



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI 09-002

Re: Department of Communities, Cultural Affairs and Labour

Prince Edward Island Information and Privacy Commissioner

Judith M. Haldemann, Acting Commissioner

March 11, 2009

I. BACKGROUND

A request was made under the *Freedom of Information and Protection of Privacy Act* (“FOIPP Act”) to the Department of Communities, Cultural Affairs and Labour (“Public Body”) on February 14, 2008, seeking access to specific correspondence and attachments sent to the Minister of the Public Body.

The Public Body acknowledged receipt of the request for access to information by letter to the requestor (“Applicant”) dated February 22, 2008. By letter dated February 29, 2008, the Public Body advised the Applicant that a time extension of thirty days would be required to allow for extensive consultations with other parties before the request could be fully processed. By letter dated April

14, 2008, the Public Body provided the Applicant with the records requested, pointing out that the severed information was determined to be personal information and withheld from disclosure under section 15 of the FOIPP Act.

On April 21, 2008, this office received an application for review from the Applicant requesting a review of the decision of the Public Body because it did not release the record in its entirety.

By letter dated April 25, 2008, this office asked the Public Body to provide all documents relevant to the request, including severed and un-severed copies of the actual records at issue. On May 9, 2008, this office received the requested documents from the Public Body.

By letter dated June 9, 2008, this office requested submissions from the Public Body to support its position that the information severed from the records provided to the Applicant was done in accordance with section 15 of the FOIPP Act. The Public Body's submissions dated July 7, 2008, were received at this office on July 7, 2008.

This office sent a copy of the submissions of the Public Body to the Applicant on July 15, 2008 for his response and arguments. The Applicant's submissions, dated August 14, 2008, were received by this office on September 12, 2008. By letter dated September 18, 2008, this office provided a copy of the Applicant's submissions to the Public Body for the Public Body's final reply. The Commissioner accepted an email request by the Public Body dated September 24, 2008, for an extension in the time for a final reply. This office received the Public Body's final reply dated October 28, 2008, on October 30, 2008.

II. RECORDS AT ISSUE

The records at issue consist of two letters, being a letter written by a third party to a school board, and a cover letter to the first letter.

III. BURDEN OF PROOF

Section 65 of the FOIPP Act deals with the burden of proof required of the parties. 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 a public body. In accordance with subsection 65(1), if a decision has been made to refuse an applicant access to a record, or a part of a record, as is the case here, the public body has the duty to prove that the applicant has no right of access to the record.

In an analysis of section 15 of the FOIPP Act, the burden may rest with the applicant. If it is determined that the record contains personal information of a third party, the applicant has the burden of proving that disclosure of the personal information of the third party would not be an unreasonable invasion of the third party's personal privacy. However, it should be noted that the applicant has no such burden of proof in respect of personal information of a third party that falls under subsection 15(2).

IV. ISSUE

- A. Subsection 15(1) – Unreasonable Invasion of a third party's personal privacy – Did the head of the Public Body properly exercise the discretion under subsection 15(1) of the FOIPP Act in refusing to disclose parts of the records at issue, by severing information from those records on the ground that disclosure of the severed information would be an unreasonable invasion of a third party's personal privacy?**

V. ARGUMENTS OF THE PARTIES

Personal information

The Public Body argues that the information severed in the records at issue constitutes personal

information in accordance with the FOIPP Act. The subclauses in the definition of personal information in clause 1(i) of the FOIPP Act relied on by the Public Body, are as follows:

- 1 (i) “personal information” means recorded information about an identifiable individual, including
- (i) the individual’s name, home or business address or home or business telephone number,
 - (vii) information about the individual’s educational, financial, employment or criminal history, including criminal records where a pardon has been given,
 - (viii) anyone else’s opinions about the individual, and
 - (ix) the individual’s personal views or opinions, except if they are about someone else;

The Public Body relies on the definition of “personal information” in clause 1(i) of the FOIPP Act to support its argument that the information in the records is personal information, stating that

The information is all contained in correspondence and is, therefore, recorded. The author is identified by name, address, employment history and the expression of personal views or opinions. With respect to the subject of the correspondence and all of the other third parties, they are identified by name, employment history and the author’s opinions about them or their conduct. As such, it is the position of this public body that the information contained in the requested records is personal information of third parties, within the meaning of the Freedom of Information and Protection of Privacy Act.

The Applicant, in his submissions, does not address the issue of what information constitutes personal information in respect of the access to information request.

Subsection 15(1)

The Public Body relies on subsection 15(1) of the FOIPP Act to justify its decision to sever the personal information of a third party from the records at issue. Subsection 15(1) 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 Public Body submits that

In order to determine whether or not to disclose this personal information, consideration must be given to the provisions of Section 15 of the Freedom of Information and Protection of Privacy Act. Subsection 15(1) provides that 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. What must be determined, then, is whether the disclosure of the personal information contained in the records would constitute an unreasonable invasion of the third party's (or, in this case, the multiple third parties) personal privacy.

The Public Body then went on to refer to Order No. 03-004 of this office regarding the steps to be taken in an analysis of section 15.

Subsection 15(2)

The clauses of subsection 15(2) of the FOIPP Act on which arguments were made by the parties are as follows:

- (2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
 - (a) the third party has, in writing, consented to or requested the disclosure;
 - (b) there are compelling circumstances affecting anyone's health or safety and notice of the disclosure is mailed to the last known address of the third party;

Subsection 15(2) of the FOIPP Act sets out the parameters to be used to determine whether or not disclosure of personal information would be deemed an unreasonable invasion of a third party's personal privacy. The Public Body submits that none of the provisions in subsection 15(2) apply to the present case. The Public Body notified the Third Party that the access request was made. The

Third Party wrote to the Public Body stating his wish that the information not be disclosed [thus negating the operation of clause 15(2)(a)], saying,

I do not feel this information is the concern of any other third party for whatever reason they may have.... I see no reason for others to have access to this information unless they are named within the document.

I do not wish to have this information further disclosed.

Although the Applicant does not specifically address subsection 15(2) of the FOIPP Act in his submissions, it can be concluded from the Applicant's arguments related to the safety of school buses that he believes that clause 15(2)(b) [health and safety] may be applicable, as an argument that the disclosure would not be an unreasonable invasion of a third party's privacy.

Subsection 15(4)

The clauses of subsection 15(4) of the FOIPP Act on which arguments were made by the parties are as follows:

- (4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
 - (d) the personal information relates to employment or educational history;
 - (f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;
 - (g) the personal information consists of the third party's name where
 - (i) it appears with other personal information about the third party, or
 - (ii) the disclosure of the name itself would reveal personal information about the third party; or

The Public Body argues that clauses 15(4)(d), (f) and (g) of the FOIPP Act are applicable to the records at issue and raise a presumption that disclosure would constitute an unreasonable invasion of a third party's personal privacy. While recognizing that "a presumption under subsection 15(4) may be rebutted by a consideration of the factors set out in subsection 15(5) as well as other factors", the Public Body submits the following:

With respect to clause 15(4)(d), the third party author has set out opinion and factual information with respect to the employment history of the author, the third party subject and third party colleagues, relating to positions held, duties and effectiveness in carrying out those duties. Much of the information is based upon the third party author's personal opinions, character references and evaluations of the situation discussed and the people referenced, which brings in clause 15(4)(f) to support the contention that a presumption does exist. To add to this, clause 15(4)(g) supports the presumption in that the names of all of the third parties appear with information concerning their employment and the author's opinions as to their capabilities and their opinions about others.

The Applicant, in his submissions, does not specifically address subsection 15(4) of the FOIPP Act.

Subsection 15(5)

The clauses of subsection 15(5) of the FOIPP Act on which arguments were made by the parties are as follows:

- (5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether
- (e) the third party will be exposed unfairly to financial or other harm;
 - (f) the personal information has been supplied in confidence;
 - (g) the personal information is likely to be inaccurate or unreliable;
 - (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant; and
 - (i) the personal information was originally provided by the applicant.

The Public Body states that it "relies primarily on clauses 15(5)(e), (f), (g) and (h) of the FOIPP Act to support its decision to sever the personal information from the records at issue, but a consideration of all factors is warranted." The Public Body also considered clause 15(5)(i). The Public Body submits that

The records at issue were created by an individual to express that individual's personal opinions about another individual in the context of a workplace environment

as well as a personal one. The disclosure of these records will do absolutely nothing to subject the activities of the Government of Prince Edward Island or a public body to public scrutiny. Such disclosure would not promote public health and safety or the protection of the environment. The records make no reference to the applicant ... the information was not originally or ever provided by the applicant.

The Public Body argues that the third parties referenced in the records at issue would be exposed unfairly to potential harm and, if disclosed, the information may unfairly damage their reputations. The Public Body argues that because the content of the records at issue is opinion-based, it presents a real possibility of inaccuracy or unreliability. The Public Body submits that “the third party author of the record has specifically requested [in writing] that these records, or at least the personal information contained in them, not be disclosed. The Applicant would be under no obligation to maintain the confidentiality of the personal information in these records and there can be little question that the information is sensitive in nature.”

The Applicant does not specifically address subsection 15(5) of the FOIPP Act; however, it is clear on the face of his arguments that the Applicant is claiming a public interest in the disclosure of the records. The Applicant appears to be relying on clauses 15(5)(a) [public scrutiny], (b) [public health and safety], and (c) [fair determination of rights]. The Applicant submits that

... the [school board] is in charge of transporting our children, safely. The public has a right to know that the public body is managing their powers in a responsible and safe manner. The public has a right to know that the bus drivers are being treated fairly. Concerning the contents of the [third party's] letter I believe that I have the right to review it because it is directly related to my complaint to the [school board] and it is of public interest.

...

The [school board] is a public body. They are funded by the Provincial Government of PEI, which has been elected by the people of Prince Edward Island.....

...

It is important that this document, letter by [third party], should be released immediately by the Department of Community and Cultural Affairs. It is important that the elected representatives who received a copy of [third party] letter have the moral obligation to release its' contents to the public for the safety of our children.

Government members who claim that this letter is privileged are wrong. Because when it comes to the safety of students and treatment of bus drivers and the unfair hiring practices there is no privilege.

The Applicant supports his contention that safety is at issue by referring to the fact that in June [May] of 2008, the government ordered all school buses off the road for safety reasons. The Applicant also submitted photographs (dated October 20, 2005) to support his contention that unsafe conditions existed on school buses.

VI. ANALYSIS

The Applicant made an access to information request for a letter that had been sent to a school board, a copy of which letter (record) was sent to the Public Body involved in this review. In searching for the letter, the accompanying cover letter was also a relevant record to the request. The records were written by a third party and do not relate directly to the Applicant.

The Public Body relied on subsection 15(1) of the FOIPP Act to sever personal information from the records before disclosing them to the Applicant. The Public Body detailed its reasoning for its non-disclosure of the severed parts of the records by considering subsections 15(2), (4) and (5), before determining that it was required to refuse disclosure under subsection 15(1).

Two of the important purposes of the FOIPP Act are: (i) to allow a right of access to information in the custody or control of public bodies, and (ii) to control the collection, use and disclosure of personal information collected by public bodies. It is clear under subsection 15(1) of the FOIPP Act that the personal information of third parties is treated as a privacy issue, provided that a public body considers and properly applies the rest of section 15. In this case, I am satisfied that the Public Body correctly considered and applied subsections 15(2), (4) and (5), before determining that it was required by subsection 15(1) to refuse to disclose the third party personal information in the records at issue. In my opinion, the two salient and deciding points in this case were the fact that (i) the Third Party withheld his consent to the release of the personal information contained in the records at issue,

and (ii) the third party personal information withheld did not relate directly to, or contain information of, the Applicant. There is no question in my mind that the records are of interest to the Applicant and relate to the kind of work that he did. That in itself, however, does not override the rights of third parties to have their personal privacy protected, and not invaded by the disclosure of their personal information.

The Applicant raised a health and safety issue in respect of the school board, but none of that is related in any way to the Public Body involved in this review. This Public Body has no responsibility or connection to the issues and concerns raised in the records at issue. In addition, I cannot authorize the release of information that would clearly be an unreasonable invasion of a third party's personal privacy, merely because a public body was given copies of records that were not addressed to it nor connected in any way to its mandate. To do so would be to allow disclosure of third party personal information to an applicant contrary to, and in spite of, the protection given to third party personal information under subsection 15(1) of the FOIPP Act. By the same token, the Applicant also fails on the public interest argument. Possession by the Public Body of these documents that are unrelated to its mandate or responsibility does not make the release of the documents a public duty, particularly in light of the personal privacy protection of third parties found in subsection 15(1) which is applicable to these circumstances.

VII. FINDINGS

I find that

- (a) the information severed from the records at issue was personal information of third parties;
- (b) the letter from the Third Party requesting that the information not be disclosed is evidence that disclosure of the records at issue would be an unreasonable invasion of a third party's personal privacy;
- (c) the Applicant failed to show that the disclosure of the records at issue would not be an

unreasonable invasion of a third party's personal privacy; and

(d) the Public Body was correct in refusing to disclose third party information in the records at issue in accordance with subsection 15(1) of the FOIPP Act.

VIII. ORDER

Thank you to the parties for their submissions.

There is no order required in this case to implement my findings.

Judith M. Haldemann
Acting Information and Privacy Commissioner