OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI-14-001

Re: Department of Transportation and Infrastructure Renewal

Prince Edward Island Information and Privacy Commissioner

Maria C. MacDonald

January 9, 2014

Summary:

The Applicant requested access to her personal information held by the Department of Transportation and Infrastructure Renewal (the "Public Body"). The Public Body refused to disclose some records under section 18 of the *Freedom of Information and Protection of Privacy Act (*the "*FOIPP Act*"), claiming that disclosure would interfere with a law enforcement matter. The Commissioner found that section 18 of the *FOIPP Act* did not apply to the records at issue. The Public Body severed information from some other records under section 15 of the *FOIPP Act*. The Applicant did not take issue with the Public Body's application of section 15. The Commissioner observed that the Public Body claimed section 15 to sever one line which was personal information of the Applicant. As section 15 of the *FOIPP Act* does not apply to personal information of the Applicant, the Commissioner ordered the Public Body to disclose this personal information.

Sections Cited:	*Freedom of Information and Protection of Privacy Act,* RSPEI 1988, c F-15.01, ss. 1(e), 1(i), 1(m), 15, 18, 34, 65(2), 68 *Civil Service Act*, RSPEI 1988, c C-8
Cases cited:	PE Order No. PP-06-001, *Re Office of the Attorney General* (2006 CanLII 39090) PE Order No. 07-001, *Re Prince Edward Island Tourism* (2007 CanLII 55713)
Resources Cited:	*PEI FOIPP Guidelines and Practices Manual* *Prince Edward Island Civil Service Workplace Harassment Policy* (March 1996).

I. BACKGROUND

1. The Applicant was an employee of the Department of Transportation and Infrastructure Renewal (the "Public Body"). During her employment, she had conflict with her supervisor. The Applicant advised her employer that she reported to the police that her supervisor was harassing her, but the Applicant did not make a formal harassment complaint to her employer.

2. The Applicant requested access to her personal information, including "any and all correspondence, email, letters, notes, blackberry, etc.", of six named employees, the Deputy Minister and the Minister, dated between "April 1, 2009 to present", with the date of her request being October 1, 2009. The Public Body gave the Applicant full access to seven records and partial access to 11 records. The Public Body severed some information from the partially disclosed records, citing subsection 15(4) of the *Freedom of Information and Protection of Privacy Act,* RSPEI 1988, c F-15.01 (the "*FOIPP Act*"), saying disclosure would be an unreasonable invasion of third parties' personal privacy. The Public Body withheld 23 pages of handwritten notes, relying on clause 18(1)(a) of the *FOIPP Act*, saying that disclosure would interfere with a law enforcement matter. The Applicant sought a review of the decision of the Public Body to refuse to disclose these 23 pages.

3. The Public Body severed a small amount of information from 11 records, citing the whole of subsection 15(4) of the *FOIPP Act*. On the request of the Acting Commissioner, the Public Body provided submissions on its application of section 15. The Applicant did not take issue with the Public Body's decisions about section 15; in fact, she believed that the Public Body revealed more information to her than it should have. Based on the content of the records, incomplete severing, and the Applicant's personal knowledge by her attendance at work and at meetings, the Applicant was able to identify severed names of her co-workers and union steward. I consider most of the Public Body's decisions about severing to be moot. I am not reviewing the Public Body's decisions about section 15 of the *FOIPP Act*, with one exception.

II. RECORDS AT ISSUE

4. The records at issue to this review are:

(i) 23 pages of handwritten notes withheld under clause 18(1)(a) of the *FOIPP Act* [disclosure harmful to law enforcement]; and

(ii) a three page confidential note to file, dated September 28, 2009 (author unidentified), severed under subsection 15(4) of the *FOIPP Act* [disclosure harmful to a third party's personal privacy].

III. ISSUES

5. The issues to this review are:

(1) Did the Public Body properly apply clause 18(1)(a) of the *FOIPP Act* to the handwritten notes withheld from the Applicant, and could one reasonably expect disclosure to interfere with a law enforcement matter?; and

(2) Did the Public Body properly apply section 15 of the *FOIPP Act* to information severed from the confidential note to file, and would disclosure be an unreasonable invasion of a third party's personal privacy?

IV. DISCUSSION

Issue 1: Did the Public Body properly apply clause 18(1)(a) of the *FOIPP Act* to the handwritten notes withheld from the Applicant, and could one reasonably expect disclosure to interfere with a law enforcement matter?

6. The Public Body withheld from the Applicant 23 pages of handwritten notes taken by the Manager of Human Resources from discussions with the Applicant and a few other employees of the Public Body. The Public Body says the notes were created during an investigation into accusations of harassment made by the Applicant. The notes are rough, the author uses incomplete sentences and short forms, and the handwriting is difficult to read. The pages are not all dated or numbered and it appears that, except for one page, most of the 23 pages were created after the Applicant's request for access to information. There are no findings, conclusions or recommendations included in the notes.

7. The head of a public body may refuse to disclose records to an applicant if he or she reasonably expects the disclosure to interfere with a law enforcement matter. Clause 18(1)(a) of the *FOIPP Act* states:

> 18. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
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> > (a) interfere with or harm a law enforcement matter, including an ongoing or unsolved law enforcement matter.

8. Interpreting and applying this exception to disclosure involves interpreting the term "law enforcement". "Law enforcement" is not limited to police investigations. The Legislature defines this term at clause 1(e) of the *FOIPP Act* to include investigations and proceedings that lead or could lead to a penalty or sanction. The definition states:

> 1. In this Act
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> . . .
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> (e) "law enforcement" means
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> (i) policing, including criminal intelligence

> operations,
> (ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or
> (iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings, or by another body to which the results of the proceedings are referred;

9. Previous orders of PEI note that the penalty or sanction referred to under subclause 1(e)(ii) of the *FOIPP Act* must be imposed by an Act or regulation [PE Order No. PP-06-001, *Re Office of the Attorney General* (2006 CanLII 39090), at page 29]. The Public Body did not cite any penalties or sanctions imposed by any Acts or regulations, either by the Public Body or by another body to which the results of the investigation were referred. I accept that some Acts and regulations impose penalties or sanctions for harassment, including the *Civil Service Act* and regulations, as found in PE Order No. 07-001 [*Re Prince Edward Island Tourism* (2007 CanLII 55713), which was about a request for records regarding a formal investigation into complaints of harassment.

10. The Public Body says that the handwritten notes are part of an administrative investigation as listed in subclause 1(e)(ii) of the *FOIPP Act*. Not all investigations are administrative investigations. Previous orders of PEI note that a formal process must be in place to be considered an administrative investigation under subclause 1(e)(ii) [PE Order No. PP-06-001, *supra*, at page 29]. Although the Public Body did not provide any details about a formal process, I am aware that the province has a policy against workplace harassment which contemplates both formal and informal investigation processes, namely, *Prince Edward Island Civil Service Workplace Harassment Policy* (March 1996).

11. Informal investigations are not completely complaint-driven, but the formal process for an investigation into harassment requires a written complaint. In this matter, there was no written complaint of harassment. There is no evidence that this was a formal investigation and, as such, the handwritten notes were not made in an administrative investigation. There is no suggestion that the notes were used in or led to another administrative investigation, police investigation or any other proceeding. I do not consider the handwritten notes to be of a law enforcement matter as described at subclause 1(e)(ii) of the *FOIPP Act*.

12. The exception to disclosure of clause 18(1)(a) of the *FOIPP Act* is not limited to ongoing law enforcement matters alone, but may also apply if one could reasonably expect that disclosure would interfere with other law enforcement matter(s). Although the handwritten notes derived from the investigation in this particular matter are not part of a law enforcement matter, I do accept that other investigations into harassment may be law enforcement matters.

13. The Public Body does not claim that disclosure of the handwritten notes would "harm" a law enforcement matter, but rather claims that disclosure would "interfere with" other investigations into complaints of harassment. Interfering with a law enforcement matter is a less stringent condition than harming it. The *PEI FOIPP Guidelines and Practices Manual* (the "FOIPP Manual") defines the expression "interfere with" at page 87, as follows:

> *Interfere with* includes hindering or hampering a law enforcement matter and anything that would detract from an investigator's ability to pursue the investigation.

14. The Public Body says:

> It is the position of the Public Body that the very nature of an investigation, and particularly an harassment investigation involving a small number of employees, is such that information gathered would be

> provided on a confidential basis. It is not unreasonable to expect that persons with relevant information would not be as willing or at all willing to come forward if they know that this information may be disclosed to the complainant or the respondent. If they do come forward, the possibility exists that the information provided may not be as accurate as it would be if the confidentiality of the process were guaranteed. As such, the Public Body, in this instance, chose to exercise its' discretion by withholding the record in question because the disclosure could reasonably be expected to interfere with the law enforcement matter.

15. The Public Body claims that if it discloses the handwritten notes, in future, employees with relevant information about harassment in the workplace would not be willing to come forward and the information provided may not be as accurate as it would be if the confidentiality of the process was guaranteed. This is sometimes called the "chilling effect". If these are consequences of disclosure, it would be reasonable to expect that disclosure would interfere with future law enforcement matters; however, other than the above-noted statement, the Public Body did not give any evidence that disclosing the handwritten notes could result in employees not coming forward with relevant information or provide accurate information in other investigations into harassment. There is no indication that the Public Body consulted with any of the individuals named in the handwritten notes about whether they would have been less forthcoming or accurate had they known that their information might be disclosed to the Applicant, nor whether they objected or consented to the disclosure.

16. In this matter, the Applicant is the one who allegedly suffered the harassment. Seven or eight pages of the 23 pages of handwritten notes the Public Body refused to disclose to the Applicant are from discussions the Manager of Human Resources had with the Applicant. It is not reasonable to expect that employees who have suffered harassment would not be as forthcoming or accurate if they knew the Public Body may provide them a copy of the notes taken from their words.

17. Provincial policy on harassment in the workplace places a responsibility on all employees to fully cooperate with those who are dealing with a complaint of harassment. The *Civil Service Act*, RSPEI 1988, c C-8, says a breach of a rule or policy may result in disciplinary action. I do not think it is reasonable to expect that employees will not comply with their responsibility under provincial policy.

18. The Public Body uses the expression "guarantee of confidentiality"; however, if it gave anyone a guarantee of confidentiality, it did not have the authority to do so. For example, information may need to be used as evidence in a grievance or criminal or civil proceeding. Section 18 of the *FOIPP Act* is a discretionary exception to disclosure, so a public body may disclose information in response to an access request, even if disclosure interferes with a law enforcement matter.

19. It is the Public Body's burden to persuade me that disclosure could reasonably be expected to interfere with a law enforcement matter. It is not enough to fear that disclosure could cause people to not come forward in future investigations or, if they do come forward, that the information provided would not be accurate. The language and test of the *FOIPP Act* is that there has to be a reasonable expectation of interference with a law enforcement matter. The Acting Commissioner requested the Public Body provide all records regarding its decision-making process, but the Public Body did not provide any evidence about how it assessed that disclosure would interfere with administrative investigations into harassment. The records at issue, the Public Body's processing records and the Public Body's submissions do not provide a reasonable basis for concluding that disclosure of the handwritten notes could reasonably be expected to interfere with other law enforcement matters. I find that the concerns of the Public Body are speculative.

20. One of the statutory purposes of the *FOIPP Act* is to allow individuals a right of access to personal information about themselves, subject to limited and specific exceptions as set

out in the Act. I do not dismiss the potential of a chilling effect out of hand, but just saying it, does not necessarily make it so. Without any evidence beyond the bald statement, I do not accept that disclosure of the handwritten notes could reasonably be expected to interfere with a law enforcement matter.

21. I find that section 18 of the *FOIPP Act* does not apply to the handwritten notes and, as such, I do not need to consider whether the Public Body properly exercised its discretion in withholding access to this record from the Applicant.

Issue 2: Did the Public Body properly apply section 15 of the *FOIPP Act* to information severed from the confidential note to file, and would disclosure be an unreasonable invasion of a third party's personal privacy?

22. The Applicant did not take issue with the Public Body's decision to provide partial access to 11 records. The Public Body severed a small amount of information, citing section 15 of the *FOIPP Act*, which prohibits a public body from disclosing personal information if disclosure would be an unreasonable invasion of a third party's personal privacy. Section 15 of the *FOIPP Act*, *supra*, says:

> 15. (1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

23. The expression "third party" in the *FOIPP Act* excludes an applicant. The definition of "third party" is found at clause 1(m) of the *FOIPP Act*, *supra*, and states:

> 1. In this Act
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> . . .
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> (m) "third party" means a person, a group of persons or an organization other than an applicant or a public body;

24. One of the 11 records the Applicant received is a three page confidential note to file dated September 28, 2009. The Public Body severed part of a line from page two at the end of the first paragraph of the third bullet, citing subsection 15(4) of the *FOIPP Act*. I examined an unsevered copy of the record and see that this information is a view or opinion of the author of the note about the Applicant. The Legislature includes this type of information in the definition of "personal information" at subclause 1(i)(viii) of the *FOIPP Act*, *supra*, which states:

> 1. In this Act
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> . . .
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> (i) "personal information" means recorded information about an identifiable individual, including
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> . . .
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> (viii) anyone else's opinions about the individual,

25. A view or opinion about an individual is the personal information of the individual, not the person who holds the opinion. I find that the severed information at the end of the first paragraph of the third bullet on page two of the confidential note to file dated September 28, 2009, is the personal information of the Applicant. Section 15 of the *FOIPP Act* does not apply to this information and it was not properly severed under section 15.

OTHER ISSUES

Correction of Records:

26. Without specifics, the Applicant noted that she wished to correct some of the personal information in the records.

27. The Applicant may request that the Public Body make corrections to personal information about herself, as set out under section 34 of the *FOIPP Act*. It may assist the Public Body if she provides supporting evidence, as making the request to correct does not necessarily

mean the Public Body will correct. The Public Body will either correct the personal information or, if it is a disputed fact or an opinion, it must annotate or link the personal information with that part of the requested correction that is relevant and material to the record in question.

Third Party Personal Information:

28. The 23 pages of handwritten notes contain personal information of the Applicant and personal information of third parties. It may be an unreasonable invasion of the third parties' personal privacy to disclose the notes.

29. Section 15 of the *FOIPP Act* is a mandatory exception to disclosure and says that a public body shall refuse to disclose personal information if disclosure would be an unreasonable invasion of a third party's personal privacy. The Public Body provided submissions about its application of section 15 to records that were severed, but not with respect to the 23 pages of handwritten notes. The Public Body may not have considered whether section 15 applied to these notes.

30. I have insufficient evidence to assess the application of section 15 of the *FOIPP Act* to the personal information in the handwritten notes and, therefore, I am not ordering the Public Body to disclose the 23 pages of handwritten notes.

V. FINDINGS

31. I find that the handwritten notes do not relate to a law enforcement matter and that it is not reasonable to expect that disclosure would interfere with a law enforcement matter. I find that clause 18(1)(a) of the *FOIPP Act* does not apply to the handwritten notes and that they were improperly withheld under section 18 of the *FOIPP Act*.

32. I find that the information severed at the end of the first paragraph of the third bullet on page two of the confidential note to file dated September 28, 2009, is the personal information of the Applicant, that section 15 of the *FOIPP Act* does not apply to the severed information and that this information is not properly severed under section 15 of the *FOIPP Act*.

VII. ORDER

33. I order the Public Body to disclose the information that was severed at the end of the first paragraph of the third bullet on page two of the confidential note to file dated September 28, 2009, being a view or opinion of the author of the note about the Applicant and, therefore the personal information of the Applicant.

34. I order the Public Body to consider the application of section 15 of the *FOIPP Act* to the 23 pages of handwritten notes of the Manager of Human Resources and to issue a decision letter to the Applicant. If the Applicant is not satisfied with the decision letter, she may seek a review by this office and I will undertake to address the matter as a priority. Subsection 65(2) of the *FOIPP Act* says that an applicant has the burden of proving that disclosing personal information would not be an unreasonable invasion of the third party's personal privacy. I am not shifting the burden of proof, but if the Public Body decides to withhold the record or sever some information from the record under section 15 of the *FOIPP Act*, I encourage the Public Body to provide thorough reasons and explanation in its decision letter.

35. Section 68 of the *FOIPP Act* says a public body shall not take any steps to comply with an order until the end of the time for bringing an application for judicial review of the order under section 3 of the *Judicial Review Act*. The time limit for making an application for judicial review is 30 days, unless it is extended by a judge of the Supreme Court of PEI. The head of the Public Body must comply to this order within 40 days of

receipt of a copy of the order, unless an application is made to the Supreme Court of PEI for a judicial review.

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Maria C. MacDonald
Information and Privacy Commissioner