



REFUSAL TO CONDUCT AN INQUIRY

under section 64.1 of the *Freedom of Information and Protection of Privacy Act*

Re: Department of Transportation and Infrastructure Renewal

April 29, 2013

The Department of Transportation and Infrastructure Renewal (the “Public Body”) received a request to access information about highway snow removal dating back to October 2002. The Applicant requests:

1. Any and all records pertaining to instructions or guidelines in relation to snow removal on provincial highways;
2. Any and all records pertaining to rules or policies in relation to snow removal on provincial highways; and
3. Any and all records pertaining to the awarding of contracts or other benefits for snow removal on provincial highways.

Before deciding whether to give the Applicant access to the records responsive to the third part of the request (contracts), the Public Body notified a number of third parties named in the contracts that it was considering disclosing the records¹. The Public Body gave each of the third parties an opportunity to object to disclosure and to give the Public Body information about how subsection 14(1) of the *Freedom of Information and Protection of Privacy Act* (the “*FOIPP Act*”) might apply to the records at issue [disclosure harmful to business interests of a third party]. Although the Public Body received a few letters objecting to disclosure, the Public Body decided that the conditions of section 14 of the *FOIPP Act* do not apply and that the Public Body could not refuse to disclose the records to the Applicant. The Public Body advised the third

¹Notification pursuant to s. 28 of the *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, c. F-15.01

parties of its decision. One of the third parties requested the Information and Privacy Commissioner review the Public Body's decision.²

Section 64.1 of the *FOIPP Act* gives the Commissioner the discretion to refuse to conduct an inquiry if the subject matter has been dealt with in an order of the Commissioner, or if the circumstances warrant:

- 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.

There have been orders from this office offering detailed instruction on subsection 14(1) of the *FOIPP Act*. Subsection 14(1) of the *FOIPP Act* has three conditions that must be met to require a public body to withhold records or information from an applicant:

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.

² Request pursuant to s. 60(2) of the *FOIPP Act*, *supra*

I reviewed copies of the records at issue and the submissions the Third Party provided to the Public Body. There is no new consideration or interpretation of subsection 14(1) of the *FOIPP Act*. From the content of the records, I do not see merit in the Third Party's claims of any of the three parts of subsection 14(1) of the *FOIPP Act*.

In these circumstances, the Third Party bears the burden of proof under section 65 of the *FOIPP Act*. Before making a decision on whether to conduct an inquiry, I requested the Third Party highlight the information in the records that it claims is commercial or financial information that would be revealed if the records were disclosed [clause 14(1)(a)]. The Third Party was unwilling or unable to identify this information. Clause 14(1)(a) of the *FOIPP Act* is not substantiated by the Third Party.

In my opinion, the legal test for a subsection 14(1) exception to disclosure under the *FOIPP Act* has been dealt with in previous orders. I see no new issue to be addressed. As the outcome is certain, the circumstances warrant refusing to conduct an inquiry.

Pursuant to section 64.1 of the *FOIPP Act*, I refuse to conduct an inquiry.

Maria C. MacDonald
Information and Privacy Commissioner

Postscript re Judicial Review: Under section 62 of the FOIPP Act, upon receiving a request for review I am to advise all parties of the review procedures. When I perform adjudicative functions, my decisions may be reviewed by the Court on judicial review.