



**OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island**

Order No. FI-10-006

Re: Office of the Premier

Prince Edward Island Information and Privacy Commissioner

Judith M. Haldemann, Acting Commissioner

May 25, 2010

Summary:

The Applicant sought access to all correspondence regarding school closures between the Premier's Office and ESD staff, trustees and elected officials. The Premier's Office advised the Applicant that a search had failed to retrieve any records responsive to the access request. The Applicant's view was that the Premier's Office should have found records as it had submitted the "exact same request" to the Premier's Office, as it did to the Department. The Commissioner found that the access request described correspondence between the Premier's Office and ESD, but not between the Premier's Office and the Department. The Commissioner also found that an access request must be read as a whole in order to determine the parameters of the access request.

Sections considered: *Freedom of Information and Protection of Privacy Act*, section 8.

I. BACKGROUND

The Applicant, under the *Freedom of Information and Protection of Privacy Act* (“FOIPP Act”), submitted an access to information request (“access request”) to the Office of the Premier (“Premier’s Office”), for access to “all correspondence including emails, letters, phone messages, conference calls, meeting minutes, etc., regarding school closures between: 1. Eastern school board staff, trustees and elected officials; and 2. All staff in the Office of the Premier”. The Premier’s Office advised the Applicant that a search had failed to retrieve any records that fell within the access request. The Applicant requested a review by the Commissioner of the decision of the Premier’s Office. The Applicant’s view was that the Premier’s Office should have found records as it had submitted the “exact same request” to the Premier’s Office, as it did to the Department of Education and Early Childhood Development (“Department”).

It should be noted that, to reduce confusion, I have not called the Premier’s Office the Public Body because there are three public bodies referred to in this case: the Premier’s Office, the Department and the Eastern School District (“ESD”).

II. RECORDS AT ISSUE

The Premier’s Office reported that no records resulted from its search for records described in the access request.

III. ISSUE

Obtaining Access to Records

Did the Premier’s Office process and complete the access to information request in a manner compliant with the FOIPP Act, by providing full access to all records at issue in its custody or control in accordance with section 8 and other provisions of the FOIPP Act?

IV. 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 by a public body to refuse an applicant access to a record or part of a record, the public body has the duty to prove that an applicant has no right of access to the record.

V. SUBMISSIONS OF THE PARTIES

The Applicant requested that a review be carried out to verify that no applicable records were excluded from the processing of the access request. The Applicant submits that it requested a review because records received by the Applicant from the Department in response to “the exact same Access Request” showed that some of those records were copied to the Premier’s Office. The Applicant lists 13 emails between the Department and the Premier’s Office, or copied to the Premier’s Office, that refer to the subject of school closures, and argues that the email records “clearly show that staff with the [Premier’s Office] did create and receive correspondence on this file”. The Applicant submits that

Recognizing that several of these records that are noted did originate from the same email exchange, this does show that the correspondence was ongoing in certain circumstances. Also, it does show that the participants were kept in touch on the subject of a briefing for the ESD Situation and someone should have had a copy.

This leads me to believe that there may be other records that were not located or that were destroyed within the Premier’s Office. On another note, this does not speak kindly the attention that is being given to the maintenance of the filing system within the Premier’s Office. In Mr. Rankin’s letter it also states that [staff] reviewed their own emails and files to determine that they did not have any documents that fell within the scope of the request. It was always my understanding that any files that may be part of a FOIPP request were to be printed to paper and a copy provided to the FOIPP Coordinator for their discretion

towards the scope.

The Applicant asked to be provided with a copy of “the forms signed by these individuals, and other staff, that shows where they looked, how long it took and with the signature of each employee”. The Applicant further questions whether it has the right to be advised if records at issue exist that are being withheld, if records exist that do not fall within the scope of the request, or if telephone calls were received, although notes of those calls were not taken. The Applicant states that

It is disheartening to know that this administration is using the FOIPP Act to withhold records, or deny the existence of records, in lieu of using it to be open and accountable.

The Premier’s Office provided a list of names of the employees of the Premier’s Office, and submitted that each individual quickly reviewed their emails and files to determine that no records existed within the parameters of the access request. The Premier’s Office was asked to provide further details describing the searches, and it responded with a brief outline of the actions carried out by three individual staff members. One staff member explained that telephone calls on the topic were received but that no notes were taken. The staff member knew that no emails or other documents on the topic had been received and, for that reason, there was no “need to do any elaborate searches for records.” The second staff member explained that it would not normally be part of the individual’s duties to be involved in discussions or communications regarding the topic, but that a comprehensive search of email using a full text search for the keywords “school”, “closure” and “reorganization” confirmed that no documents were in that employee’s possession. The third staff member described the manual search carried out of emails and files dealing with school closures, using the time lines and parameters of the specific request. The staff member found that no documents existed within those parameters. After each staff member was asked about the subject of the access request, the Premier’s Office stated that other staff members did not deal with such matters and, therefore, would have no records on the subject.

The Premier's Office argues that the access request submitted by the Applicant to the Department was not exactly the same as the access request it had received, because the parties to the records for which access was requested were not the same. The Premier's Office points out that the emails listed in the Applicant's submissions are between the Department and ESD, and states that "[T]herefore, the documents listed in the applicant's letter would not fall within the scope of our request."

VI. ANALYSIS

Concerns were raised by the Applicant about record-keeping and record-searching practices of the Premier's Office. The Applicant was concerned because it did receive copies of records that were sent to the Premier's Office by the Department. The Applicant expected that those records would be disclosed in response to the access request, but the Applicant did not realize that the access request to the Premier's Office did not include records of correspondence between the Premier's Office and the Department. The records listed by the Applicant, that it received from an access request to the Department, were records between the Department and ESD. The access request in this case was for records between the Premier's Office and ESD; therefore the records listed that were obtained from the Department, between the Department and ESD, were not relevant to the access request made to the Premier's Office. The wording of the access request was for specific correspondence and other communications between the two public bodies named, regarding school closure. In my opinion, the access request cannot be broadened to all communications from the Premier's Office about school closure, but only such communications between the two public bodies. The access request was not for records about school closure kept by the Premier's Office; the access request was for records between the Premier's Office and ESD about school closure. The Premier's Office submits that it has no records on that subject between it and ESD. I accept that submission and the explanation of the searches conducted by the Premier's Office. I am satisfied that the Premier's Office made a reasonable search for records that were responsive within the parameters of the access request.

Section 8 of the FOIPP Act relates to the duty of a public body to assist applicants. Section 8 says

8. (1) The head of a public body shall make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.
- (2) The head of a public body shall create a record for an applicant if
 - (a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise; and
 - (b) creating the record would not unreasonably interfere with the operations of the public body.

Although section 8 compels a public body to “make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely”, this obligation is in respect of records that fall within the parameters of the access request. This does not stop an applicant from making a different access request at a later time. The Applicant wondered whether there were records that exist that do not fall within the scope of the access request, but given the outcome of my analysis the question is not relevant in this case.

It is certainly understandable that the Applicant thought that the Premier’s Office had records responsive to its access request, because the Applicant has copies of records on the subject of school closure between the Department and the Premier’s Office, or records that were copied by the Department to the Premier’s Office. However, all of the records listed by the Applicant are limited to correspondence between the Premier’s Office and the Department. The Applicant’s access request is, in itself, problematic because the actual wording of the access request does not accomplish the Applicant’s intention, as inferred from its submissions on this review. The access request asks for records between the Premier’s Office and ESD, not for records between the Premier’s Office and the Department. It is not necessarily a good thing to word an access request in a way that is identical to a previous access request. As is the case here, using identical wording in an access request to two different public bodies can lead to different results.

Finally, in its submissions, the Applicant argues that it meant MLAs when it stated elected officials, as one of the parties whom the records at issue would include. This was not clarified until later in the submissions of the parties. When I read the access request I understood it to mean elected officials under the *School Act*, not MLAs, because in my experience people often repeat themselves by using synonyms to ensure that they cover everything. Thus, in the context, I interpreted the access request to be records between the Premier's Office and any kind of school official or staff person. This was also the interpretation of the Premier's Office.

The result of this analysis is that I find that the Premier's Office has no records responsive to the access request.

VII. ORDER

Thank you to the parties for their submissions.

Based on my findings, there are no directions to the Premier's Office in this order.

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

Judith M. Haldemann
Acting Information and Privacy Commissioner