



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI-09-003

Re: Department of Transportation and Public Works

Prince Edward Island Information and Privacy Commissioner

Judith M. Haldemann, Acting Commissioner

March 11, 2009

I. BACKGROUND

A request was made under Freedom of Information and Protection of Privacy Act (“FOIPP Act”) to the Department of Transportation and Public Works (“Public Body”) on February 21, 2008, seeking access to specific correspondence and attachments sent to the Minister of the Public Body.

The Public Body acknowledged receipt of the Applicant’s request by letter dated February 25, 2008. The Public Body recognized that it would be necessary to contact the third party author of the records at issue and it sent a second letter to the Applicant dated March 3, 2008, advising that a decision on the access request would be made by April 2, 3008. By letter dated April 16, 2008, the Public Body

provided the Applicant with the records requested, pointing out that the severed information was determined to be personal information and was 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 requested 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 6, 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 severed 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 14, 2008.

This office sent a copy of the submissions of the Public Body to the Applicant on July 22, 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. A second request for the Public Body's final reply was sent to it by letter dated October 24, 2008. By email from the Public Body dated October 28, 2008, the Public Body advised that it had nothing further to add to its previous submission.

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 the public body. In accordance with subsection 65(1), if a decision has been made to refuse an applicant access to a record or 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 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, pointing out that the information is contained in correspondence, and consists of the name, address and employment of third parties, as well as the author’s opinions about the third parties.

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 argues that it must consider the other provisions of section 15 in order to determine whether it is required to sever the personal information of third parties under subsection 15(1). The

Public Body referred 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 the Applicant 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 personal 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. The Public Body submits that the records at issue contain the names and employment information of third parties and the author's opinions about the third parties, including his opinions about the third parties' effectiveness in their employment.

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

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

These records represent one person's opinions expressed to specific persons for a specific reason. The public body cannot say if all of the third party's mentioned in the records are even aware of the existence of these records. If the information and opinions are disclosed to the applicant, there is then no control over who may see these opinions and be harmed by them. At a minimum, there is a distinct possibility, if not a probability, that disclosure may unfairly damage the reputation of any person referred to in the records requested by the applicant. Furthermore, the information, being based upon opinion rather than fact, may well be inaccurate or unreliable. The public body also submits that the Applicant would be under no obligation to keep the information, about the third parties in the records at issue, confidential.

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 of being unreliable. The Public Body submits that "the third party author 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 of a sensitive nature."

The Applicant does not specifically address subsection 15(5) of the FOIPP Act in his submissions. It is, however, 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 was sent to the Public Body involved in this review. In searching for the letter (record), 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 under the Act, 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.

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 addressed to another public body. 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 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