



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

Order No. FI-12-001

Re: Department of Tourism and Culture

Prince Edward Island Information and Privacy Commissioner

Maria C. MacDonald

May 25, 2012

Summary:

The Applicant requested access to a copy of a contract made between the Department of Tourism and Culture (“Tourism PEI”) and a third party. Tourism PEI withheld the record, relying on subsection 14(1) of the *Freedom of Information and Protection of Privacy Act* (the “*FOIPP Act*”) and contending that disclosure of the record would be harmful to the business interests of the third party. Some information contained in the contract was business and financial information, but it did not meet the other two required elements under the subsection 14(1) exception.

Although the Applicant requested to withdraw the review, the Commissioner continued with the review under subsection 50(1) of the *FOIPP Act* to comment on several concerns about Tourism PEI’s processing of the Applicant’s access to information request and in its participation with the Commissioner’s review.

Sections Cited: *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, cap. F-15.01, ss. 1(n) [definition of trade secret], 2(a) [purposes of this Act]; 6(2) [excepted information, severance]; 8(1) [duty to assist applicants]; 14(1) [disclosure harmful to business interests of a third party], 50(1) [Commissioner’s functions] 53(3) [production of record]; 65(1) [burden of proof]; 74 [protection of public body from legal suit]; 75(1)(c) [offences].

Authorities Cited: *Re: P.E.I. Lending Agency*, PEI Order No. FI-10-001; *Re: Department of Agriculture, Fisheries and Aquaculture*, PEI Order FI-06-007; *Re: Town of Ponoka*, Alberta Order F2011-002; *O’Connor v. Nova Scotia*, 2001 NSCA 132 (CanLII); *Re Toronto (City)*, 2007 CanLII 42224 (ON IPC); *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61 (CanLII), [2004] 3 S.C.R. 304].

Other Resources Cited: *PEI FOIPP Guidelines and Practices Manual*, May 2006.

I. BACKGROUND

[1] The Applicant applied for access to a contract made between Tourism PEI and a third party. Tourism PEI invited submissions from the third party. The third party requested that Tourism PEI withhold the contract, claiming that disclosure would harm its business interests. Tourism PEI decided not to give the Applicant access to the record and told the Applicant that it was required to refuse to disclose the record under subsection 14(1) of the *Freedom of Information and Protection of Privacy Act* (“*FOIPP Act*”), claiming that disclosure would harm the business interests of the third party. The Applicant sought a review of the decision of Tourism PEI.

II. RECORDS AT ISSUE

- [2] The record at issue is a two and a half-page Memorandum of Understanding between Tourism PEI and a third party.

III. ISSUE

- [3] Was Tourism PEI correct in refusing to give the Applicant access to the Memorandum of Understanding under subsection 14(1) of the *FOIPP Act*?

IV. DISCUSSION

- [4] Subsection 14(1) of the *FOIPP Act* is a mandatory exception to disclosure. It is a “shall refuse to disclose” provision. If someone asks for a type of information found under subsection 14(1), a public body has no option except to refuse to disclose the information. There is no discretion involved. The subsection 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.

[5] The Applicant states that previous orders of the Information and Privacy Commissioner of PEI have ruled that “contracts are releasable information”. Not every contract is necessarily “releasable”, but the *FOIPP Act* does not shield all information about a third party business. Acting Commissioner Karen A. Rose remarks at page 16 of Order FI-06-007, *Re: Department of Agriculture, Fisheries and Aquaculture*, that:

I wish to point out that section 14 was not meant to protect from disclosure every piece of information relating to a third party business. It is incumbent upon the Public Body to look to the purpose of the section 14 exception, which is to protect confidential business information from entering the public domain.

[6] To qualify for the exception to disclosure set out in subsection 14(1) of the *FOIPP Act*, the record must satisfy every element of the three-part test of that subsection. In Order No. FI-10-001, *Re: P.E.I. Lending Agency*, at page 7, Acting Commissioner Judy Haldemann says:

Subsection 14(1) of the *FOIPP Act* is a mandatory exception that requires a public body to refuse the disclosure of a record, or part of a record, if all of the components of subsection 14(1) of the Act are met. The test set out in subsection 14(1) of the Act requires that a record, or part of a record, must satisfy the whole of subsection (1); i.e., the provisions of (a) and (b) and (c) are met. In other words, the information that the Public Body must refuse to disclose under section 14 of the Act 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) of the Act.

The important thing about subsection 14(1) of the Act is that all three of these elements must be present in the particular circumstances of the case.

- [7] The burden of proof lies with Tourism PEI for all three elements of subsection 14(1) of the *FOIPP Act*. Subsection 65(1) of the *FOIPP Act* says as follows:

65. (1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.

Step 1: Would disclosure of the record reveal the types of information set out in clause 14(1)(a)?

- [8] The first step of the three-part test has three required elements. In Order FI-06-007, *Re: Department of Agriculture, Fisheries and Aquaculture*, at page 7, Acting Commissioner Rose says:

According to subsection 14(1)(a), three criteria must be satisfied:

- (i) the records must contain trade secrets or commercial, financial, labour relations, scientific or technical information;
- (ii) the above information must be “of a third party”; and
- (iii) disclosure of the records must reveal this type of information; in other words, the information cannot already be in the public domain.

- [9] Tourism PEI submits that the Memorandum of Understanding contains trade secrets, commercial information and financial information about the third party.

Trade Secrets

- [10] For information to be considered a “trade secret,” it needs to meet all of the four components set out in the definition of “trade secret” as found at clause 1(n) of the *FOIPP Act*, which states as follows:

1. In this Act

(n) “trade secret” means information, including a formula, pattern, compilation, program, device, product, method, technique or process

(i) that is used, or may be used, in business or for any commercial purpose,

(ii) that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use,

(iii) that is the subject of reasonable efforts to prevent it from becoming generally known, and

(iv) the disclosure of which would result in significant harm or undue financial loss or gain.

[11] Tourism PEI states that:

Trade secrets include methods by which [the third party] conducts [its] business and structures [its] affairs to effectively manage [its] demanding roles. This information is unique in [the third party’s] industry and valuable to [its] business, which, it is our position, brings the information within the definition of trade secrets.

[12] The following guidance on information being considered as “trade secrets” comes from the *PEI FOIPP Guidelines and Practices Manual*, at page 61:

Information that is generally available through public sources (e.g., corporate annual reports) would not usually qualify as a trade secret under the *Act*. A third party must also own trade secrets or must be able to prove a claim of legal right in the information (e.g., a licence agreement) in order for that information to qualify for the exception [emphasis added].

[13] I read the Memorandum of Understanding. The Memorandum of Understanding vaguely describes the practice of planning or scheduling. The only description in the document of how the third party conducts its business and structures its affairs is reference to events being coordinated in advance, subject to availability. This does not describe a “method” of how the third party conducts its business or structures its affairs. Many people organize their schedules in advance, and the third party does not have a legal claim of

right to the practice of planning or scheduling. It is not secret, it is not proprietary, it has no independent economic value and its disclosure would not result in significant harm or undue financial loss or gain. Based on the evidence and argument presented to me, Tourism PEI's claim of a trade secret is not credible.

- [14] I find that Tourism PEI has not satisfied the first required element of the three-part test under clause 14(1)(a) of the *FOIPP Act* as it relates to Tourism PEI's claim of trade secrets. I continue the analysis with respect to its claim of commercial and financial information.

Commercial Information

- [15] In Order FI-06-007, *Re: Department of Agriculture, Fisheries and Aquaculture*, Acting Commissioner Rose provides the following definition of commercial information, at page 8:

"commercial information" - Relates to the buying, selling or exchange of merchandise or services. Commercial information includes third party associations, history, references, and insurance policies, as well as pricing structure, market research, business plans, and customer records.

- [16] Tourism PEI submits that the record at issue "contains commercial information relating to the buying, selling and exchange of [the third party's industry] services".
- [17] I reviewed the Memorandum of Understanding and confirm that it contains commercial information. Specifically, the record contains the dollar amount Tourism PEI agreed to pay to the third party and the services the third party agreed to provide to Tourism PEI. I further confirm that this information is information about the third party.
- [18] With respect to the dollar amount Tourism PEI agreed to pay to the third party for its services, the Applicant advises me that ". . . the government has already released the

dollar value of the contract on the floor of the provincial legislature”. The Applicant learned this from Tourism PEI. I searched the public records and confirm that this is true.

[19] To exercise the exception of subsection 14(1) of the *FOIPP Act*, clause 14(1)(a) requires that a disclosure would “reveal” excepted information. Disclosure of the Memorandum of Understanding would not reveal the dollar amount, as Tourism PEI disclosed this commercial information on the floor of the Legislative Assembly, so it was in the public realm.

[20] I find that Tourism PEI has not satisfied the first required element of the three-part test under clause 14(1)(a) of the *FOIPP Act* with respect to its claim of commercial information and the dollar amount Tourism PEI agreed to pay the third party. I continue the analysis with respect to Tourism PEI’s claim of commercial information and the services the third party agreed to provide.

[21] Tourism PEI acknowledges the previous disclosure of the dollar amount of the contract, but speaks to the services provided for those dollars, as follows:

The dollar amount of this contract has already been disclosed, but the basis of our submission is that there is much more to our contract than just dollars. It is what [the third party] is prepared to do for those dollars that could damage [its] business, and it is for this reason that the decision has been made to refuse disclosure.

[22] Four to five months before the Applicant submitted his request for access to information, the services the third party agreed to provide to Tourism PEI were described as marketing services by Tourism PEI in the Legislative Assembly. These services are commercial information about the third party. Further, some of the marketing services listed in the Memorandum of Understanding involve public functions and, as the third party fulfilled the contract, the services involving public functions are in the public domain.

- [23] To repeat paragraph 19 above, to exercise the exception of subsection 14(1) of the *FOIPP Act*, clause 14(1)(a) requires that a disclosure would “reveal” excepted information. Disclosure of the Memorandum of Understanding would not reveal some of the marketing services the third party agreed to provide to Tourism PEI. This commercial information was already in the public domain, both having the dollar amount previously disclosed in the Legislative Assembly and having certain services involve public functions.
- [24] I find that Tourism PEI has not satisfied the first required element of the three-part test under clause 14(1)(a) of the *FOIPP Act* with respect to its claim of commercial information and the services the third party agreed to provide to Tourism PEI.
- [25] I have identified a few contractual terms of this agreement that are commercial information that, to the best of my knowledge, are not available publicly. Tourism PEI did not specifically identify these terms as a concern; however, because these terms are arguably of the third party, and because section 14 of the *FOIPP Act* is a mandatory exception to disclosure, I address these contractual terms under the second part of my section 14 analysis.
- [26] I find that Tourism has satisfied the first required element of the three-part test under clause 14(1)(a) of the *FOIPP Act* as it relates to commercial information with respect to certain contractual terms contained in the Memorandum of Understanding. I continue the analysis with respect to Tourism PEI’s claim of financial information.

Financial Information

- [27] In Order FI-06-007, *Re: Department of Agriculture, Fisheries and Aquaculture*, Acting Commissioner Rose provides the following definition of financial information, at page 8:

"financial information" - Information regarding the monetary resources of a third party, such as the third party's financial capabilities, and assets and liabilities, past or present. Financial information is not limited to information relating to financial transactions in which the third party is involved.

- [28] I reviewed the Memorandum of Understanding and confirm that it contains financial information, including the dollar amount Tourism PEI agreed to pay to the third party for its services. As noted above, however, the dollar amount is already in the public realm and, therefore, providing the Memorandum of Understanding to the Applicant will not “reveal” the dollar amount.
- [29] I find that Tourism PEI has not satisfied the first required element of the three-part test under clause 14(1)(a) of the *FOIPP Act* as it relates to Tourism PEI’s claim of financial information with respect to the dollar amount Tourism PEI agreed to pay to the third party for its services.
- [30] The Memorandum of Understanding includes a provision for payment of other specific costs and periodic increases by Tourism PEI to the third party. Tourism PEI submits that the “specific data regarding the fees payable to [the third party] under the Agreement are in line with other examples of financial information as set out in Ontario IPC Order PO-2010”.
- [31] I consider the provision for payment of other specific costs and periodic increases by Tourism PEI to the third party to be financial information about the third party. To the best of my knowledge, this information is not in the public domain and, therefore, would be revealed if Tourism PEI disclosed the record.
- [32] I find that Tourism PEI has satisfied the first required element of the three-part test found under clause 14(1)(a) of the *FOIPP Act* as it relates to Tourism PEI’s claim of financial

information with respect to the payment of other specific costs and periodic increases by Tourism PEI to the third party.

[33] I continue the analysis and move to clause 14(1)(b) of the *FOIPP Act* with respect to the limited commercial information noted above at paragraph 25 and the limited financial information noted above at paragraph 31.

Was the information supplied, explicitly or implicitly, in confidence, as found under clause 14(1)(b)?

[34] The second step of the three-part test has two required elements, as follows:

- i) that the information was supplied by the third party; and
- ii) that the information was supplied explicitly or implicitly in confidence.

[35] Tourism PEI sets out the law, as follows:

Information may qualify as “supplied” if it was directly supplied to a public body by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by the third party (Ontario IPC Orders PO-2010, PO-2043).

[36] Tourism PEI correctly sought input from the third party. In the third party’s response, it refers to a proposal from the third party to Tourism PEI following a request from Tourism PEI. The third party says this proposal included original ideas and innovations. I did not receive or review any other records or evidence on how the agreement came about, other than Tourism PEI’s initial submission that “[the third party] provided this information in order to facilitate the contract negotiations between [the third party] and Tourism PEI”. I will discuss this issue further, but it is a natural place to mention that I made a specific request for these records and any other related records from Tourism PEI and that Tourism PEI offered to search for these records. I did not seek a copy of this proposal or

any additional records from the third party, because the Applicant advised he no longer needed the record, and I decided I would not be ordering disclosure of the record.

- [37] Without any evidence to the contrary, terms of a contract are considered negotiated terms that the parties mutually generate. Terms of a contract are not considered supplied by one party or the other, even if there is very little actual negotiation. An excellent discussion on this principle is found in a recent decision of Alberta, *Re, Town of Ponoka*, Order F2011-002. Pages 6 to 8, inclusive, cite several Alberta and Ontario orders and judgments that support this principle.
- [38] I reviewed the Memorandum of Understanding and considered whether an astute person could draw any inferences that the third party supplied the information to Tourism PEI. I am not able to draw any inferences that the third party supplied any of the information in the Memorandum of Understanding to Tourism PEI. The information in the Memorandum of Understanding appears to be ordinary negotiated terms.
- [39] I have insufficient evidence to show that the third party “supplied” any information to Tourism PEI. Tourism PEI did not meet its burden of proof.
- [40] I find that Tourism PEI has not satisfied the first of two elements necessary under the second part of the three-part test in that Tourism PEI has not persuaded me on a balance of probabilities that the third party supplied the information in the Memorandum of Understanding.
- [41] I have found that the requirements of clause 14(1)(a) of the *FOIPP Act* have not been met, and that I have insufficient evidence that the third party supplied the information in the Memorandum of Understanding. Although not necessary, I will continue with my analysis on confidentiality.

Confidentiality

- [42] To satisfy the second required element under clause 14(1)(b) of the *FOIPP Act* about confidentiality, Tourism PEI must establish that the third party had a reasonable expectation of confidentiality, implicit or explicit, at the time the third party provided it with the information.
- [43] As there is no evidence of an “explicit” expectation of confidentiality (for example, a written condition of confidentiality), Tourism PEI relies on the “implicit” expectation of confidentiality. Tourism PEI submits that “it was understood at all times that the information supplied to Tourism PEI by [the third party] would be kept confidential and protected from disclosure”.
- [44] It is not enough to say that a third party, or even a public body for that matter, considered the information to be confidential. The expectation of confidentiality must be based on reasonable and objective grounds. Tourism PEI provided no argument of reasonable and objective grounds for an expectation of confidentiality for me to consider. As noted, Tourism PEI previously disclosed the dollar value of the contract. In addition, both Tourism PEI and the third party publicly promoted their relationship. Tourism PEI did not meet its burden of proof.
- [45] I find that Tourism PEI has not satisfied the second element necessary under the second part of the three-part test as it relates to Tourism PEI’s claim that information was supplied implicitly or explicitly in confidence.
- [46] I find that Tourism PEI has not satisfied the application of clause 14(1)(b) of the *FOIPP Act* and has failed to meet its burden of proof that the information in the Memorandum of Understanding was supplied by the third party explicitly or implicitly in confidence

[47] As the record at issue must satisfy all three clauses of subsection 14(1) of the *FOIPP Act* to qualify for the exception to disclosure set out therein, and because Tourism PEI failed to satisfy clause 14(1)(b), I find that Tourism PEI was not obliged or entitled to withhold the Memorandum of Understanding from the Applicant.

[48] Although not required to do so, I continue my analysis and address the third prong of the harms test as found at clause 14(1)(c) of the *FOIPP Act*.

Would the third party suffer one of the harms set out in clause 14(1)(c)?

[49] Tourism PEI claims that the third party would suffer harm from the disclosure of the Memorandum of Understanding. It cites three of the four subclauses from 14(1)(c), namely:

- (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 ...

[50] Because of the burden of proof mandated by subsection 65(1) of the *FOIPP Act*, it is the responsibility of Tourism PEI to clearly show a reasonable expectation of probable harm.

[51] In its final reply to the Applicant's response submissions, Tourism PEI states:

There has been no harm proven because the contract details have not been released. The entire reason for section 14(1) of the act is to prevent harm from being caused to the third party.

[52] Tourism PEI's statement as cited above falls short of meeting the burden of proof required. A reasonable expectation of probable harm is shown through detailed and convincing evidence and argument. As noted in other orders of this office, establishing

certainty of harm is not necessary, but speculative statements of harm will not meet the test.

[53] The *PEI FOIPP Guidelines and Practices Manual* speaks to the provision of detailed evidence of harm under the heading “Effect on Business Interests” at page 63, and states:

A refusal of access under this exception should be supported by detailed evidence showing that the expectation of harm is reasonable and the harm is probable. The evidence must show that:

- there is a clear cause and effect relationship between the disclosure and the alleged harm;
- the expected harm amounts to damage or detriment and not simply hindrance or minimal interference; and
- the likelihood of harm from disclosure of the specific information is genuine and conceivable, and not merely speculative; it is not sufficient to show that there is a potential for harm simply because the information is sensitive.

Would disclosure significantly harm the third party’s competitive position or significantly interfere with the negotiating position of the third party?

[54] Tourism PEI argues that if it disclosed the Memorandum of Understanding, the third party’s ability to compete for future service contracts would be compromised. Tourism PEI submits:

Given the competitive nature of [the third party’s] business, disclosure of [its] services in this Agreement with Tourism PEI, could be harmful to [its] competitive edge in the industry. [Its] ability to compete for future service contracts could be compromised. Competitors would have an unfair advantage of knowing this information about [its] business. They would have information regarding fees and terms that [the third party] is willing to accept as well as underlying financial information. Competitors would be able to copy the same techniques and operations to their advantage.

- [55] I received no evidence on the competitiveness of the third party's type of business. Based on the documents before me, I have no way of knowing if the third party competed for the contract. In addition, the competitors of the third party, if any, have access to the contract value, and there is no other underlying financial information in the agreement.
- [56] I read the Memorandum of Understanding. I am not able to identify any "techniques and operations" specific to the third party within the record, nor am I able to surmise what unfair advantage competitors could gain from having access to the record.
- [57] I find that Tourism PEI failed to meet its burden of proof and did not provide any evidence or argument to persuade me that disclosure of the Memorandum of Understanding would significantly harm the third party's competitive position or significantly interfere with its negotiating position, as found at subclause 14(1)(c)(i) of the *FOIPP Act*.

Would disclosure result in similar information no longer being supplied to the public body when it is in the public's interest that this information continue to be supplied?

- [58] Tourism PEI argues that third parties may choose not to provide proprietary information if unable to provide it in confidence and that this would result in public bodies being unable "to enter into contractual relations with a fully informed perspective".
- [59] This was a difficult analysis, because I have no evidence that the third party supplied the limited commercial and financial information in the Memorandum of Understanding. I have no evidence of a future need for Tourism PEI to continue being supplied with any information. I have no evidence, except for a bare statement describing why it would be in the public's interest that the information continue to be supplied. Having reviewed the short record many times, I find on a balance of probabilities that this type of information

would not affect the ability of any public body to enter into a contract with a fully informed perspective.

- [60] I find that Tourism PEI failed to meet its burden of proof and did not provide any evidence or argument to persuade me that disclosure of the Memorandum of Understanding would result in similar information no longer being supplied to Tourism PEI when it is in the public's interest that this information continue to be supplied, as found at subclause 14(1)(c)(ii) of the *FOIPP Act*.

Would disclosure result in undue financial loss or gain to any person or organization?

- [61] Tourism PEI submits that the third party agreed to provide its services at a significantly reduced rate and that disclosing the Memorandum of Understanding would significantly undermine the third party's capacity to charge its normal rates in future. Tourism PEI submits that disclosure of the record could result in financial loss or gain. Tourism PEI states:

Finally, a reasonable expectation of harm can also be established under clause 14(1)(c)(iii). [The third party] provided [its] services under the Agreement at a significantly reduce rate which is far below industry standards and far below the fee [it] would normally receive for the provision of such services. As such, disclosure of the fee paid to [the third party] together with the services [it] is performing in exchange for that fee would significantly harm [its] ability to charge [its] normal rates for [its] professional services, and would seriously undermine [its] capacity to contract freely in the future. Disclosure could reasonably be expected to result in financial loss to [the third party], both personally to professionally on a corporate level.

- [62] The Applicant contends that Tourism PEI's argument is not supported by any fact. The Applicant believes that Tourism PEI has provided mere conjecture and speculation. In response, Tourism PEI submits:

The Applicant makes the argument that there are no facts to support our assertion that releasing specific contract details will harm [the third party]. There has been no harm proven because the contract details have not been released. The entire reason for section 14(1) of the act is to prevent harm from being caused to the third party.

[63] I agree with the Applicant's contention. I received no evidence or argument on what would be considered a standard rate for services within the third party's industry. For discussion purposes, if I accept that the third party gave Tourism PEI a reduced rate, other content in the Memorandum of Understanding leads me to believe that it is unlikely the third party would charge normal rates in other circumstances. Further, Tourism PEI's argument that there has been no harm proven because Tourism PEI has not released the contract details falls short of meeting the burden of proof.

[64] I find that Tourism PEI failed to meet its burden of proof and did not provide any evidence or argument to persuade me that disclosure of the Memorandum of Understanding would result in undue financial loss or gain to any person or organization, as found at subclause 14(1)(c)(iii) of the *FOIPP Act*.

[65] I find that Tourism PEI has not satisfied any of the required elements of clause 14(1)(c) of the *FOIPP Act*.

[66] I find that Tourism PEI failed to meet the burden of proof of the conditions found under clauses 14(1)(a), (b) and (c) of the *FOIPP Act* that are required to authorize a mandatory exception to disclosure. I reiterate that Tourism PEI was not obliged or entitled to withhold the Memorandum of Understanding from the Applicant.

V. SUPPLEMENTARY DISCUSSION

[67] The Applicant speculates that the Government of PEI is playing on the knowledge that the Office of the Information and Privacy Commissioner is under resourced and is

overwhelming the office with frivolous refusals to thwart timely access to information.

The Applicant states:

. . . the government's response to this request is reflective of an unfortunate, but growing trend. Government routinely denies valid access requests in the knowledge that the overly legal, and taxing process will result in many requests being dropped. Government knows that the act is tipped against applications made by ordinary Islanders. We have neither the financial nor legal resources available to us. Few ordinary Islanders can efficiently answer the legal questions you pose. The same does not apply to government. It is using publicly funded legal resources to stifle and delay what should be ready public access.

[68] The Applicant aptly and persuasively presents his points. I appreciate the Applicant's frustration. I acknowledge that there are backlog and timing issues in the Office of the Information and Privacy Commissioner. I further acknowledge that this is not the first time I have heard this theory and complaint. I do not dismiss the Applicant's concern: access delayed is access denied.

[69] After the passage of eleven months at our office, the Applicant requested that I discontinue the review. The Applicant submits that the time delays of this office resulted in the record at issue no longer being relevant for the Applicant's purpose.

[70] I continued the review with authority under subsection 50(1) of the *FOIPP Act*. The Applicant was "gobsmacked that [I] would waste one second of precious review time" to continue the review in the face of his withdrawal. While I appreciate the Applicant's position, I am also mindful of my mandated responsibility to monitor how the *FOIPP Act* is administered to ensure that its purposes are achieved. Subsection 50(1) of the *FOIPP Act* states, with emphasis added:

50. (1) In addition to the Commissioner's functions under Part IV, with respect to reviews, the Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may

- (a) conduct investigations to ensure compliance with any provision of this Act or compliance with rules relating to the destruction of records set out in any other enactment of Prince Edward Island;
- (b) make an order described in subsection 66(3) whether or not a review is requested;
- (c) inform the public about this Act;
- (d) comment on the implications for freedom of information or for protection of personal privacy of proposed legislative schemes or programs of public bodies;
- (e) comment on the implications for protection of personal privacy of using or disclosing personal information for record linkage;
- (f) authorize the collection of personal information from sources other than the individual the information is about;
- (g) bring to the attention of the head of a public body any failure by the public body to assist applicants under section 8; and
- (h) give advice and recommendations of general application to the head of a public body on matters respecting the rights or obligations of a head under this Act.

[71] Although the Applicant no longer required the record, important issues were revealed during my review that need to be addressed. As I proceed with this order, my intention is to stimulate an attitude more reflective of the culture of transparency that our access legislation is designed to promote. Clause 2(a) of the *FOIPP Act* states:

2. The purposes of this Act are

- (a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act;

Processing the Access to Information Request

[72] I use this order as an opportunity to comment more generally about processing access to information requests, including a public body's obligations under the *FOIPP Act*, and

specifically under subsection 8(1). Subsection 8(1) is a statutory standard of the quality of a public body's response to applicants. It states:

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.

[73] While processing the Applicant's access to information request, Tourism PEI complied with the legislated time lines to reply to the Applicant, it correctly approached the third party for input, and it continually communicated with the Applicant through letters, phone calls and e-mails. In its final reply to the submissions of the Applicant, Tourism PEI states that it "followed the proper process in determining whether the information requested by the Applicant can be released". With respect, I take issue with this statement.

[74] I do not hold any public body to a standard of perfection, but it is apparent that Tourism PEI took several shortcuts in processing the Applicant's access to information request and in its participation with my review of its decision. It is possible for reasonable people to disagree on applying the access to information law to a particular record, but these shortcuts lead me to believe that this public body fell short of its subsection 8(1) duty to respond to the Applicant openly, accurately and completely.

[75] The *FOIPP Guidelines and Practices Manual* is a comprehensive reference available to public bodies to help them carry out their obligations. This resource contains explicit instructions on processing a FOIPP request. Chapter 3.3 outlines all of the duties a FOIPP coordinator will carry out when processing an access request. After carefully reviewing and considering both the procedures that are expected from a public body and the documentation Tourism PEI provided to me, I question whether this public body:

- created a separate file for the access request;
- searched for, or collected records;

- considered providing partial release of the record by severing the information the third party wanted withheld;
- performed a line-by-line review of the record;
- based its decision on the statutory factors of section 14 of the *FOIPP Act*;
- had the evidence on which it based its bare submissions;
- appreciated its obligation to the third party to advise it that some of the information was already in the public realm; and
- appreciated its obligation to reply fully with me on this review.

Creating a separate file for the access request:

[76] The manual speaks to maintaining a separate file for each access request to document the activities of processing the access request. At page 29, under “Documenting and Tracking Requests”, the manual states:

All public bodies should maintain documentation systems to record all deliberations and decisions regarding the processing of requests and to help ensure that the request process meets the requirements set out in the *Act*.

This documentation may become a critical part of the evidence required during a review by the Information and Privacy Commissioner. It can also be of assistance in the processing of subsequent similar requests.
[emphasis added]

[77] Subsection 53(3) of the *FOIPP Act* requires a public body to produce within 10 days any record or a copy of any record required by the Commissioner. The initial correspondence to a public body from this office upon the receipt of a request for review asks the public body to produce all documents or correspondence relating to the access to information request, including records surrounding the public body’s decision-making process. This is essential for me to determine whether a formal investigation or inquiry is warranted.

- [78] In response to my initial request to Tourism PEI to produce all records related to the access request, including those not disclosed to the Applicant, I received only limited correspondence between the Applicant and Tourism PEI and between the third party and Tourism PEI. I received no records about the processing of the access request.
- [79] In my second request to Tourism PEI to produce records, as noted above, I asked for records mentioned by the third party (proposal and request for proposal). I also offered examples of the other records I was looking for including: correspondence, minutes of meetings, notes to file, emails, documented appointments or documented phone calls created during Tourism PEI's decision-making process. Tourism PEI provided one additional e-mail, the content of which I will discuss below.
- [80] Had Tourism PEI created a separate file about this access to information request, a reply to my requests for records would have been very simple. There is no statutory obligation to create records when processing a file, but on a practical level, records are helpful for a public body to support its position in an investigation of this office. For example, if an issue on a review is about the adequacy of a search for records, it would greatly assist the inquiry if the public body had recorded the efforts it made to search, including where and by whom.

Searching and collecting records:

- [81] I have no evidence that Tourism PEI searched for records. Tourism PEI provided no information describing where it searched for records, no correspondence with staff to identify who performed a search for records and no documentation about the time staff spent searching and retrieving records.
- [82] The Applicant only asked for one record - a contract. Tourism PEI only identified one record - a memorandum of understanding. I believe that Tourism PEI should have

continued searching. The two and a half page Memorandum of Understanding contained little detail for a contract involving a relatively large sum of money. I acknowledge that a memorandum of understanding may be considered a contract and that the law does not require an agreement to be detailed; however, it is also not uncommon for parties to follow up a memorandum of understanding with a contract containing specific details. The Memorandum of Understanding contemplated periodic reviews, the results of which I would have presumed to be documented. Further, the correspondence refers to both a request for a proposal and a proposal from the third party. As noted above, I requested these records from Tourism PEI and received the following response, in part:

Unfortunately, the information you are requesting is outside the scope of applicant's original request for information which was solely for a "copy of the contract". I can certainly begin a search in the Department for the additional information you would like to have but would like to ask for an extension on your deadline ...

[83] Although the Applicant did not request additional records, Tourism PEI relied on these other records when it determined that the information was supplied by the third party. Tourism PEI argued that the third party supplied the information contained in the Memorandum of Understanding. There was no mention of the information having been supplied orally. The information the third party supplied to Tourism PEI would have been contained in a record, and that record would have been considered a related record to the request. No such records were provided to me. It is curious that the Public Body was not able to readily produce records on which it relied.

[84] I do not think this is a case where the records were reviewed but not retained. Tourism PEI asked for an extended period of three and a half weeks to gather the records on which it relied. If Tourism PEI had already reviewed the records that indicated the information was supplied by the third party, I question why it would take that much time for Tourism PEI to collect the records again. This is not merely an artifact of a failure to keep a separate file for an access request.

[85] Tourism PEI offered to obtain these records for me. I do not believe that Tourism PEI was intentionally providing incomplete records or was endeavouring to obstruct the investigation of our office, as both would be an offence under clause 75(1)(c) of the *FOIPP Act*.

[86] I have no evidence that Tourism PEI searched for additional records. I have no way of knowing whether the Memorandum of Understanding represents the whole agreement between Tourism PEI and the third party.

Providing partial release of a record:

[87] Subsection 6(2) of the *FOIPP Act* says that when a record contains excepted information, an applicant has a right of access to the remainder of the record. When a public body can reasonably sever excepted information from a record, the law requires the public body to provide the remainder of the record to the applicant. Receiving the remainder of a record is a legislated right and, as such, partial release has to be considered by a public body for every record. Subsection 6(2) states, as follows:

6. (2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record. [emphasis added]

[88] Tourism PEI decided that subsection 14(1) of the *FOIPP Act* was applicable to some but not all of the information in the Memorandum of Understanding. Many details of the agreement were already in the public realm at the time of the access request, but I have no evidence or argument that Tourism PEI considered providing the balance of the record to the Applicant.

Line-by-line review:

[89] The *FOIPP Guidelines and Practices Manual* recommends that each record be reviewed on a line-by-line basis when considering disclosing information. This exercise may have helped Tourism PEI focus on the specific information contained in the Memorandum of Understanding that would harm the third party's business if disclosed. I expect that such an analysis would have also revealed flaws in the third party's claim that the record contained trade secret(s).

[90] As noted by Justice Saunders of the Nova Scotia Court of Appeal for the majority in *O'Connor v. Nova Scotia*, 2001 NSCA 132 (CanLII), at paragraph 94, "[t]here is no shortcut to inspecting the information for what it really is and then conducting the required analysis . . .". Justice Saunders is discussing another exception to disclosure provision regarding Nova Scotia's *Freedom of Information and Protection of Privacy Act*, but the same principle applies in analyzing any exception to disclosure - 'there are no shortcuts'.

Statutory factors of section 14 of the FOIPP Act:

[91] As noted above, in response to our second request for records, Tourism PEI provided one additional e-mail which says, in part:

If we decided to release the information we could damage our relationship with [the third party].

If the Applicant decides to appeal to the commissioner and wins, at least [the third party] will know that we tried to do as he asked.

[92] The *FOIPP Act* is a law entitling persons access to public information in the custody and control of our provincial public bodies. A public body has an obligation to make its decisions regarding access to information based on the *FOIPP Act*, not based on the

wishes of a third party. Tourism PEI's remarks reflect a very casual approach to withholding information from an applicant; the remarks show more deference to the wishes of a third party than to Tourism PEI's responsibilities to the citizens of Prince Edward Island under the law.

[93] Tourism PEI's relationship with the third party is not a consideration under the provisions of section 14 of the *FOIPP Act*.

Public body's obligation to the third party:

[94] I reviewed the letter that the third party gave to Tourism PEI. In addition to objecting to disclosure of the information about the services it was providing, the third party objected to the contract amount being disclosed to the Applicant. The third party did not appear to appreciate that Tourism PEI had disclosed the dollar amount of the contract in the Legislative Assembly several months previous. Although Tourism PEI advised the Applicant of this fact, it does not appear that Tourism PEI advised the third party of this fact. As a result, it is possible that the third party was not even in a position to properly assess the potential harm disclosure of the record would have to its business, if any.

[95] In the case at hand, the Applicant advised that the record was no longer relevant. As such, I did not seek additional evidence from the third party, nor from the public body, beyond the requests already noted above.

Reply fully on this review:

[96] I have concerns about the bare submissions provided me by Tourism PEI. It's submissions contained no evidence. Subsection 65(1) of the *FOIPP Act* says a public body bears the burden of proof. I question whether Tourism PEI was relying on the third party to fulfill its burden of proof.

[97] This is not the first request for access to information that Tourism PEI has received, nor is it the first review of a decision of this public body by this office. As noted by the Applicant, the head of the Public Body and its FOIPP Coordinator have expertise and resources within its department and other areas of the provincial government from which to rely; therefore, it does not appear to be a systemic problem of an incapacity to properly respond to access to information requests.

[98] My detailed observations on how this file was processed are presented with the objective of improving the services provided to citizens when exercising their legal right of freedom of information, including the decision-making by our public bodies. In my opinion, the head of the Public Body took shortcuts with both the Applicant's access request and the subsequent review by this office. Improper processing of a request for access to information and analysis of a record is a disservice to an applicant, a third party and the general public.

[99] Under section 74 of the *FOIPP Act*, the province enjoys indemnity against civil actions for damages resulting from a public body and any of its employees acting in good faith. The concept of good faith and bad faith in the context of access to information is considered in *Re Toronto (City)*, 2007 CanLII 42224 (ON IPC), at page 11. Citing from a decision of the Supreme Court of Canada, *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61 (CanLII), [2004] 3 S.C.R. 304], Madam Justice Deschamps noted that:

. . . the concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith.

[100] I am not able to assess whether Tourism PEI failed to appreciate its responsibilities under the *FOIPP Act*, or whether it was denying access for reasons that do not fall within the *FOIPP Act*. I reiterate that I do not hold any public body to the standard of perfection, but it is difficult to give a public body the benefit of the doubt that it is not aware of its obligations when the legislation has been in force for almost 10 years. There are numerous orders from this office which speak specifically to the exceptions found at subsection 14(1) of the *FOIPP Act* about harm to the business interests of a third party, and there are hundreds of decisions from other jurisdictions with laws similar to ours.

VI. FINDINGS

[101] Subsection 14(1) of the *FOIPP Act* requires that all three of its clauses (a), (b) and (c) be satisfied in order for a public body to withhold requested information from an applicant.

[102] With respect to clause 14(1)(a), I find the following:

- a. I find that the Memorandum of Understanding did not contain any trade secrets as described at subclause 14(1)(a)(i); and
- b. I find that disclosure of the Memorandum of Understanding would reveal limited commercial and financial information of the third party, being the type of information designed to be protected under subclause 14(1)(a)(ii).

[103] With respect to clause 14(1)(b), I find that there is no evidence that the third party supplied the content of the Memorandum of Understanding. Additionally, and in the alternative, if the content of the Memorandum of Understanding was supplied by the third party, it was not supplied in confidence.

[104] With respect to clause 14(1)(c), I find that there is no evidence or argument that disclosure of the Memorandum of Understanding would result in any harm to the third party as described within 14(1)(c).

[105] I find that there is only limited commercial and financial information of the type designed to be protected under section 14 of the *FOIPP Act*, as found under clause 14(1)(a); however, I find that this limited information does not meet the requirements of clauses 14(1)(b) and (c) of the *FOIPP Act*.

[106] I find that Tourism PEI did not provide sufficient evidence or argument to prove that it was required to withhold the Memorandum of Agreement from the Applicant under subsection 14(1) of the *FOIPP Act* and that the record at issue to this review, being the Memorandum of Understanding, was improperly withheld from the Applicant.

VII. ORDER

[107] Under subsection 66(2) of the *FOIPP Act*, I may, at my discretion, order a public body to disclose a record at issue. I am not ordering Tourism PEI to disclose the Memorandum of Understanding to the Applicant, as I have reason to believe that I have an incomplete record which may result in an incomplete analysis, and further that the Applicant has indicated the record at issue is no longer relevant for his purposes.

VIII. RECOMMENDATION

[108] Under subsection 66(4) of the *FOIPP Act*, I am recommending that the head of the Public Body ensure that it adequately trains all of its staff who are responsible for responding to applicants in the application of the *FOIPP Act*.

Maria C. MacDonald
Information and Privacy Commissioner