.

Budget: This annual report covers activities of the OIPC during the calendar year of 2012 in all respects except the budget. The reporting period of the budget is from April 1, 2012 to March 31, 2013.¹

	<i>2012-2013 Budget Forecast</i>	<i>2012-2013 Budget Estimate</i>	<i>2012-2013 Expenditures</i>
Administration	4,900.00	4,900.00	2,319.00
Materials, Supplies and Services	1,600.00	1,600.00	59.00
Professional and Contract Services	1,000.00	1,000.00	1,650.00
Salaries, benefits and contributions	99,800.00	99,800.00	111,687.00
Travel and Training	5,000.00	5,000.00	3,379.00
Total	112,300.00	112,300.00	119,092.00

The OIPC stayed within its allocated budget in all areas but salaries and legal services. The cost overrun in salaries reflects the reclassification of the administrative assistant position to an administrative officer and province-wide amendments to the collective agreements.

The OIPC budget does not give the whole picture of the operating expenses of the office. The costs of some of the supplies and services the office receives is absorbed by other departments of the provincial government and the Legislative Assembly (e.g. office space and utilities, photocopy paper, accounting services, printing services, IT support and personnel services).

¹ This information is taken from page 157 of the *Prince Edward Island Estimates of Revenue and Expenditures 2012-2013*, as found at: http://www.gov.pe.ca/photos/original/fema_bdgtestim.pdf and page 147 of the *Prince Edward Island Estimates of Revenue and Expenditures 2013-2014*, at: http://www.gov.pe.ca/photos/original/fema_bgtestim13.pdf

Update to 2011 Annual Report:

Judicial Review of Order No. FI-10-007: The Department of Innovation and Advanced Learning (“I&AL”) refused several requests for access to records of the Island Investment Development Inc. (“IIDI”) about the Provincial Nominee Program (“PNP”), the name of its participants and the number of units each participant received. I&AL withheld information citing sections 14 [business interests] and 15 [personal privacy] of the *FOIPP Act*. Four of the applicants asked the OIPC to review the decision that each had received from I&AL. Acting Information and Privacy Commissioner Judy Haldemann dealt with all four reviews in Order No. FI-10-007. The Commissioner determined that section 15 did not apply, but upheld I&AL’s decision to refuse access based on section 14. One of the four applicants, the CBC, asked the Supreme Court of PEI to judicially review Order No. FI-10-007, claiming the Commissioner erred in fact and law.

The judicial review was heard before the Honourable Justice Wayne D. Cheverie of the Supreme Court of PEI on March 26-29, 2012. He issued his decision, No. S1-GS-23769, on November 2, 2012. He determined that the standard of review was reasonableness, as the Commissioner was interpreting and applying her home statute, the *FOIPP Act*.

With respect to section 15 [personal privacy], Honourable Justice Cheverie found the Commissioner to be reasonable in her interpretation. Only companies were eligible for the PNP program and, although a company is a ‘person’ under the *Interpretation Act*, the *FOIPP Act* defines personal information as relating to an identifiable individual; therefore, section 15 was not applicable to the cases before her. He further found that the Commissioner’s decision to consolidate the four files in one order was reasonable.

“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 P.E.I. Order No. FI-10-001, at page 10.”

- Acting Commissioner Judy Haldemann, Order No. FI-10-007 at page 24.

Under subsection 14(1) of the *FOIPP Act*, the following three elements are required in a record before a public body can refuse to disclose the information:

- 1) the information, if disclosed, must reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party;
- 2) the information must be supplied explicitly or implicitly in confidence; and

- 3) the information, if disclosed, must be reasonably expected to result in one or more of the specific harms listed under clause 14(1)(a).

Decision No. SI-GS-23769 is posted on the OIPC website at www.oipc.pe.ca under *Rulings*. In his decision, Honourable Justice Cheverie gives guidance on the threshold of the harms under subsection 14(1) of the *FOIPP Act* and the evidence that meets this threshold. He found the Commissioner's decision to uphold IIDI's refusal to disclose the number of units each participant received under the PNP was reasonable and that the harm described in clause 14(1)(c) of the *FOIPP Act* was amply proved and met the test of significant harm. He further found that the Commissioner's decision to uphold IIDI's refusal to disclose the corporate names of the PNP participants was indefensible upon the facts and law and was not reasonable. He held that the evidence provided by the parties was not detailed or convincing and was more of an argument of possibilities, conjecture and speculation, and not evidence.

Lessons learned: Evidence provided by the parties must be detailed and convincing, and not an argument of possibilities, conjecture and speculation.

Corporations do not have "personal information". Information about a corporation cannot be withheld from disclosure under section 15 of the FOIPP Act [unreasonable invasion of personal privacy]

Judicial Review of Order No. PP-10-001: An individual named in a decision of the Island Regulatory and Appeals Commission ("IRAC") submitted a privacy complaint to the OIPC, particularly because IRAC posts its decisions online with the names of the parties. In Order No. PP-10-001, Acting Commissioner Judy Haldemann dismissed the privacy complaint because the Complainant was adequately notified that IRAC holds its hearings in public and the resulting orders are published online; however, Acting Commissioner Haldemann ordered that IRAC not publish names of non-party witnesses in its published orders. IRAC asked the Supreme Court of PEI for a judicial review of Order No. PP-10-001, claiming that the Commissioner erred by considering an issue that was not part of the complaint before her and by rendering a decision without requesting submissions from the parties.

The hearing of the judicial review came before the Honourable Justice Benjamin B. Taylor of the Supreme Court of PEI on February 21, 2012, and he issued his decision on August 31, 2012.

The applicable standard of review was correctness on the question of procedural fairness. Subsection 64(3) of the *FOIPP Act* provides that the parties to an inquiry have an opportunity to make representations. Honourable Justice Taylor pointed out that the Commissioner did not give the parties notice of her consideration to the issue of publishing names of non-party witnesses in published orders. The Commissioner had a duty to give IRAC an opportunity to make representations, being a clear entitlement to procedural fairness.

“I find the Commissioner acted beyond her jurisdiction:

- (1) in failing to give notice to and receive submissions from the parties, particularly IRAC;*
- (2) in failing to gather evidence in conducting an inquiry or review; and*
- (3) and although the Commissioner could have proceeded with an inquiry or review without a complaint or request, in deciding an issue not before her without notice to the parties.*

As a result, I would nullify that part of the June 4, 2010 Order of the Commissioner which deals with the publication of names of non-party witnesses in decisions of IRAC.”

- The Honourable Justice Benjamin B. Taylor, Decision No. SI-GS-23775 at para 9.

The Commissioner has the right to conduct investigations on his/her own and to make orders whether or not someone requested a review. The Commissioner can also require a public body to stop collecting, using or disclosing personal information in violation of Part II. During an inquiry, the parties must have the opportunity to make representations to the Commissioner. Honourable Justice Taylor found that the Commissioner acted beyond her jurisdiction in failing to give notice to and receive submissions from the parties and in failing to gather evidence when conducting her inquiry or review. Although the Commissioner may proceed with an inquiry or review without a complaint or request, she must gather evidence from the parties before deciding an issue. Honourable Justice Taylor nullified that part of the order dealing with publishing names of non-party witnesses in decisions of IRAC.

Lesson learned: Make sure that parties to a review have an opportunity to speak to any issue the Commissioner addresses in an order.

DID YOU KNOW THAT . . . The Ontario Court of Appeal broke new ground by recognizing a right to bring a civil action for damages for the invasion of personal privacy. The Plaintiff discovered that a bank employee had been surreptitiously looking at her banking records. The employee had gained access to her personal financial records at least 174 times over a period of four years. In his decision, Justice R. J. Sharpe states:

[68] It is within the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form. Technological change poses a novel threat to a right of privacy that has been protected for hundreds of years by the common law under various guises and that, since 1982 and the *Charter*, has been recognized as a right that is integral to our social and political order.

[69] Finally, and most importantly, we are presented in this case with facts that cry out for a remedy.

Justice Sharpe fixed the range of damages for intrusion upon seclusion at up to \$20,000. The Plaintiff was awarded \$10,000.00 in damages. [*Jones v. Tsige*, 2012 ONCA 32 (CANLII)]

Summary of Order No. FI-12-001

The FOIPP Guidelines and Practices Manual is a comprehensive reference available to public bodies to help them carry out their obligations. This resource contains explicit instructions on processing a FOIPP request. Chapter 3.3 outlines all of the duties a FOIPP coordinator will carry out when processing an access request. After carefully reviewing and considering both the procedures that are expected from a public body and the documentation Tourism PEI provided to me, I question whether this public body:

- *created a separate file for the access request;*
- *searched for, or collected records;*
- *considered providing partial release of the record by severing the information the third party wanted withheld;*
- *performed a line-by-line review of the record;*
- *based its decision on the statutory factors of section 14 of the FOIPP Act;*
- *had the evidence on which it based its bare submissions;*
- *appreciated its obligation to the third party to advise it that some of the information was already in the public realm; and*
- *appreciated its obligation to reply fully with me on this review.*

- Commissioner Maria C. MacDonald, Order No. FI-12-001 at para 75.

Order No. FI-12-001 - The Applicant applied for access to a contract in the custody and control of the Department of Tourism and Culture made between Tourism PEI and a third party. The Third Party asked the Public Body to withhold the contract based on subsection 14(1) of the *FOIPP Act*, claiming that disclosure would harm the business interests of the Third Party. Tourism PEI withheld the record on this basis. The Applicant sought a review of the decision.

The business interest exception requires a public body to protect limited and specific information submitted by a business to the province in confidence, and if its disclosure could cause certain kinds of harm. The Commissioner found that a very small amount of the information contained in the record was business and financial information, but that the information was not submitted by the Third Party and that its disclosure would not cause any of the harms listed in the *FOIPP Act*.

Although the Applicant requested that the Commissioner discontinue the review as the record was no longer relevant due to delays,

the Commissioner continued the review under subsection 50(1) of the *FOIPP Act*. The Commissioner found that the Public Body took several shortcuts and fell short of its obligations and responsibilities under the *FOIPP Act*. The Public Body provided insufficient evidence to prove it was required to withhold the record.

The Third Party and the Public Body claimed they were attempting to protect trade secrets. The Commissioner could not find any trade secrets in the short memorandum of understanding. The Third Party and the Public Body did not identify the information they were seeking to protect; they claimed the entire record contained business secrets that section 14 intended to protect. Both claimed that the Third Party supplied the information, but neither party provided any records or evidence to support this assertion. The Third Party did not want the Public Body to disclose the contract price, but the Public Body had already revealed this information in its usual public accounting. The parties provided no evidence to show that this disclosure harmed the Third Party. It is very difficult to review a decision of a public body that provides such little evidence in support of its own position.

Noting the Applicant said it no longer required the record, the Commissioner did not order the Public Body to disclose the record. The Commissioner recommended the head of the Public Body ensure that staff of the Public Body who are responsible for the *FOIPP Act* receive adequate training. The OIPC appreciates the Public Body's public acknowledgement of having failed in handling the access request and of its commitment to FOIPP training and compliancy.

"We hope that we're gonna be able to comply more timely fashion in future, as well as in a more accurate fashion. ... What the Freedom of Information Commissioner has identified has been very educational from our department's perspective and we hope we can be more compliant in future."

- Tourism Minister Robert Henderson, Interview by Ryan Hicks (04 June 2012) CBC Compass

Commissioner's Focus:

I issued an order in 2012 primarily to address a public body's aptitude or attitude in processing an access request and to address its involvement with the OIPC review of its decision. The Applicant advised that he no longer required the records; however, he was likely unaware of the shortcuts the Public Body took in processing his access request. My intention in carrying on with the review was to "stimulate an attitude more reflective of the culture of transparency that our access legislation is designed to promote."

When a public body receives an access to information request, it must search for any responsive records, review them to see if any of the several exceptions to disclosure apply to the information contained in the records, then make its decisions about disclosure. A public body could easily make a hundred decisions on one access to information request. The *FOIPP Act* says that if a public body decides to deny access to information to an applicant, the public body must tell the applicant "the reasons for the refusal" and the provision of the *FOIPP Act* on which the refusal is based. Complying with the spirit and the letter of the law compels a public body to examine the provisions it is relying on and the information it is considering to disclose or withhold. In addition to the obligation to explain its position and reasons to an applicant, if the public body has decided to withhold information, it has the burden of proof to the OIPC. For every instance it withholds information, a public body must explain exactly how the provision it is claiming applies. In most instances, a public body has the best understanding of the records, its programs and what is at stake if the information is disclosed. As Commissioner, I expect a public body to be able to defend its decisions.

As I review work of 2012, I see several examples of submissions that I consider less than robust. Information that could be, or is required to be withheld, is sometimes obvious from the content of the record, but more often it is not. On many occasions, public bodies just state the number of the section of the *FOIPP Act* on which they rely without providing the specific subsection and clause. I often receive submissions from public bodies with vague claims that do not specify or even describe the specific information it withheld. A public body has already assessed the records and the exceptions to disclosure. It is more efficient for a public body to pinpoint and explain why it decided to withhold the information, than for the OIPC to hunt for the information the public body claims is subject to an exception. Even though it is not a task the OIPC is obliged to do, the OIPC must often undertake line-by-line reviews of records at issue to ensure that the *FOIPP Act* is followed and the claims of the public bodies are reasonable. I urge public bodies to be specific when claiming an exception to disclosure and to provide a detailed explanation in support of the exception on which is being relied.

"My detailed observations on how this file was processed are presented with the objective of improving the services provided to citizens when exercising their legal right of freedom of information, including the decision-making by our public bodies. In my opinion, the head of the Public Body took shortcuts with both the Applicant's access request and the subsequent review by this office. Improper processing of a request for access to information and analysis of a record is a disservice to an applicant, a third party and the general public."

- Commissioner Maria C. MacDonald, Order No. FI-12-001 at para 85.

“I am not able to assess whether Tourism PEI failed to appreciate its responsibilities under the FOIPP Act, or whether it was denying access for reasons that do not fall within the FOIPP Act. I reiterate that I do not hold any public body to the standard of perfection, but it is difficult to give a public body the benefit of the doubt that it is not aware of its obligations when the legislation has been in force for almost 10 years.”

– Commissioner Maria C. MacDonald,
Order FI-12-001 at para 100.

The work involved at the public body level is not under my direct supervision. Each public body designates an employee as its FOIPP coordinator, to administer access to information requests and protection of privacy issues; however, administering the FOIPP Act is not usually a FOIPP coordinator’s sole function. Although some public bodies receive more requests for access to information and their FOIPP coordinators gain more experience in FOIPP matters than other FOIPP coordinators, all public bodies have access to advice, expertise and resources to assist with access requests and with reviews by the OIPC. The government has a FOIPP manual and the Department of Environment, Labour and Justice has a Manager of Access and Privacy Services.

I encourage each public body to support its FOIPP coordinator with training, networking and resource development. My encouragement may appear to be magnanimous, but it is really self-serving. A properly processed request for access to information requires a public body to perform a thorough review of the records, a thoughtful analysis and, if withholding information, have a clear and detailed explanation of its reasons to provide to the applicant. A properly processed access request will make for a more efficient review by the OIPC.

DID YOU KNOW... In 1977, a government bill entitled *Access to Public Documents Act* (Bill No. 53) was introduced in the Legislative Assembly of Prince Edward Island. It received 1st reading on May 12 and subsequently died on the Order Paper. [PE Journal of the Legislative Assembly 59th Leg, 3rd Sess, *Report of the Special Committee on Access to Information* , 19950309-0504) at 173]

STATISTICS

Summary of Requests for Review January 1, 2012 – December 31, 2012

Public Body	Access to Information		Protection of Privacy		Resolved in 2012 (without an order)	Order issued in 2012	Carried Forward to 2013
	<i>carried over from previous years</i>	<i>2012 requests</i>	<i>carried over from previous years</i>	<i>2012 requests</i>			
Agriculture and Forestry	1	0	0	0	0	0	1
Commission scolaire de langue française	0	0	0	0	0	0	0
Community Services and Seniors	1	2	0	0	1	0	2
Eastern School District	4	1	2	0	0	0	7
Education and Early Childhood Development	1	1	1 <i>[overlaps with above-noted ESD file]</i>	0	0	0	2 <i>[+ 1 overlaps with above-noted ESD file]</i>
Elections PEI	0	0	0	0	0	0	0
Environment, Labour and Justice	0	5	0	0	0	0	5
Executive Council Office	0	0	0	0	0	0	0
Fathers of Confederation Buildings Trust	0	0	0	0	0	0	0
Finance, Energy and Municipal Affairs	2	0	2	0	0	0	4
Fisheries, Aquaculture and Rural Development	0	0	0	0	0	0	0
Health and Wellness	0 <i>[1 transferred to Health PEI]</i>	1	1 <i>[overlaps with above-noted FEMA file]</i>	0	0	0	2 <i>[+ 1 overlaps with above-noted FEMA file]</i>

Public Body	Access to Information		Protection of Privacy		Resolved in 2012 (without an order)	Order issued in 2012	Carried Forward to 2013
	<i>carried over from previous years</i>	<i>2012 requests</i>	<i>carried over from previous years</i>	<i>2012 requests</i>			
Health PEI	3 [1 transferred from H&W]	2	2	0	0	0	7
Innovation and Advanced Learning	8	0	1	0	4	0	5
Island Regulatory and Appeals Commission	0	0	1	0	1	0	0
Island Waste Management Corporation	0	0	0	0	0	0	0
Office of the Premier	0	0	0	0	0	0	0
PEI Liquor Control Commission	0	0	0	0	0	0	0
PEI Public Service Commission	0	0	0	0	0	0	0
Tourism and Culture	1	0	0	0	0	1	0
Transportation and Infrastructure Renewal	1	0	0	0	0	0	1
Western School Board	0	0	0	0	0	0	0
Workers Compensation Board of Prince Edward Island	0	0	1	0	0	0	1
Workers Compensation Appeals Tribunal	0	0	0	0	0	0	0
TOTAL	22	12	9	0	6	1	36