

ANNUAL REPORT

2013

**OFFICE OF THE
INFORMATION AND PRIVACY
COMMISSIONER**

**PROVINCE OF PRINCE EDWARD
ISLAND**





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

2013



Prince Edward Island Île-du-Prince-Édouard

Legislative Assembly

Assemblée législative

Information and
Privacy Commissioner
PO Box 2000, Charlottetown PE
Canada C1A 7N8

Commissaire à l'information et
à la protection de la vie privée
C.P. 2000, Charlottetown PE
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April 2, 2015

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 the enclosed 2013 Annual Report of the Office of the Information and Privacy Commissioner for the period January 1, 2013 to December 31, 2013. This is the eleventh 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

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OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

Commissioner's Message:

The Commissioner's job is important, interesting and challenging. Each file has its own set of unique facts and issues. I continue to learn about the law, the Commissioner's role and the policies and programs of government. The Commissioner can issue binding orders to resolve issues that, in turn, become precedents and help resolve future cases by establishing rights about government information and personal information. Although a large part of the job is to develop and apply the law, in 2013 I received and resolved four third party requests to review that did not have such noble impacts of legal interpretation.

The *FOIPP Act* does not protect all business information of a third party, but if disclosure would reveal business information that a third party gave to a public body in confidence and the disclosure would harm the business, the public body must not disclose it. If a public body does not find that this exception from the *FOIPP Act* applies to the business information and decides to disclose it, a third party can ask the Commissioner to review the public body's decision. In these circumstances, a third party has the burden of proof and my approach is to hold a third party to its burden of proof from the beginning of a review.

For each of the third party reviews I received in 2013, I asked the third party to highlight the business information it objected to disclosing. When my requested response dates passed, I followed up. The third parties had lots of time, the records were not long and it was not a time consuming or difficult request. One of the third parties withdrew its request to review, one responded and two did not respond at all. I wondered why they would ask me to review these matters, if they were not planning to participate in the review. When a third party requests a review by the Commissioner, the public body cannot disclose the records at issue until the review is complete. I could not help but wonder whether these businesses were using the review process to delay disclosure. There is no cost for a third party to ask for a review, there is no risk of any penalty to a third party and I have no jurisdiction to review the actions of a third party. Although it is still time-consuming, I consider it a success that the approach of holding third parties to their burden of proof has rooted out claims without merit at the outset.

Fourteen files were resolved in 2013 and 30 files were carried over to 2014; this is down from the 36 files that were carried over from the year before.

During the last three years, I received a couple of requests for information about the number of ongoing files of the office. In addition to proactively disclosing the expenses of the office on our website since 2011, in 2013 I commenced proactively disclosing monthly statistical information about the number of files open, resolved and gone to an order.

In closing, I particularly want to thank Mary-Lynn Smith for her continued dedication to the important work of the office.

Maria C. MacDonald,
Information and Privacy Commissioner

Overview:

- Mandate:** The Commissioner's office is an independent, quasi-judicial body, generally responsible for monitoring how public bodies administer the *Freedom of Information and Protection of Privacy Act*. The Commissioner conducts investigations and inquiries, provides advice and recommendations, issues orders, comments on proposed programs and informs the public about the *Act*.
- Vision:** Effective, independent oversight and review of public bodies that stimulates strong access to information and protection of privacy practices.
- Mission:** To provide vigilant oversight of the administration of access to information and protection of privacy practices of public bodies. To investigate complaints thoroughly, attempt to resolve them and to adjudicate fairly and independently.
- Values:** Fairness, Openness & Transparency, Respect for Privacy and Excellence
- Office:** The office makeup includes the Commissioner's position, which is a part-time position (60% or 22.5 hours per week) and one full-time Administrative Officer position.
- Commissioner:** The Information and Privacy Commissioner is appointed by the Legislative Assembly under section 42 of the *Freedom of Information and Protection of Privacy Act* for a five-year term and reports at least annually to the Legislative Assembly. The Commissioner is independent of the government to ensure impartiality.
- Law:** The *Freedom of Information and Protection of Privacy Act*, SPEI 2001 Cap. F-15.01 came into force in 2002 and is generally referred to by the acronym "the *FOIPP Act*".
- Purpose:** The best description of the intention of the *FOIPP Act* is found in the list of its purposes at section 2:
2. *The purposes of this Act are*
- (a) *to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act;*

- (b) to control the manner in which a public body may collect personal information from individuals, to control the use that a public body may make of that information and to control the disclosure by a public body of that information;*
- (c) to allow individuals, subject to limited and specific exceptions as set out in this Act, a right of access to personal information about themselves that is held by a public body;*
- (d) to allow individuals a right to request corrections to personal information about themselves that is held by a public body; and*
- (e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.*

**Legislative
Responsibility:**

The Commissioner performs independent reviews of decisions by public bodies about access to information or correction of personal information and investigates people's complaints that their personal information has been collected, used or disclosed in violation of the *FOIPP Act*.

The Commissioner's other functions include:

- 50. (1) In addition to the Commissioner's functions under Part IV, with respect to reviews, the Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may*
- (a) conduct investigations to ensure compliance with any provision of this Act or compliance with rules relating to the destruction of records set out in any other enactment of Prince Edward Island;*
 - (b) make an order described in subsection 66(3) whether or not a review is requested;*
 - (c) inform the public about this Act;*
 - (d) comment on the implications for freedom of information or for protection of personal privacy of proposed legislative schemes or programs of public bodies;*
 - (e) comment on the implications for protection of personal privacy of using or disclosing personal information for record linkage;*
 - (f) authorize the collection of personal information from sources other than the individual the information is about;*
 - (g) bring to the attention of the head of a public body any failure by the public body to assist applicants under section 8; and*
 - (h) give advice and recommendations of general application to the head of a public body on matters respecting the rights or obligations of a head under this Act.*
- (2) Without limiting subsection (1), the Commissioner may investigate and attempt to resolve complaints that*
- (a) a duty imposed by section 8 has not been performed;*
 - (b) an extension of time for responding to a request is not in accordance with section 12;*
 - (c) a fee required under this Act is inappropriate;*
 - (d) a correction of personal information requested under subsection 34(1) has been refused without justification; and*
 - (e) personal information has been collected, used or disclosed by a public body in violation of Part II.*

Year in Review:

Heading into 2013, the office had 36 open reviews; at the end of 2013, it had 30 open reviews. The eight new requests for review received in 2013 were of the following types:

- two about a public body's decision on an access to information request;
- one about a public body's fee estimate;
- four from third parties about disclosing business information; and
- one privacy complaint that a public body improperly disclosed personal information.
-

Fourteen files were closed in 2013; they were either investigated but did not proceed to inquiry, resolved by negotiation of the parties or resolved by an order.

The Commissioner issued seven decisions in 2013:

- one decision refuses a third party's request for review (13-001);
- three decisions refuse to conduct an inquiry (RI-13-001, RI-13-002 and RI-13-003);
- two orders about freedom of information re fee estimates and waivers (FI-13-001 and FI-13-002); and
- one order about protection of privacy (PP-13-001).

As part of the Commissioner's mandate is to inform the public about the law, the Commissioner gave four presentations on the *FOIPP Act*: to the PEI Citizens Alliance in February 2013; to provincial FOIPP Coordinators in June 2013; to the UPEI Faculty Association in October 2013; and to students of the Holland College Medical Support Services program in December 2013.

As part of the Commissioner's mandate is to comment on proposed legislative schemes or programs of public bodies, the Commissioner wrote to the responsible Ministers regarding proposed amendments to the *Public Health Act*, the *Disability Supports Act* and the *Workers Compensation Act*. The Commissioner commented on legislative matters, including the early drafts of the *Health Information Act*, which consultation continued into 2014. The Commissioner wrote to the Minister of Environment, Labour and Justice, expressing support for a suggested program change to centralize the processing of access to information requests.

The Commissioner joined with her colleagues from Alberta and Nova Scotia in a Supreme Court of Canada case as co-interveners in an appeal about the exception to disclosure of advice and recommendations. As interveners, they did not take a position with respect to the facts of the case, but rather intervened to provide information on how other provinces interpret similar provisions.¹

TIP: PEI used to require that if a public body was withholding information about advice and recommendations [clause 22(1)(g)], the information had to have been communicated to a decision maker. The Supreme Court of Canada held that the information does not need to be communicated to a decision maker to fall within this exception to disclosure.

Many laws govern the collection, use and disclosure of personal information and all of them contain provisions to allow for the sharing of personal information in the event of an emergency. In an emergency, privacy laws are not a barrier to appropriate information sharing, nor should they be used as an excuse for inaction. Seeing the need for guidance, and in consultation with the commissioners across Canada, the federal Privacy Commissioner's office created guidelines on privacy in an emergency. The purpose of the emergency kit is to help organizations enhance the timeliness and content of communications during an emergency, while giving people confidence that their personal information will be handled appropriately.

The Commissioner attended the 2013 Federal/Provincial/Territorial Conference of Information and Privacy Commissioners and Ombudsmen, held in Vancouver, BC. The commissioners issued a joint resolution that called upon the federal, provincial and territorial governments to update and modernize their respective access and privacy laws to meet the realities of the 21st century². After these meetings, there was a two-day conference presented by the Office of the Information and Privacy Commission of British Columbia entitled "Privacy and Access 20/20: A New Vision for Information Rights". The conference focused on new approaches, tools and strategies necessary to address the challenges arising from new technology like big data, GPS navigation, mobile devices and facial recognition.

Both the Commissioner and the Administrative Officer took French language courses with Collège Acadie Î.-P.-É. The Commissioner and Administrative Officer joined the employees of the other provincial and federal oversight offices at an investigators conference in Ottawa, ON. Not only did they receive quality instruction on investigative techniques, the conference provided an avenue for colleagues to share experiences with an outlook for improving common practices.

¹ Supreme Court of Canada decision on the interpretation of "advice and recommendations" under access to information legislation, <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13633/index.do>

² News Release and Resolution from the Federal-Provincial-Territorial Meeting of Information and Privacy Commissioners and Ombudspople, October 9, 2013 on Modernizing Access and Privacy Laws for the 21st Century, http://www.gov.pe.ca/photos/original/oipc_modlaw21.pdf

Decisions and Rulings

Refusal to Accept a Request for Review:

61. (1) To ask for a review under this Division, a written request shall be delivered to the Commissioner.

(2) A request for a review of a decision of the head of a public body must be delivered to the Commissioner

- (a) if the request is pursuant to subsection 60(1), (3) or (4), within
 - (i) 60 days after the person asking for the review is notified of the decision, or
 - (ii) any longer period allowed by the Commissioner; or
- (b) if the request is pursuant to subsection 60(2), within 20 days after the person asking for the review is notified of the decision.

Decision No. 13-001: An applicant requested access to records that may have contained business information of two third parties acting as partners in a proposal. After consulting with the third parties, the Public Body decided to disclose the records to the Applicant. The Public Body informed the third parties of its decision and advised them about their right to ask the Commissioner for a review of its decision within the statutory 20-day time limit. One of the third party partners submitted a request for review on its own behalf, but shortly after withdrew the request. The other third party partner submitted a request for review 56 days after the date of the decision letter and at least 48 days after the decision letter was received. As the Commissioner does not have the discretion to accept a third party request for review submitted beyond the statutory 20-day time period or to extend the limitation period, the Commissioner issued a decision refusing to accept the third party's request for review.³

TIP: The Commissioner cannot extend the 20-day limitation period, so make sure the Commissioner receives your request to review within the time allowed.

The 20-day time limit starts from when the third party is notified of the decision. This is not usually the date the letter is mailed, and there are no statutory presumptions about mail delivery times. If you are a third party, make a note of the date you received the notice. If you are a public body, generate evidence about the date of notification by sending letters with built-in date confirmations, e.g. by sending notifications by fax, e-mail or courier.

³ The Commissioner was not able to accept the request to review, so the request and the decision are not included in the statistics at page 12 of this report.

Refusal to Conduct an Inquiry:

64.1 *The Commissioner may refuse to conduct an inquiry pursuant to section 64 if, in the opinion of the Commissioner,*

- (a) the subject matter of a request for a review under section 60 has been dealt with in an order or investigation report of the Commissioner; or*
- (b) the circumstances warrant refusing to conduct an inquiry.*

The Commissioner refused to conduct an inquiry in response to three separate third party requests for review. In each instance, an applicant requested access to records containing third party business information and, after consulting with the third party, the public body decided to disclose the records. In each instance, the third party asked the Commissioner to review the public body's decision. Under these circumstances, the third party bears the burden of proof (s. 65(3)(b) of the *FOIPP Act*). In each instance, the Commissioner was persuaded that the third party would not be able to meet its burden of proof and refused to conduct an inquiry.

RI-13-001, Re: Department of Transportation and Infrastructure Renewal

An applicant asked for information about snow removal, including contracts. One of the contractors claimed the Public Body was required to withhold information under subsection 14(1) of the *FOIPP Act* [disclosure harmful to business interests of a third party]. When asked, the Third Party was unable or unwilling to identify the information it claimed the Public Body is obliged to withhold.

RI-13-002, Re: Department of Transportation and Infrastructure Renewal

An applicant asked for information about snow removal, including contracts. One of the contractors claimed the Public Body was required to withhold information under subsection 14(1) of the *FOIPP Act* [disclosure harmful to business interests of a third party]. When asked to highlight the information it objected to the Public Body disclosing, the Third Party highlighted information that is already of public record, including information published in the Public Body's annual general reports, and it highlighted information that may have been commercial information, but was not supplied in confidence to the Public Body by the Third Party.

RI-13-003, Re: Department of Health and Wellness

An applicant asked for information about a specific nursing home, including inspections, reports, recommendations and follow ups. After consulting with the third party business, the Public Body decided to disclose the information with the names of employees severed. The Third Party asked the Commissioner to review the decision, claiming that the Public Body was required to withhold personal information under section 15 of the *FOIPP Act* and business information under subsection 14(1). The Commissioner asked the Third Party to highlight the information it objected to the Public Body disclosing. The Third Party was unable or unwilling to identify the information it claimed the Public Body is obliged to withhold.

Order re Access to Information - Fee Estimate and Waiver:

Public bodies can charge fees for processing access to information requests up to the maximum allowances set out in the fee schedule in the regulations, but not exceeding the actual cost. Before processing a request, a public body provides the applicant with an estimate of fees. An applicant can ask a public body to waive the fees, if the applicant cannot afford the fee, or if the records relate to a matter of public interest.

FI-13-001, *Re Health PEI*

The Applicant received three fee estimates. He asked the Commissioner to review the estimates; he also asked for a fee waiver because the records related to matters of public interest. The Commissioner did not uphold the fee estimates, because the Public Body did not meet the standard of proof about how it came up with its estimates. The Commissioner ordered the Public Body to reduce the fee estimates, including reducing photocopying rates from the maximum allowable rate of \$0.25 per page to \$0.08 per page.

“I acknowledge that fee estimates will frequently vary from the actual cost, but adjusting the fee after the request is processed is not a sum-zero solution if an overestimated fee deters an applicant from exercising his or her legal right of access. A public body must produce a reasonable fee estimate.”

- Commissioner Maria C. MacDonald, Order FI-13-001 at para. 29.

The very first order issued from this office suggests that public bodies help applicants make informed decisions about reducing the scope of their request by providing an applicant with information about the types of records it possesses. The Commissioner found that the Public Body did not fulfill its duty to assist the Applicant, because it did not give the Applicant any information regarding the records in its possession (e.g., samples, indices or summaries).

The very first order issued from this office⁴ also rejects a public body’s consideration of an applicant’s identity and whether the applicant is motivated by commercial or other private interests. The Commissioner found that the Public Body incorrectly considered the Applicant’s identity and whether the Applicant was motivated by commercial or other private interests when

⁴ Order 03-001, May 21, 2003, page 25, remarks on how an applicant’s identity and what motivates an applicant is irrelevant to considerations of whether a record relates to matters of public interest, <http://www.assembly.pe.ca/foipp/03-001.pdf>

making its decision on public interest. The Commissioner agreed that the records relate to a matter of public interest and ordered the Public Body to waive 50% of the fee estimates.

“Although other jurisdictions have used the question of whether the Applicant is motivated by commercial or other private interests as part of the criteria for deciding whether a fee waiver should be granted in the public interest, I do not accept this as reasonable criteria under section 76(4)(b). In my view, what motivates the Applicant has no bearing on whether the record relates to a matter of public interest in accordance with the Act and also should have no bearing on whether a fee waiver is granted.

Further, in my view, a Public Body’s very consideration of the Applicant’s identity in making decisions under the Act runs contrary to the expectation that a public official will exercise his or her discretion in an unbiased manner. Therefore, while this factor is borrowed from other jurisdictions and is included in the Guidelines and Practices Manual, I do not consider it to be an appropriate consideration in making a decision whether to grant a fee waiver.”

- Commissioner Karen Rose, Order 03-001 at page 25.

FI-13-002, Re: Department of Finance, Energy and Municipal Affairs

The Applicant sought a review of a fee estimate of the Public Body. The Commissioner reduced the estimate for the cost of photocopying the records from the maximum allowable rate of \$0.25 per page to \$0.08 per page. The Commissioner found that the Public Body provided enough detail to substantiate its estimates for the other aspects of processing the access to information request.

The Applicant also requested a full fee waiver from the Public Body based on public interest. The Commissioner found that the records relate to a matter of public interest and ordered the Public Body to waive 20% of the actual costs to process the access request.

TIP: *Public bodies should be prepared to defend how they arrived at a fee, in case an applicant requests a review of the fee estimate.*

Order re Privacy Complaint:

PP-13-001, Re: English Language School Board

A complainant questioned the authority of a public body to collect and use his personal information without his knowledge or consent. He believed that the Public Body collected personal information without legal authority and used inaccurate information to make a decision that affected him. The Commissioner looked at sections 31, 32 and 33 of the *FOIPP Act* and found no wrongdoing in the Public Body’s collection and use of the Complainant’s personal information. The Public Body collected the information for the purpose of law enforcement, and the collection was directly related to and necessary for an operating program or activity of the

Public Body [s. 31]. The public body was permitted to collect it from sources other than the complainant [s. 32] and it made every reasonable effort to ensure that the personal information on which it relied was accurate and complete [s. 33]. The Commissioner also found that the public body's use of the personal information was for the purpose for which the information was collected, was for a use consistent with this purpose, and was a use that complied with clause 36(1)(a), subsection 36(2) and section 38 of the *FOIPP Act*.

TIP: *Orders that start with the letters:*

FI - *are about freedom of information issues*

PP - *are about protection of privacy issues*

Decisions that start with the letters:

AU - *are about requests by public bodies to disregard an access request*

RI - *are about the Commissioner refusing to conduct an inquiry*

Other decisions do not have letter codes (e.g. refusal to accept a request to review)

Financial Information:

This annual report covers activities of the OIPC during the calendar year of 2013 in all respects except the budget. The reporting period of the budget is from April 1, 2013 to March 31, 2014.⁵

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 are shared services with other departments of the provincial government (ITSS and Public Works) and the Legislative Assembly (e.g. office space and utilities, photocopy paper and payroll and accounting services). I thank the Administrative Officer of the Legislative Assembly for his ongoing work on behalf of the office in tracking and providing the figures on the expenditures.

	<i>2013-2014 Budget Estimate</i>	<i>2013-2014 Budget Forecast</i>	<i>2013-2014 Expenditures</i>
Administration	4,900.00	4,900.00	2,975.00
Materials, Supplies and Services	1,600.00	1,600.00	0.00
Professional and Contract Services	1,000.00	1,000.00	0.00
Salaries, benefits and contributions	106,300.00	106,800.00	110,803.00
Travel and Training	5,000.00	5,000.00	5,521.00
Total	118,800.00	119,300.00	119,299.00

Pursuant to the *FOIPP Act*, I am required to annually submit a budget to the Standing Committee on Legislative Management that I estimate is required to operate the office. For the 2013 fiscal year, I asked for additional funding to hire an investigator and to increase the Commissioner's position to full time. These budget requests were not accepted.

In early 2013, the budget for the 2013-2014 year was set at \$118,800. In November of 2013, the government granted a retroactive 0.5% increase in wages for government employees effective April 1, 2013 and increased the budget to \$119,300 to reflect this increase. In 2013, the OIPC exceeded its allocations budgeted for salaries and travel, but remained within the overall amount budgeted for the office.

There were no legal costs associated with the Commissioner's participation in the Supreme Court of Canada hearings as a co-intervener. The in-house counsel for the Office of the Alberta Information and Privacy Commissioner did the majority of the work.

⁵ This information is taken from page 147 of the *Prince Edward Island Estimates of Revenue and Expenditures 2013-2014*, as found at: http://www.gov.pe.ca/photos/original/fema_bgtestim13.pdf and page 145 of the *Prince Edward Island Estimates of Revenue and Expenditures 2014-2015*, at http://www.gov.pe.ca/photos/original/fema_budestim14.pdf

Statistics
Summary of Requests for Review
January 1, 2013 – December 31, 2013

Public Body	Access to Information		Protection of Privacy		Resolved in 2013 (without an order)	Order issued in 2013	Carried Forward to 2014
	<i>carried over from previous years</i>	<i>2013 requests</i>	<i>carried over from previous years</i>	<i>2013 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	2	0	0	0	0	0	2
English Language School Board	5	2	2	0	1	1	7
Education and Early Childhood Development	2	0	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	5	1	0	0	3	0	3
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	1	3
Fisheries, Aquaculture and Rural Development	0	0	0	0	0	0	0
Health and Wellness	1	1	1 <i>[overlaps with above-noted FEMA file]</i>	0	0	1	1 <i>[+ 1 overlaps with above-noted FEMA file]</i>
Health PEI	5	1	2	1	2	1	6

Public Body	Access to Information		Protection of Privacy		Resolved in 2013 (without an order)	Order issued in 2013	Carried Forward to 2014
	<i>carried over from previous years</i>	<i>2013 requests</i>	<i>carried over from previous years</i>	<i>2013 requests</i>			
Innovation and Advanced Learning	4	0	1	0	2	0	3
Island Regulatory and Appeals Commission	0	0	0	0	0	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	0	0	0	0	0	0	0
Transportation and Infrastructure Renewal	1	2	0	0	0	2	1
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	28	7	8	1	8	6	30