OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI-10-003

Re: Department of Finance and Municipal Affairs

Prince Edward Island Information and Privacy Commissioner

Judith M. Haldemann, Acting Commissioner

February 10, 2010

Summary:

The Applicant sought records relating to any conflict of interest report done on any deputy minister of the provincial government during the period from June, 2007 to January, 2009.

Sections considered: *Freedom of Information and Protection of Privacy Act*, clauses 22(1)(g) and 22(2)(b).

I. BACKGROUND

This review arises from a decision of the Department of Finance and Municipal Affairs ("Public Body") to refuse to disclose records in respect of an access to information request ("access request") submitted by the Applicant pursuant to the *Freedom of Information and Protection of Privacy Act* ("FOIPP Act"). The Applicant made an access request for any "conflict of interest report done on any Deputy Minister in the provincial government and the correspondence surrounding any conflict of interest complaint. This includes written or oral reports and complaints." The period of the access request was from June 2007 to January 2008.

The Public Body notified a third party of the access request, as the records may contain personal information that could affect the third party if disclosed. The third party responded to the Public Body and objected to the release of the records.

The Public Body provided to the Applicant access to some records, while withholding other records pursuant to clause 4(c), clause 22(1)(g) and section 25 of the FOIPP Act. The Applicant did not dispute records that were withheld under section 4 or 25 of the Act.

The Applicant filed a request for review of the decision of the Public Body not to disclose the conflict report under clause 22(1)(g) of the FOIPP Act.

II. INFORMATION AT ISSUE

The information at issue is the conflict report which consists of letters that initiated and completed the request of the Premier to the Deputy Minister of the Public Body regarding an allegation of conflict of interest by a deputy minister of another public body.

III. BURDEN OF PROOF

Section 65 of the FOIPP Act deals with burden of proof. 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 is made to refuse an applicant access to a record, or part of a record, the public body has a duty to prove that the applicant has no right of access to the record under the FOIPP Act.

IV. ISSUE

Clause 22(1)(g) of the FOIPP Act – Advice from officials

Did the head of the Public Body correctly exercise its discretion by refusing to disclose information to the Applicant on the grounds that disclosure could reasonably be expected to reveal (g) advice, proposals, recommendations, analyses or policy options developed for or a member of the Executive Council, within the meaning of clause 22(1)(g) of the FOIPP Act?

V. ARGUMENTS OF THE PARTIES

The Public Body withheld the conflict report pursuant to clause 22(1)(g) of the FOIPP Act. The Public Body argues that the person who made the report was not the decision-maker; the Premier was the decision-maker. The Public Body argues that

> It is our interpretation that this section is intended to protect candour in the giving of advice and formulation of proposals, analysis, policy options, recommendations and related alternatives for potential courses of action.
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> It should be noted that the responsibility for the administration of the conflict of interest guidelines when they are applied to a Deputy Minister rests with the

> Premier, as per Section 20.01 of the Treasury Board Policy and Procedures Manual.
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> We are aware that this section is not intended to be applied to the details of a study or background paper where factual information is presented to describe certain issues, problems or events. Rather, it applies to the information used to formulate possible directions in dealing with an issue or problem, to establish a policy or to make a decision.
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> We believe this section allows us to provide a zone of confidentiality around the decision-making process of Government.
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> The Premier ... requested that the Deputy Provincial Treasurer conduct an investigation and provide advice on the handling of [Third Party's] alleged conflict of interest.... There was no delegation of decision making authority or authority for the administration of the Conflict of Interest Guidelines as they applied to [Third Party]. As such, it is our position that Section 22(2)(b) of the FOIPP Act does not apply to the facts of this situation.

The Public Body refers to Alberta Order 96-006 which states that the advice should be sought or expected, directed toward taking an action and made to someone who can implement the action. The Public Body also refers to PEI Order 06-004 which discusses candid advice provided to public bodies.

The Applicant argues that the Public Body is incorrect in arguing the application of clause 22(1)(g) of the FOIPP Act, and instead argues that clause 22(2)(b) applies to the conflict report. The Applicant refers to the Treasury Board Manual and the fact that the conflict report was subject to those guidelines. The Applicant goes on to say that

> the details of an internal investigation that was done by the Deputy Provincial Treasurer which should include nothing but factual information that would describe the issues, problems and events that surrounded [Third Party's] alleged conflict of interest. It in no way fits the criteria that it was used to formulate possible directions in dealing with an issue or problem, or would establish a policy or make a decision. Rather, it was the statement of reasons that led the Premier to make a decision that [Third Party] was not in a conflict. To which I might add the Auditor General disagreed....

The Applicant also refers to PEI Order 06-004 and says:

> Order No. 06-004 does go on to direct the head of the public body to disclose the record at issue. Also, the Commissioner noted that she saw no evidence from which she could infer the substance of any deliberations or consultations. The Commissioner went on to say that while the record at issue may have had a deliberative and consultative nature, the deliberations and consultations themselves were not revealed by the record. It is my argument that upon your perusal of this record that you find that its release will not reveal any such information. It is also my belief that the advice contains only factual information and that there was no suggested course of action that would be accepted or rejected by its recipient during the deliberative process.
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> ... It is my hope that the public body will reconsider their stand on this record and take into consideration that government programs operate at their best when they are both open and transparent and that the public of Prince Edward Island be shown that there actually was an investigation done and the information provided was correct and accurate, especially with the Auditor General ruling against the government on this specific issue.

The Third Party's position is that the record at issue should not be released. The Third Party argues that

> I am cognizant of the fact that the Auditor General, in his 2009 report to the Legislative Assembly, referenced excerpts from the document in question. The Auditor General's public release of his report supersedes and stands in the place of the report being sought by the applicant.
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> The Auditor General called into question the validity of the report's findings and he did so in a very public way. In short, the Auditor General rendered the original document invalid.

The Applicant argues on the Third Party's point that

> [the Third Party] is correct in stating that the Auditor General's finding did supersede the internal investigation report that was completed by [Deputy Minister] but the report itself is still a record of government and should show the process that was followed during the internal investigation. The fact that the

[officer] did not agree does not make the record itself null and void.

I therefore continue to stand by my original response under section 22(b) [22(2)(b)] that this record was indeed created as a "statement of reasons for a decision that was made in the exercise of a discretionary power or an adjudicative function."

VI. ANALYSIS

The Public Body relied on clause 4(1)(c) of the FOIPP Act to refuse to disclose a record which was a letter to an officer of the Legislative Assembly. The Public Body also did not disclose records under the solicitor-client privilege provisions of section 25 of the Act. The Applicant does not dispute the non-disclosure of these records and I will not comment on them, as they are not at issue in this review. The only record at issue in this case is the conflict report.

I agree with the Applicant that the conflict report continues to exist despite the Third Party's argument that a later report overrides it. The fact that a subsequent report disagrees with and substitutes an opinion for the first report does not render the first report non-existent. The subsequent report may override the first report, but the first report continues to exist as an historical record included in the sequence of events that led to the subsequent report. In addition, the substitution of a later opinion is not in itself a reason for disclosure or non-disclosure of the first report (conflict report). A public body must find its reason for refusal to disclose in the FOIPP Act itself.

The provisions of section 22 of the FOIPP Act referred to in this Order are as follows:

22. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

(a) consultations or deliberations involving

(i) officers or employees of a public body,

(ii) a member of the Executive Council, or

(iii) the staff of a member of the Executive Council;

(c) plans relating to the management of personnel or the administration of a public body that have not yet been implemented;

(g) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council; or

(2) Subsection (1) does not apply to information that

(b) is a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function;

The Public Body argues that clause 22(1)(g) was the applicable clause for its refusal to disclose the conflict report. I prefer to first look at the section as a whole to determine what clauses may be applicable to the case, as I may not agree with the provisions relied on by the Public Body or, I may determine that more than one provision applies. Having looked carefully at clauses 22(1)(a), (c) and (g), my conclusion is that clause (g) is the applicable clause in this case.

Clause 22(1)(g) of the FOIPP Act gives a discretion to a public body to refuse to disclose information to an applicant in the circumstances described in the clause. Under that clause, the discretion relates to advice, proposals, recommendations, analyses or policy options developed for a member of the Executive Council. The issue was a possible conflict of interest involving a deputy minister of a department. The obvious intention of the Premier in requesting the conflict report was to have the analysis of a senior deputy minister available to assist him in determining whether the complaint was well founded and, if so, what to do about it. The conflict report details the writer's investigation, analyzes the results of the investigation and draws conclusions. The conflict report assisted the Premier in determining his course of action as a decision-maker, but the report does not purport to give a statement of reasons for the Premier's action in the matter.

The Alberta Information and Privacy Commissioner's criteria for advice was stated in Order 96-

006 [a leading case on this issue], which says that the advice should be

> sought or expected, or be part of the responsibility of a person by virtue of that person's position; directed toward taking an action including making a decision; and made to someone who can take or implement the action.

The Public Body also refers to PEI Order 06-004, where the Commissioner said

> The Alberta Commissioner has noted, and I agree, that section 22 enables candid advice to be provided to public bodies without fear of outside scrutiny (Order 2001-006 [42]). It also allows persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is to allow such persons to address an issue without fear of being wrong, "looking bad", or appearing foolish if their frank deliberations were made public.

This view also finds favour in BC. In BC Order 01-15 (which continues to be cited in BC). The BC Commissioner addresses subsection 13(1) [the part equivalent to PEI clause 22(1)(g)]:

> Section 13(1) is a discretionary exception that protects advice or recommendations prepared by or for a public body or minister. It says that a public body
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> > ... may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
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> This exception is designed, in my view, to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations. I have considered s. 13(1) in a number of orders. For example, in Order 00-08, [2000] B.C.I.P.C.D. No. 8, I said the following:
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> > In my view, the word "advice" in s. 13(1) embraces more than 'information'. Of course, ordinary statutory interpretation principles dictate that the word 'advice' has meaning and does not merely duplicate 'recommendations'. Still, 'advice' usually involves a communication, by an individual whose advice has been

> sought, to the recipient of the advice, as to which courses of action are preferred or desirable. The adviser in such cases will say 'In light of all the facts, here are some possibilities, but the one I think you should pursue is as follows.'

In my opinion, the analysis of the issue and the conclusions made in the conflict report were advisory, and would have formed an integral part of any verbal discussion of the issue that followed the completion of the conflict report.

PEI Order 06-004 dealt with clause 22(1)(g). In that case the records at issue were audit reports dealing with health care facilities which are used to determine whether a facility complies with national accreditation standards. In the 2006 case, the Commissioner's conclusions in respect of the reports was that

> In my view, the "recommendations" made in the report are simply remedies for the Public Body to comply with national standards of health care accreditation. They are not the type of "advice" meant to be excepted from disclosure under section 22(1)(g) of the FOIPP Act. The reports are evaluative in nature and the "recommendations" set out therein are meant simply to identify shortfalls in compliance with the standards.

PEI Order 07-003 also dealt with clause 22(1)(g) of the FOIPP Act. PEI Order 07-003 considered a follow-up report dealing regarding proposed regulatory changes regarding pesticides. Regarding the approach to section 22, the Commissioner quoted Kelly v. Canada, a 1992 Federal Court of Appeal case, as follows:

> It will be seen that these exemptions require two decisions by the head of an institution: first, a factual determination as to whether the material comes within the description of material potentially subject to being withheld from disclosure; and second, a discretionary decision as to whether that material should nevertheless be disclosed.

I agree with the analyses of the issues of the cases cited above. Each case must consider the kind of records that are the subject of the access request. The reports at issue in PEI Order 06-004 dealt with factual compliance issues related to the accreditation of health care facilities. In PEI Order 07-003 the follow-up report regarding regulatory changes proposed for pesticides, included input from public presentations by non-government organizations. These types of records in the former cases differ significantly from conflict record in the present case. The present case involves a management report and decision regarding a senior executive.

I do not agree with the Applicant that the conflict report falls under clause 22(2)(b). The conflict report was an analysis of the circumstances, and conclusions made, in respect of the possible conflict of interest. The Premier decided what to do about the Third Party after he received the conflict report. In my opinion, a report containing an analysis of an issue cannot be taken to be a statement of the reasons for a decision taken on an issue, if the report was not done by the decision-maker. Unless the decision-maker specifically incorporates the report as reasons for the decision, the report is only one of the considerations that the decision-maker used to reach a conclusion and determine a course of action. Logically speaking, there would be no reason for the decision-maker to be involved, if the issuance of the report to the decision-maker were the final step in the process of determining the issue.

I have examined the conflict report and in my opinion, disclosure of the conflict report could reasonably be expected to reveal an analysis and advice developed by a senior official for a member of the Executive Council within the meaning of clause 22(1)(g) of the FOIPP Act. This means that the discretion given by subsection 22(1) is available to the Public Body to decide whether or not it would disclose the conflict report. The Public Body's refusal to disclose, in this particular case, is supported by clause 22(1)(g) of the Act. In my opinion, this report by a senior advisor to the Premier is analysis and advice that is properly refused from disclosure because the conflict report investigates, analyzes and reaches conclusions on the issues at the behest of the decision-maker. Such a decision is, under Treasury Board Rules, entirely within the discretion of the Premier. The advice at issue in this case falls fully within the criteria listed in the Alberta

case: the advice was sought by the decision-maker, given by a person responsible for giving it, directed toward an action to be taken and made to the person who could implement an action. Insofar as there was some factual information in the conflict report, I decline to order that part to be disclosed because, in my opinion, all of the information contained in the conflict report falls within clause 22(1)(g).

I must caution public bodies that not all cases will have the same result as this one on a subsection 22(1) argument. A public body must understand that section 22 does not apply to all matters related to operating a public body, as that would have the untenable result of making all actions of a public body exceptions to disclosure rules. The intent of section 22 is to protect such things as internal analysis, advice and recommendations by senior managers, among other things, so that a public body can deal with the management of its organization. Although the Public Body apparently understands the distinction, it is important to note that each case must be decided on the circumstances that are applicable to the circumstances.

Finally, I must comment on the relevance of the Auditor General's report to this review. Access to information under the Act is broad, but it is subject to exceptions that are specifically set out in the Act. If a particular section applies and gives a Public Body a discretion to release a record or not, that is a matter that is particular to the facts of a case. The Commissioner's role is to review the circumstances surrounding a public body's decision to refuse the disclosure of records and to determine two things: whether the public body is correct that a particular provision of the Act applies, and whether it applied the section or exercised its discretion in a reasonable manner. The Commissioner's role is to determine whether a record should be disclosed or not under the FOIPP Act. The Commissioner's role does not extend to examining whether a particular decision of a head of a public body contained in the record was correct or not. As a corollary to that, it is not relevant to a Commissioner that the report of another official like the Auditor General may disagree with, or supersede, the public body's decision.

VII. FINDINGS

1. I find that the Public Body correctly determined that the conflict report falls under clause 22(1)(g) of the FOIPP Act.

2. I find that the Public Body correctly exercised its discretion not to disclose the conflict report because the Public Body determined that the information in the record could reasonably be expected to reveal advice or analysis developed for a member of the Executive Council, within the meaning of clause 22(1)(g) of the FOIPP Act.

3. I find that a subsection 22(1) exception to disclosure depends on the facts of each particular case and that it is incumbent upon the head of a public body to ensure that it does not interpret subsection 22(1) too broadly.

VIII. ORDER

Thank you to the parties for their submissions.

Based on my findings, I order that the Public Body is not required to disclose the record at issue in this case.

In accordance with subsection 68(1.1) of the FOIPP Act, the Public Body shall not take any steps to close its file in this matter until the expiry of the time period for bringing an application for judicial review of this order under section 3 of the *Judicial Review Act.*

Judith M. Haldemann
Acting Information and Privacy Commissioner