



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI-09-004

Re: PEI Business Development Inc.

Prince Edward Island Information and Privacy Commissioner

Judith M. Haldemann, Acting Commissioner

April 16, 2009

I. BACKGROUND

The Applicant in this review submitted an access to information request under the *Freedom of Information and Protection of Privacy Act* (“FOIPP Act”) to PEI Business Development Inc. (“Public Body”) on December 11, 2007. The information requested by the Applicant relates to all loans and grants made by the Public Body to a third party company and its thirteen affiliated companies (“affected third party”) from 1996 to 2007.

By letter to the Applicant dated February 26, 2008, the Public Body acknowledged receipt of the

access request on December 14, 2007, and a payment of \$7.63 on February 19, 2008, representing half of the fee estimate previously provided to the Applicant, which estimate was not provided to this office. The Public Body informed the Applicant that the affected third party was contacted for its submissions in respect of disclosure.

Pursuant to section 28 of the FOIPP Act, the Public Body advised the affected third party of the access request by letter dated February 26, 2008, and provided it with an opportunity to consent to the disclosure, or to make representations against disclosure. The Public Body received a response from the affected third party by letter dated March 19, 2008, opposing “any and all disclosure of information relating to the financial and commercial transactions of the companies.”

By letter dated April 1, 2008, the Public Body advised the Applicant that partial access to the records requested would be provided, subject to exceptions found in section 14 of the FOIPP Act. The Public Body stated that disclosure of the specific documents in their entirety could be harmful to the business interests of the affected third party. The Public Body further advised that release of the documents were pending the receipt of the balance of the fee estimate. On April 23, 2008, the Public Body again emailed the Applicant, advising that the records were ready to be issued upon receipt of the balance of the fee estimate.

The Applicant submitted an application for review to this office by letter dated May 5, 2008, stating that all of the requested financial information for which a fee had been paid was severed from the documents received.

This office requested the relevant records from the Public Body by letter dated May 30, 2008. The records were received from the Public Body with a cover letter dated June 11, 2008.

By letters dated July 14, 2008, submissions were requested from the Public Body and the affected third party, in support of their positions regarding the disclosure of the records at issue. The Public Body’s response dated August 22, 2008, was received at this office on August 28, 2008. The Public

Body indicated that its decision was based on the specific request of the affected third party to not provide access to the information at issue. The Public Body supported its decision by relying on clauses 14(1)(a), (b), and (c) of the FOIPP Act. The Public Body submitted that it would also be relying on any submissions this office may receive from the affected third party.

By letter dated September 3, 2008, this office sent a second request for submissions to the affected third party. Having received no response from the affected third party, this office gave the Public Body the opportunity to submit evidentiary details to support the section 14 provisions on which it was relying to withhold certain information from disclosure. Additional details were received from the Public Body on October 10, 2008, by letter dated October 3, 2008.

This office forwarded a copy of each of the Public Body's two submissions to the Applicant by letter dated October 24, 2008. The Applicant was asked to provide arguments in support of disclosure of the information at issue. The Applicant's response was received by email on November 10, 2008.

By letter dated November 18, 2008, this office forwarded a copy of the Applicant's submissions to the Public Body and provided the Public Body an opportunity to submit a final reply. The Public Body's final reply dated November 24, 2008, was received at this office on December 3, 2008.

II. RECORDS AT ISSUE

The records at issue consist of five documents: three separate letters to the affected third party from Island Investment Development Inc. confirming financial assistance through Prince Edward Island Development Fund (No. IV) Inc., the first dated March 17, 1999, the second dated November 2, 1999, and the third dated April 17, 2001; a promissory note of the affected third party dated March 16, 2000; and a letter from the Public Body to the affected third party dated November 17, 2000, confirming the approval of a loan.

The Public Body provided partial access to the records requested, severing all financial information

from the records as the Public Body such information fell within the exceptions to disclosure under section 14 of the FOIPP Act.

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) of the FOIPP Act, if a decision has been made to refuse an applicant access to a record or part of a record, the public body has the duty to prove that the applicant has no right of access to the record.

IV. ISSUE

There is one issue to be determined by this review:

Subsection 14(1) – Significant harm to business interests of a third party – Was the head of the Public Body correct in determining that the Public Body was required to refuse the disclosure of information in the records at issue, based on a reasonable expectation that disclosure of the information in the records would reveal information that could significantly harm the business interests of a third party within the meaning of subsection 14(1)?

V. ARGUMENTS OF THE PARTIES

In its decision letter to the Applicant, the Public Body advises that some of the terms of loan and grant agreements, and some of the information in the letters of offer, were severed pursuant to subclause 14(1)(a)(ii), clause 14(1)(b), and subclauses 14(1)(c)(i) and (iii) of the FOIPP Act. The Public Body states that it “partly agrees with the third party in that some of the information contained

in the letters of offer would reveal financial information of a third party and could harm significantly the competitive position or interfere significantly with the negotiating position of the third party.”

In its initial submissions, the Public Body relies on clauses 14(1)(a), (b) and (c) of the FOIPP Act to support its decision to sever the information from the records at issue. The Public Body also refers to the affected Third Party’s indicated concerns regarding disclosure of the information in question, and the Third Party’s desire to withhold the information in question from the public realm.

The Public Body says:

This decision was based on the status of the company in terms of the public knowledge that this company is in the middle of a sale process. We supported this request not to disclose some of the information to the Applicant due to the sensitivity around the sale of this company and the full impact on this release of this information was in question.

In its supplementary submissions of October 3, 2008, the Public Body submits its reasoning that the criteria found in section 14 of the Act were satisfied. The Public Body points out that: the information to which access is sought is financial information since it would disclose the amount of the loans; the information to determine eligibility for the loans was supplied explicitly in confidence; and the release of the information could reasonably be expected to bring about harm to the company [third party]. On the latter point, the Public Body says:

This group of companies is currently for sale and the interpretation on this release of this information may cause harm to its negotiations with any interested parties. This may hinder negotiations because of possible assumptions made by an interested party in terms of the stability of the company due to these loans and may actually prevent interested parties from pursuing their efforts to purchase this group of companies. We submit this is a genuine and conceivable concern and would be a detriment to the current sale process.

The Public Body adds that it “would also express concerns about the ability or the confidence companies would have in the public body if such information is given out at such a critical time.”

The Applicant argues that the access request did not include information that would reveal trade secrets, commercial, labour relations, scientific or technical information. The Applicant acknowledges the comments of the Commissioner in Order No. 06-005 who said that the information that section 14 is meant to protect is “information relating to day-to-day operations. The Applicant argues that the financial information sought is not of a day-to-day nature, but includes only the total amounts of each of the grants or loans government has provided to the affected third party. The Applicant submits that

... I am NOT looking for any details of the loan agreements, just the *total amount* of the grant or loan.

... This clause requires that the information [was] supplied in confidence. I argue that the third party is NOT supplying any confidential information. The Public Body does not *ask* the third party how much money it borrowed from government. One would assume the government already knows how much it's lending!!

In respect of the confidentiality clause at 14(1)(b), the Applicant submits that the information requested is only the amounts of the grants and loans provided by the Public Body to the affected third party, and that the request does not include any information that was collected from the affected third party to determine eligibility.

The Applicant submits that no evidence was presented by the Public Body to prove that disclosure of the information requested would harm the competitive position of the affected third party, or significantly interfere with its negotiating position. The Applicant disagrees with the Public Body's submission that the release of the financial information may cause harm to the affected third party's negotiations with any parties interested in the purchase of its companies, or that disclosure of the grant and loan amounts would be a detriment to the sale process. The Applicant submits that any serious buyer would receive financial information of the affected third party, including any information regarding grants and loans the affected third party may have received from the government. The Applicant further submits that the Public Body has not presented evidence of harm, but merely a concern. The Applicant states that “there is no clear cause and effect relationship

between the disclosure and the alleged harm.” The Applicant closes his arguments by saying:

“Finally, and most importantly, this is taxpayers’ money...and taxpayers need to know how their money is being spent.”

The Third Party was notified of this review process but the Third Party made no submissions to this office on this review. I note, however, that the Public Body has indicated it did receive a response from the Third Party indicating that it was opposed to any disclosure of information to the Applicant.

VI. ANALYSIS

Section 14 of the FOIPP Act

The Public Body relies on section 14 of the FOIPP Act. Subsection 14(1) says:

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.

Subsection 14(1) of the FOIPP Act is a mandatory exception that requires a public body to refuse the disclosure of a record, or a part of a record, if all of the components of subsection 14(1) are met. The test set out in subsection 14(1) requires that a record, or part of a record, satisfies the whole of subsection (1), being the provisions of (a) and (b) and (c). In other words, the information to be withheld from disclosure must be information that, (a) would reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party; and (b) is supplied, explicitly or implicitly, in confidence; and (c) would be reasonably expected to result in one or more of the outcomes listed in clause 14(1)(c).

Clause 14(1)(a) – Information that would reveal trade secrets
or commercial, financial (etc.) information of a third party

In order to satisfy the criteria of clause 14(1)(a) of the FOIPP Act, the information requested must contain information that would reveal trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party. In any situation where a public body bases its refusal to disclosure on subsection 14(1), clause (a) will be satisfied because subsection 14(1) applies only where the information at issue is one of the types listed in clause (a). In this case, the information at issue is financial information and fits within the meaning of subclause (a)(ii).

Clause 14(1)(b) – Information supplied, explicitly or implicitly, in confidence

Clause 14(1)(b) of the FOIPP Act requires that a public body refuse to disclose information that is “supplied, explicitly or implicitly, in confidence”. In order for a public body to satisfy this clause, the public body must provide evidence of the explicit or implicit reasons that the information was supplied in confidence by a third party.

An Information Commissioner must always be concerned with accomplishing the purposes and upholding the intent of the FOIPP Act. Thus, a Commissioner must weigh the rights of an applicant to access to information against the privacy rights of a third party. The obvious intention of clause

14(1)(b) is to protect a third party's business information from disclosure, where information was provided to the public body with a reasonable expectation that the public body would maintain the confidentiality of the information.

The Public Body advises that the information supplied by the Third Party was done so with the implicit expectation that it would remain confidential between the parties, and that the affected third party confirmed this expectation to the Public Body by letter. I have looked at the records. The information withheld by the Public Body relates to information about the amounts of loans made by the Public Body to the Third Party, and information related to the details of the loans such as security for the loans, etc. In respect of clause 14(1)(b), the Public Body says that the "information to determine the eligibility for these loans has been supplied explicitly in confidence which is typical of any negotiations concerning loans." I agree that eligibility requirements would be submitted on a confidential basis; however, the Public Body has misapprehended the access request. The Applicant is concerned only with the dollar amounts of the loans or grants granted by the Public Body to the Third Party. Stating it simply, the Applicant wants to know how much money the Third Party received by way of grants or loans from the Public Body. The Applicant is, in fact, not asking for information which is described in clause (b) as information "that is supplied, explicitly or implicitly, in confidence". It is clear from the access request and from the Applicant's submissions that the Applicant does not want any information supplied by the third party. The Applicant wants only the dollar amounts of money provided by the Public Body to the Third Party.

Looking at the dollar amounts of loans and grants in light of clause 14(1)(b), it is clear that this type of information does not fall within clause (b). Determining how many dollars will be lent or granted to a company under a government program is not information, in the language of clause (b) "that is supplied, explicitly or implicitly, in confidence", by the Third Party to the Public Body. The Applicant has not applied for access to information provided by the Third Party in confidence to the Public Body. Having clarified that it is loan amounts only that are the subject of the access request, then clause (b) has no application to the access request.

The result of analyzing clause 14(1)(b) and finding that it does not apply to this case, is that there is not any need to analyze clause 14(1)(c). As stated above, in order for a public body to rely on subsection 14(1), it must meet the criteria of (a) and (b) and (c). Since the Public Body has not met the requirements of clause (b), the entire argument on subsection 14(1) fails. The result is that there is no statutory reason for the Public Body to refuse to disclose the loan amounts in respect of the Third Party, as listed in the access request.

VII. FINDINGS

I find that the loan and grant amounts requested by the Applicant do not fall within the meaning of subsection 14(1) of the FOIPP Act, and therefore, these loan and grant amounts are not exceptions from disclosure.

I find that the information severed from the records at issue, insofar as that information relates to the amounts of loans or grants given by the Public Body to the Third Party was incorrectly severed from the records.

I find that the Applicant is entitled to receive from the Public Body the parts of the records that disclose the amounts of the loans or grants to the Third Party.

VIII. ORDER

Thank you to the parties for their submissions.

Based on my findings, I order the Public Body to disclose to the Applicant, in respect of the companies listed on the access request, the loan and grant amounts, interest rates and the dates of the loans or grants.

In accordance with subsection 68(1.1) of the FOIPP Act, the Public Body shall not take any steps to comply with this order until the expiry of the time period for bringing an application for judicial review of this order under the *Judicial Review Act*.

Judith M. Haldemann
Acting Information and Privacy Commissioner