



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

**Order No. FI-15-003**

**Re: Department of Family and Human Services**

**Prince Edward Island Information and Privacy Commissioner**

**Karen A. Rose**

**August 31, 2015**

**Summary:**

An applicant requested access to documents regarding a request for proposal for the redevelopment of a seniors housing complex, including a contract made between the Department of Community and Seniors, now referred to as the Department of Family and Human Services (the “Public Body”) and the successful proponent, and all records of the sale of the lands related to the seniors housing complex. The head of the Public Body decided to release the records to the applicant, with limited severing of third party personal information, relying on section 15 of the *Freedom of Information and Protection of Privacy Act* (the “*FOIPP Act*”). Two third party companies requested a review by the Information and Privacy Commissioner of the decision of the Public Body, arguing the information in the records is exempt from disclosure under subsection 14(1) of the *FOIPP Act*, as it would be harmful to their business interests. The Commissioner found that subsection 14(1) did not apply to the information in any of the three records at issue, as all three clauses of subsection 14(1) had not been satisfied. The Commissioner confirmed the Public Body’s decision to disclose the records at issue to the applicant, severing third party personal information, pursuant to section 15.

- Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, ss. 14(1) [disclosure harmful to business interests of a third party], 65(3) [burden of proof]; 68(1.1) [duty to comply with order]
- Decisions Considered:** Order No. FI-06-007, *Prince Edward Island (Agriculture, Fisheries and Aquaculture) (Re)*, 2006 CanLII 60800 (PE IPC)  
*Department of Economic Development and Tourism, Re* (31 August 2015), Charlottetown FI-15-002 (PE IPC)  
Order F2009-028, 2010 CanLII 98672 (AB OIPC)  
*Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII)  
Order No. FI-10-001, *P.E.I. Lending Agency (Re)*, 2010 CanLII 7313 (PE IPC)  
Order No. FI-12-001, *Department of Tourism and Culture (Re)*, 2012 CanLII 99857 (PE IPC)  
*Wolfville (Town)*, 2015 CanLII 39148 (NS FOIPOP)  
*Interior Health Authority (Re)*, 2015 BCIPC 4 (CanLII)  
Order 99-018, 1999 CanLII 19670 (AB OIPC)  
*CBC v. Privacy Commissioner & IIDI*, 2012 PESC 32 (CanLII)  
Order 96-013, 1996 CanLII 11518 (AB OIPC)
- Other Resources Cited:** Prince Edward Island *Freedom of Information and Protection of Privacy Guidelines and Practices Manual* (May 2006)

## I. BACKGROUND

- [1] An applicant (“the Applicant”) applied for access to documents relating to a request for proposal for the redevelopment of a seniors housing complex. The Applicant wanted a copy of the contract made between the Department of Community and Seniors, now referred to as the Department of Family and Human Services (the “Public Body”) and the successful proponent, all records of the sale of the lands related to the seniors housing complex, tenders, requests for proposal or other public documents. The time period for the records requested span one year, between January 1, 2010 and January 1, 2011.

[2] As part of the access process, the Public Body invited submissions from the agent of the successful proponent, which agent is also a third party company affected by the access request. The agent company requested that the Public Body withhold its financial information, and any financial and personal information that is not of public record concerning the successful proponent. The agent claimed that disclosure of the information would harm the business interests of both companies, and place both companies at a competitive disadvantage.

[3] The head of the Public Body determined that the information in the records requested did not meet the requirements of section 14 of the *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01 (the “*FOIPP Act*”), and decided to release the records, severing information relating to employment and education history of third party individuals, pursuant to section 15 of the *FOIPP Act*. Section 15 is not an issue to this review.

[4] Both third party companies (“the successful proponent” and “the agent company”) requested a review of the decision of the head of the Public Body, that subsection 14(1) of the *FOIPP Act* does not apply to the information in the records at issue. Throughout this order, these third party companies will be referred to collectively as “the Third Parties”.

## **II. RECORDS AT ISSUE**

[5] There are three Records at issue:

(i) an 11-page agreement dated August 31, 2010, between the Public Body and the successful proponent (the “Agreement”);

(ii) a four-page memorandum of understanding dated September 21, 2010 (the

“MOU”); and

(iii) an 82-page expression of interest relating to the redevelopment of a seniors housing complex (the “EOI”).

### III. ISSUE

- [6] Was the Public Body correct in its decision to disclose the Records at issue to the Applicant, with minimal severing of third party personal information as required under section 15 of the *FOIPP Act*, as the information in the Records at issue does not meet the requirements for the exception to disclosure under subsection 14(1) of the *FOIPP Act*?

### IV. BURDEN OF PROOF

- [7] Subsection 65(3) of the *FOIPP Act* places the burden on the Third Parties to prove that the information at issue should not be disclosed pursuant to subsection 14(1). It states:

65. (3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,  
(a) in the case of personal information, it is up to the applicant to prove the disclosure of the information would not be an unreasonable invasion of the third party’s personal privacy; and  
(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record. [underline emphasis added]

- [8] During the review process, the Third Parties made submissions in support of their position, which submissions are discussed in detail below.

## V. DISCUSSION

### Section 14 of the *FOIPP Act*

[9] Many decisions of information and privacy commissioners exist about the types of information belonging to third party businesses that are excepted from disclosure under provisions equivalent to subsection 14(1) of the *FOIPP Act*. These have clearly established that not all business information is excepted from disclosure under this subsection. I make this distinction in Order No. FI-06-007, *Prince Edward Island (Agriculture, Fisheries and Aquaculture) (Re)*, 2006 CanLII 60800 (PE IPC), at page 16, where I state:

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.

[10] I also discuss the background of the purpose of the section 14 exception in Order No. FI-15-002, released concurrently with this order. At paragraphs [13] and [14], I review some history of this limited and specific exception, pointing out that section 14 of the *FOIPP Act* is not meant to protect from disclosure all third party business information. Similarly, in Order F2009-028, 2010 CanLII 98672 (AB OIPC), the Alberta Commissioner states the following with regard to Alberta's section 16, the equivalent of our section 14, at paragraph 36:

[para 36] The purpose of mandatory exceptions to disclosure for the commercial information of third parties in access to information legislation is set out in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* at page 313:

The accepted basis for an exemption relating to commercial activity is that business firms should be

allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information.

The purpose of provisions like section 16 is to protect specific types of proprietary information or “informational assets” of third parties from disclosure, so that businesses may be confident that they can continue to invest in this kind of information, and to encourage businesses to provide this kind of information to government when required.

[11] Thus, determining the applicability of section 14 of the *FOIPP Act* requires a careful balancing of the interests of openness and transparency with third party business interests, which balance I have borne in mind throughout this review. This balance was pointed out by the Supreme Court of Canada in *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (Can LII), as follows:

[2] Providing access to government information, however, also engages other public and private interests. Government, for example, collects information from third parties for regulatory purposes, information which may include trade secrets and other confidential commercial matters. Such information may be valuable to competitors and disclosing it may cause financial or other harm to the third party who had to provide it. Routine disclosure of such information might even ultimately discourage research and innovation. Thus, too single-minded a commitment to access to this sort of government information risks ignoring these interests and has the potential to inflict a lot of collateral damage. There must, therefore, be a balance between granting access to information and protecting these other interests in relation to some types of third party information.

[12] Subsection 14(1) of the *FOIPP Act* is a mandatory exception to disclosure, so that a

public body must refuse to disclose information that meets its three requirements.

Subsection 14(1) states:

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.

[13] In Order No. FI-10-001, *P.E.I. Lending Agency (Re)*, 2010 CanLII 7313 (PE IPC), former Acting Commissioner Haldemann explains the three-part test set out in subsection 14(1) of the *FOIPP Act* to determine whether information qualifies for an exception to disclosure. At page 7, the Acting Commissioner states:

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.

This three-pronged test has been confirmed in other decisions of this office, and in decisions considering equivalent freedom of information provisions in other provinces.

***Would disclosure of the Records at issue reveal the types of information set out in clause 14(1)(a) of the FOIPP Act?***

[14] Clause 14(1)(a) of the *FOIPP Act* breaks down the above analysis still further. Three required elements must exist in order for information to meet the parameters of clause 14(1)(a). Order No. FI-06-007, *supra*, discusses clause 14(1)(a) at page 7, and states:

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.

***Clause 14(1)(a), Type of information***

[15] The Third Parties argue that information about its business arrangements with each other, the business operational information of both companies, and the financial information contained in the EOI, the Agreement and the MOU, should not be disclosed to the Applicant. During the course of this review, the Third Parties were able to identify the specific information in the Records at issue to which they submit subsection 14(1) of the *FOIPP Act* should apply.

[16] In its submissions, the Public Body has not identified the category of information under which the Records at issue might fall in accordance with clause 14(1)(a) of the *FOIPP Act* (ie. trade secrets, commercial information, etc.). Instead, it has eliminated the

application of clause 14(1)(a), because it submits the Agreement and the MOU are not “of a third party”. As to the EOI, the Public Body submits that it was not supplied in confidence, which submission will be discussed under clause 14(1)(b), below.

[17] The information in the Agreement to which the Third Parties have applied clause 14(1)(a) of the *FOIPP Act* is as follows:

Page 1, second recital	Dollar amount of grant
Page 2, para 6	Dollar amount upon which grant is based
Schedule “B” , entitled “Rent Levels”	Maximum rent amounts
Schedule “E” , entitled “Grant Dispensation”, para 1	Dollar amount of grant
Schedule “E” , entitled “Grant Dispensation”, para 2	Dollar amount maximum for invoice payment
Schedule “F” , entitled “Reporting”	Periodic reporting requirements

[18] The information in the MOU to which the Third Parties have applied clause 14(1)(a) of the *FOIPP Act* is as follows:

Page 2, para 3	Purchase price of property
Page 2, para 4	Lease arrangement
Page 2, para 5	Dollar amount of grant
Page 2, para 6	Dollar amount of insurance requirement
Page 4, para 1	Phase 2 particulars

[19] The information in the EOI to which the Third Parties have applied clause 14(1)(a) of the

FOIPP Act is as follows:

Cover letter, page 2, second line	Purchase price of property
Page 8 and 9, para 3.4	Phase information
Page 11, para 4.1	Purchase price of property
Page 11, para 4.2	Capital cost and financial projections
Page 11, para 4.3	Rent supplement proposal
Page 12, para 4.4	Rent supplement proposal – 5 year projection
Page 70, Team Experience, Appendix “A” from table of contents	Examples of projects and dollar amounts
Page 82 (final page), Appendix “B” from table of contents	Projected income and expense for project

[20] Under the *FOIPP Act*, the term “trade secret” is defined at clause 1(n); however, the other types of information listed at subclause 14(1)(a)(i), namely, commercial, financial, labour relations, scientific and technical information, are not defined. Previous decisions have established that these other terms are to be interpreted by their ordinary meanings, and several decisions have elaborated on the types of business information that would fall under each category.

[21] “Business operational information” is not one of the types of information listed under subclause 14(1)(a)(i) of the *FOIPP Act*; however, in the context of the Third Parties’ use of this term, it may be considered “commercial information”.

[22] An accepted definition of “commercial information” is found at paragraph [15] of Order No. FI-12-001, *Department of Tourism and Culture (Re)*, 2012 CanLII 99857 (PE IPC), which states:

[15] . . .  
"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.

[23] I have reviewed the information in the three Records at issue: the Agreement, the MOU and the EOI. I agree that the Records at issue contain commercial information, including periodic reporting requirements, lease arrangements, Phase 2 particulars, phase information, and examples of projects.

[24] An accepted definition of "financial information" is also found in Order No. FI-12-001, *supra*, at paragraph [27], which states as follows:

[27] . . .  
"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.

[25] Upon review of the Records at issue, and taking into consideration the definition noted above, I confirm that the remainder of the information at issue (that information which is not commercial information) in the Agreement, the MOU and the EOI, and set out in the tables above, is financial information.

Clause 14(1)(a), Information "of a third party"

[26] The second element that must exist to establish the information at issue meets the parameters of clause 14(1)(a) of the *FOIPP Act* is that the information be "of a third party", or belonging to a third party. The intent of this element is to protect the informational assets of non-governmental parties, as opposed to information relating

to commercial matters generated by government itself.<sup>1</sup>

*The Agreement and the MOU*

- [27] As noted above, it is the Public Body's position that the information in the Agreement and the MOU is not "of a third party", as these Records at issue were created as a result of negotiations between the parties. The Agreement and the MOU are negotiated instruments based, in part, on information supplied by the Third Parties. Several decisions have addressed the reality that final agreements may contain information that was originally provided by third parties, and guidelines for analysis have evolved as a result.
- [28] In *Wolfville (Town)*, 2015 CanLII 39148 (NS FOIPOP), the Nova Scotia Review Officer recently issued a decision discussing the meaning of "of a third party" in this context. Relying on a decision of Nova Scotia's Supreme Court, the Review Officer concluded, at paragraph 27, that commercial and financial information of a third party can be modified by the negotiation process to the point that it clouds the third party's claim to a proprietary interest in the information, and would therefore not be considered "of a third party".
- [29] I have reviewed the information at issue in the Agreement and the MOU. The evidence reveals that the maximum rent levels originated in the Public Body's Request for Expressions of Interest, as did the requirement for periodic reporting and insurance coverage. As to the remainder of information at issue in the Agreement and the MOU, it is the Public Body's evidence that this information was negotiated between the parties. The Third Parties do not address the issue of negotiated terms in their submissions. I accept the Public Body's submission, and, to paraphrase the Nova Scotia Review Officer in *Wolfville (Town)*, *supra*, at paragraph 27, I find that this

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<sup>1</sup>*Public Government for Private People, The Report of the Commission on Freedom of Information and Individual Privacy*, vol 2, ch. 14 (Toronto: Queen's Printer of Ontario, 1980) at pp. 312-314

information is as much or more the commercial or financial information of the Public Body, as it is of the Third Parties.

- [30] The Third Parties have provided uncontradicted evidence that the Phase 2 information in the MOU was an initiative of the Third Parties only. However, it is my finding that, although this information may have been proposed by the Third Parties initially, it was subject to negotiation between the parties, as submitted by the Public Body. While there is no specific requirement for a second phase of development, Appendix “A” of the Public Body’s Request for Expressions of Interest notes at section 7.1 (1.1) that the “[p]roject is to recognize existing facility will remain in operation while construction proceeds and proposal should reflect efforts to minimize disruption to existing tenants during construction”. Although Phase 2 may have been proposed by the Third Parties, it was proposed as part of the negotiated terms which would eventually form the MOU. Once contained in the negotiated instrument, the information is no longer considered information of the Third Parties alone, but, rather, information of the parties to the negotiated instrument. I therefore agree with the Public Body’s characterization of the Agreement and the MOU as containing information that is not “of the Third Parties”.

*The EOI:*

- [31] An analysis of the EOI leads me to a contrary conclusion. Upon review of the Public Body’s Request for Expressions of Interest, dated March 23, 2010, together with the Third Parties’ response EOI, I confirm that all of the information identified in the table above (at paragraph [19]), summarizing the information at issue in the EOI, is information of the Third Parties, as it belongs to the Third Parties, did not originate from the Request for Expressions of Interest, and was not the result of negotiations between the parties.

Clause 14(1)(a), Disclosure would reveal information

- [32] The third and final element that must exist to establish that the information at issue meets the parameters of clause 14(1)(a) of the *FOIPP Act* is that disclosing the information would “reveal” the information.
- [33] A press release by one of the Third Parties, dated June 14, 2010, and a subsequent article in the *Canadian Apartment Magazine*, dated October 5, 2010, discloses information about the redevelopment project that is the subject of the Records at issue. In the press release, information about the Third Parties’ relationship with the Public Body, and with each other, and certain details about project and client history of the Third Parties, is revealed. In the magazine article, the information disclosed includes the relationship between the Third Parties, Phase 2 particulars, an estimate of the total constructions costs, the expected capitalization rate, and the capital contribution (the grant amount) the successful proponent would receive from the Public Body and the Federal government. Having already been disclosed publicly, this information would not be revealed if disclosed to the Applicant.
- [34] The websites of both Third Parties also reveal business information about the companies. Most of this information is not the specific information that is the subject of this review; however, some of it is. The particulars will be discussed under clauses 14(1)(b) and 14(1)(c) of the *FOIPP Act* below, as it will be considered in an assessment of whether information was supplied by the Third Parties in confidence, and whether there is a reasonable expectation of harm from disclosure of the information at issue.

Conclusions regarding Clause 14(1)(a)

- [35] I find that the Third Parties have not satisfied clause 14(1)(a) of the *FOIPP Act* with respect to any of the information at issue contained in the Agreement and the MOU. More specifically, I find that the information at issue in the Agreement and the MOU is commercial and/or financial, but is not “of a third party”, and, further, that some of it

would not be revealed by the Public Body’s disclosure, as it is already in the public domain.

[36] I find that the information at issue in the Third Parties’ EOI meets the parameters of clause 14(1)(a) of the *FOIPP Act*, and if disclosed to the Applicant would reveal commercial and/or financial information of the Third Parties. This information is as follows:

Cover letter, page 2, second line	Purchase price of property
Page 8 and 9, para 3.4	Phase information
Page 11, para 4.1	Purchase price of property
Page 11, para 4.2	Capital cost and financial projections
Page 11, para 4.3	Rent supplement proposal
Page 12, para 4.4	Rent supplement proposal – 5 year projection
Page 70, Team Experience, Appendix “A” from table of contents	Examples of projects and dollar amounts
Page 82 (final page), Appendix “B” from table of contents	Projected income and expense for project

[37] Having met the first of three required conditions for an exception to disclosure under subsection 14(1) of the *FOIPP Act*, I continue my examination of the information at issue in the EOI to determine whether it meets the second required condition.

***Was the information in the Records at issue supplied, explicitly or implicitly, in confidence, as required by clause 14(1)(b) of the FOIPP Act?***

[38] Two required elements must exist in order for information to meet the parameters of clause 14(1)(b) of the *FOIPP Act*, and they are:

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

Clause 14(1)(b), Information supplied by the Third Parties

[39] The Third Parties claim that the financial information contained in the three Records at issue was provided implicitly and explicitly in confidence, and has never been the subject of any public disclosure. The Third Parties state that disclosing it would harm the Third Parties' competitive position.

*The Agreement and the MOU*

[40] I have already decided that the information at issue in the Agreement and the MOU has not satisfied the requirements of clause 14(1)(a) of the *FOIPP Act*, as it is not information "of a third party", and, further, some of it would not be revealed by disclosure. However, I think it is also useful to discuss the information in these Records at issue as it relates to clause 14(1)(b), as I also find that this information was not supplied by the Third Parties. Paragraphs [26] to [31] above speak to information that is considered "of a third party", and in this review overlaps with information that was supplied by the Third Parties.

[41] The British Columbia Information and Privacy Commissioner has recently issued an order discussing the rule under the equivalent to our clause 14(1)(b) of the *FOIPP Act*. In *Interior Health Authority (Re)*, 2015 BCIPC 4 (CanLII), the Commissioner states as follows:

[15] A number of orders have found that information in an agreement or contract will not normally qualify as "supplied" by the third party for the purposes of s. 21(1)(b), because the information is the product of negotiations between the parties, even where the information was subject to little or no back and forth negotiation. There are two exceptions to this general rule:

- where the information the third party provided was "immutable" – and thus not open or susceptible to negotiation – and was

incorporated into the agreement without change

- where the information in the agreement could allow someone to draw an “accurate inference” about underlying information a third party had supplied in confidence to the public body but which does not expressly appear in the agreement.

[16] Key judicial review decisions have confirmed the reasonableness of these findings.

[42] As noted earlier, the information at issue in the Agreement and the MOU results from negotiations between the Third Parties and the Public Body. All of the information at issue in these Records at issue was susceptible to negotiation, including the Phase 2 information. No accurate inferences may be drawn about underlying information of the Third Parties that does not expressly appear in these Records at issue. Therefore, it is my finding that the information at issue in the Agreement and the MOU was not supplied by the Third Parties to the Public Body, and therefore does not come under the protection of clause 14(1)(b) of the *FOIPP Act*.

*The EOI:*

[43] In contrast, all of the information at issue in the Third Parties’ EOI was supplied by the Third Parties to the Public Body. As this was the Third Parties’ initial proposal, it was not the subject of negotiation between the parties. Upon review of the Public Body’s Request for Expressions of Interest, together with the response EOI, I am satisfied that the following information was supplied by the Third Parties to the Public Body:

Cover letter, page 2, second line	Purchase price of property
Page 8 and 9, para 3.4	Phase information
Page 11, para 4.1	Purchase price of property
Page 11, para 4.2	Capital cost and financial projections
Page 11, para 4.3	Rent supplement proposal

Page 12, para 4.4	Rent supplement proposal – 5 year projection
Page 70, Team Experience, Appendix “A” from table of contents	Examples of projects and dollar amounts
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Clause 14(1)(b), Information supplied explicitly or implicitly in confidence:

[44] The Public Body has based its decision to disclose the EOI, with personal information severed, on its conclusion that there is no evidence that the information contained in the EOI was supplied explicitly or implicitly in confidence.

*Was the information in the EOI supplied explicitly in confidence?*

[45] Other than stating in their submissions to the Public Body that the financial information was provided implicitly and explicitly in confidence, the Third Parties have provided no evidence to show that they provided the information at issue in the EOI to the Public Body explicitly in confidence.

[46] When information is supplied explicitly in confidence, there is tangible evidence conveying the intention of confidentiality, such as a written statement of confidentiality. As the Public Body points out, there is no explicit indication of confidentiality in the Public Body’s Request for Expressions of Interest, or in the Third Parties’ response EOI. In fact, there is evidence to the contrary.

[47] The Public Body’s Request for Expressions of Interest refers to the *FOIPP Act* at section 3.6. It advises proponents that all documents and submissions become the property of the government. It provides notice to the proponents that the information may be subject to disclosure under the *FOIPP Act*, and advises them to clearly mark confidential information “confidential” in order that it be given appropriate consideration. Section

3.6 states, in part:

. . . By making a submission, the proponent thereby agrees to public disclosure of its content, subject to the provision of the Freedom of Information and Protection of Privacy Act. Proponents will be consulted prior to release of any information. Any information the proponent considers “confidential information” because of its proprietary nature should be clearly marked “confidential” and will be given appropriate consideration under the Freedom of Information and Protection of Privacy Act.

The Third Parties did not include any reference to confidentiality in the cover letter accompanying the EOI, or in the EOI itself.

[48] Through the provision of section 3.6 of the Public Body’s Request for Expressions of Interest, the Third Parties had an opportunity to express their desire that the contents of the EOI be confidential. The Third Parties are clearly sophisticated companies with extensive business experience, but they chose not to identify the information in the EOI as confidential information.

[49] The Nova Scotia Review Officer took the opportunity to discuss confidentiality clauses in *Wolfville (Town), supra*, at paragraph 54, referencing the Information and Privacy Commissioner for British Columbia, as follows:

[54] The Information and Privacy Commissioner for British Columbia made an important point regarding the effects of a confidentiality clause:

[62] To be clear, I accept that a confidentiality clause can greatly assist the determination of whether the parties to a contract intend information related to it to be confidential. In this respect, I support my predecessor’s call for public bodies to address intentions of confidentiality in their contracts for products and services. Public bodies should also address their confidentiality

intentions in records that govern tenders, requests for proposal and other procurement processes. Similarly, where third parties voluntarily supply information to a public body, they ideally should do so knowing the public body's confidentiality practices. Since a public body cannot guarantee confidentiality if the Act mandates disclosure, it should frame any contract provisions, representations or policies accordingly. [28].

[50] The Public Body took the proactive initiative to address issues of confidentiality in its Request for Expressions of Interest. The Third Parties did not respond, leading me to conclude that the information in the EOI was not supplied explicitly in confidence. As discussed below, the failure of the Third Parties to identify any of the information in the EOI as "confidential" at the time of the submission of the EOI is also one consideration in my analysis of whether the information in the EOI was supplied implicitly in confidence.

*Was the information in the EOI supplied implicitly in confidence?*

[51] Tangible evidence is not required to prove that information was supplied "implicitly" in confidence; a party must prove the existence of an understanding of confidentiality. In essence, the Third Parties must show a reasonable expectation of confidentiality.

[52] I have considered the Third Parties' submission related to the implicit confidentiality of the information at issue in the EOI. The Third Parties submit as follows:

... we reiterate our position that the financial information contained in the response to the RFP, as it relates to the projected expenses for the operation of the project, should not be disclosed. It is inherent in the RFP process that cost information contained in one proponent's response will not be disclosed to another proponent. There is an implicit obligation of confidentiality with respect to that information. That implicit condition also extends to the public at large, as, otherwise, confidential information that another proponent could not obtain under

the RFP process would then become known to the proponent under the FOIPP process, thereby putting our client at a competitive disadvantage in future projects.

Thus, the Third Parties submit that they had a reasonable expectation of confidentiality in the information at issue in the EOI.

[53] The Public Body states that it is not aware of any understanding, written or verbal, between it and the Third Parties that the submissions would be kept confidential. It further states that it is difficult to conclude that confidentiality of the information was implied.

[54] Alberta IPC Order 99-018, 1999 CanLII 19670 (AB OIPC), quotes at paragraph [37] from Ontario IPC Order M-169, setting out four circumstances to examine when determining whether or not an expectation of confidentiality exists:

[para 37.] . . .

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
- (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization.
- (3) Not otherwise disclosed or available from sources to which the public has access.
- (4) Prepared for a purpose which would not entail disclosure.

*Communicated to the institution on the basis that it was confidential and that it was to be kept confidential:*

[55] On request, the Public Body supplied all records and related documents to the access request. There is no evidence before me that reflects any communication from the Third Parties to the Public Body that the information in the EOI, supplied in response to the Public Body's Request for Expressions of Interest, was or was to be kept confidential, although opportunity to provide such communication was given by the Public Body.

[56] In the Request for Expressions of Interest, two required items of information were specified by the Public Body, at page 9: a firm quote for the purchase of the property, and projections of income and expenditure for the project. As noted above, the Request for Expressions of Interest also specified that the Third Parties had an opportunity to express their concern for the confidentiality of this information, but they did not take that opportunity. Not only have I found no evidence that this information was communicated on the basis that it was confidential, but I have evidence to the contrary, supporting that the Third Parties were unconcerned about the confidentiality of this information:

Cover letter, page 2, second line	Purchase price of property
Page 82 (final page), Appendix "B" from table of contents	Projected income and expense for project
Page 11, para 4.1	Purchase price of property

*Treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization:*

[57] I have no evidence before me from the Third Parties that would reflect that the Third Parties treated the information it supplied to the Public Body in the EOI, in response to

the Request for Expressions of Interest, in a manner that indicates a concern for its protection from disclosure. Except for the examples of projects and dollar amounts provided at page 70, under "Team Experience", all of the information at issue in the Records at issue was created for this specific project, and therefore had no history of protection from disclosure.

*Not otherwise disclosed or available from sources to which the public has access:*

[58] The Third Parties submit that the financial information contained in the EOI and supplied to the Public Body was never intended to be made public. A closer look at some of the information at issue in the EOI indicates otherwise. More specifically, I refer to the phase information, capital costs and financial projections, rent supplement proposal and five-year projection, and team experience, all discussed more fully below.

*Prepared for a purpose that would not entail disclosure:*

[59] Based on the wording of section 3.6 of the Public Body's Request for Expressions of Interest above, and based on the EOI itself, there is no evidence that the information supplied to the Public Body by the Third Parties was prepared for a purpose that would not entail disclosure.

[60] The Third Parties point out that the financial information in the EOI was provided implicitly in confidence, as this is inherent in the Request for Expressions of Interest process. While I accept that competitors do not, and should not, have access to one another's Expressions of Interest during the competitive process, this process was long over when the Applicant requested the Records at issue. The deadline to submit the EOI was April 23, 2010, while the records were first requested from the Public Body almost one year later, on March 23, 2011. I would therefore conclude that the EOI was prepared for a purpose that would not entail disclosure until after the competitive process was complete.

*Phase Information:*

[61] As noted above, the October 5, 2010 article in *Canadian Apartment Magazine* describes both Phase 1 and Phase 2 of the development project. There is nothing in the phase information in the EOI that would lead to a conclusion that it was supplied in confidence. The information simply lists the general steps of the phases of the project.

*Capital Cost and Financial Projections:*

[62] The capital cost and financial projection information in the EOI is simply a dollar amount projection of the costs of the project. The press release of one of the Third Parties dated June 14, 2010, provides a dollar amount to describe the Third Party's investment in the project.

*Rent Supplement Proposal and Five-year Projection:*

[63] The rent supplement proposal simply takes the market rent of the proposed units at that time, and subtracts the maximum rents stipulated by the Public Body in its Request for Expressions of Interest, to determine a monthly rent supplement. There is no implicit confidentiality in market prices, and the Request for Expressions of Interest is a publicly available document. For the five-year projection, the same information is used in combination with an expected rate of inflation to project five years of rent. In my view, there is no reasonable expectation of confidentiality associated with this simple mathematical calculation.

*Team Experience:*

[64] The Third Parties submit that the examples of projects of the Third Party agent were supplied implicitly in confidence. I have reviewed the website of the agent company, and note that most of the projects referred to under "Team Experience" are referred to on the website, which also refers to total budgets. This is the information at issue in the EOI. Given that the agent company openly reveals this information on its website,

I find that there is no reasonable expectation of confidentiality in this information.

[65] The fact that the Third Parties have made the foregoing information public is a fact to which I give significant weight. It is very difficult to find a reasonable expectation of implicit confidentiality by the Third Parties when they have put the five above-noted items of information at issue into the public domain:

<i>Available from sources to which the public has access</i>	
Page 8 and 9, para 3.4	Phase information
Page 11, para 4.2	Capital cost and financial projections
Page 11, para 4.3	Rent supplement proposal
Page 12, para 4.4	Rent supplement proposal – 5 year projection
Page 70, Team Experience, Appendix “A” from table of contents	Examples of projects and dollar amounts

[66] The expectation of confidentiality must be based on reasonable and objective grounds. Given the foregoing facts relating to specific information in the EOI, it is not reasonable to conclude that the Third Parties had an expectation of implicit confidentiality.

*Conclusions regarding Clause 14(1)(b)*

[67] To summarize, I have found that the information in the Agreement and the MOU was not supplied by the Third Parties to the Public Body, and therefore does not fulfill the requirement for nondisclosure under clause 14(1)(b) of the *FOIPP Act*. Although I have found that the information in the EOI was supplied by the Third Parties to the Public Body, I find that it was not supplied, explicitly or implicitly, in confidence, thus not fulfilling the requirement for nondisclosure under clause 14(1)(b) of the *FOIPP Act*.

[68] I find that the information in the Records at issue does not satisfy subsection 14(1) of the *FOIPP Act*, as it is either not subject to clause 14(1)(a), or not subject to clause 14(1)(b), or both. I will, nonetheless, consider whether the information in the Records at issue is subject to the third required condition at clause 14(1)(c).

***Would disclosure of the Records at issue cause the Third Party to suffer one of the harms set out in clause 14(1)(c) of the FOIPP Act?***

[69] The third prong of the test established by clause 14(1)(c) of the *FOIPP Act* is whether a third party would suffer one or more of the listed harms under clause 14(1)(c). The Third Parties claim that disclosing their financial information will place them at a competitive disadvantage both for future development projects and in the multi-unit rental business. This type of harm is found at subclause 14(1)(c)(i). The Third Parties have not specifically identified the type of harm that they would suffer from the disclosure of the non-financial information in the Records at issue.

[70] The Third Parties bear the burden of proving that it is reasonable to expect that disclosing the information at issue will harm their competitive position. Clause 14(1)(c) of the *FOIPP Act* specifies that the harm must be significant.

[71] The Third Parties submit,

With respect to the expression of interest submitted by the third party, the capital cost and financial projections information consist of cost projections determined by [the Third Parties]. Disclosure of the capital costs for this project will enable our clients' competitors to extrapolate our clients' costs for similar projects, and adjust their bidding accordingly. This will place our clients at a competitive disadvantage to its competitors in other projects. Similarly, the projected income and expense of the [project] would disclose to competitors of our clients the costs associated with this project, and allow them to extrapolate costs for similar projects, again placing our clients at a competitive disadvantage. The submission by [the agent company] of examples of other projects and dollar amounts were provided for the purpose of

demonstrating the magnitude of projects undertaken by the [the agent company] team. It was not intended that the amounts be made public.

*Standard of Proof:*

- [72] The standard of proof for the harms set out at clause 14(1)(c) of the *FOIPP Act* is discussed in some detail in Order No. FI-15-002, released concurrently with this order. Order No. FI-15-002 refers to *CBC v. Privacy Commissioner & IIDJ*, 2012 PESC 32 (CanLII), where Honourable Justice Wayne D. Cheverie found that the threshold of proof is more along the continuum toward probability, and certainly beyond a mere possibility. The court further stated that the evidence must be detailed and convincing.
- [73] The Prince Edward Island *Freedom of Information and Protection of Privacy Guidelines and Practices Manual* (May 2006) also describes the type of evidence required to prove harm under clause 14(1)(c) of the *FOIPP Act*. At page 63, it 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.

*Analysis of Harm:*

- [74] I must base my decision on the information and evidence before me. The Third Parties did not present any detail in evidence or argument, but only stated the harm they submit will occur. For my determination, I am left with the Records at issue themselves.

[75] The Third Parties state that disclosing the financial information in the Records at issue will enable their competitors to extrapolate costs for similar projects, such as determining debt service ratios and other financing information, allowing their competitors to adjust their bidding accordingly, and placing the Third Parties at a competitive disadvantage. At the time of the access request, the subject re-development was well underway; any information in the EOI to a competitor would no longer be relevant. With respect, I doubt the extrapolated costs would be beneficial for any future similar projects. It would be unreasonable to find that out-dated financial information specific to a particular re-development and based on a combination of client requirements, market costs and expected rate of inflation, would have any effect on the Third Parties' competitive positioning for future projects, let alone placing the Third Parties at a competitive disadvantage. I am mindful of the requirement that the Third Parties show damage or detriment by disclosure, and not simply hindrance or minimal interference.

[76] The Third Parties further submit that releasing the financial information will harm their commercial dealings with lenders and other suppliers, and will interfere significantly in their ability to negotiate contract terms with their lenders, suppliers and potential customers, both for future development projects and in the multi-unit rental business. The Third Parties provide no clear cause and effect relationship between disclosure and these alleged harms, although they are required to do so.

[77] The Alberta Information and Privacy Commissioner interprets "harm significantly" in Alberta's equivalent of subclause 14(1)(c)(i) of our *FOIPP Act*, in Order 96-013, 1996 CanLII 11518 (AB OIPC). At paragraph [32], Commissioner Clark states:

[32] Moreover, under s. 15(1)(c)(i), the harm or interference must be "significant", and under s. 15(1)(c)(iii), the resulting financial loss or gain must be "undue". I would interpret "harm significantly" to mean that

the third party should provide evidence that tips the “balance of probabilities” scale in its favour, and that I should take into consideration the third party’s ability to withstand the harm only when weighing that evidence. I would also use this same approach (determining whether the weight of evidence tips the scale in the third party’s favour) when interpreting “interfere significantly” in section 15(1)(c)(i) and “result in undue financial loss” in section 15(1)(c)(iii). [underline emphasis added]

[78] The Third Parties are a reputable Canadian developer and one of Canada’s largest residential landlords. The developer has offices throughout Canada with annual combined sales of over \$100,000,000 since 1980. The landlord holds properties throughout Atlantic Canada’s six major urban centres and Ontario. At the time this review was initiated, it was a public company with real estate assets of approximately 840 million dollars. The Third Parties did not provide sufficient evidence to prove that disclosing the information at issue would cause them significant harm. Even to consider a possibility of harm, it would be unreasonable to conclude that the harm that may possibly be realized for future development projects or in the multi-unit rental business of the Third Parties would be of a scale that the Third Parties would be unable to withstand. I find that the Third Parties’ evidence of harm is not genuine and conceivable; it is no more than conjecture.

[79] I find that the Third Parties’ evidence in support of their position that disclosing the information at issue would cause significant harm to their competitive position to be lacking. I also point to *Wolfville (Town), supra*, where the Nova Scotia Review Officer states:

[66] As a practical matter mere assertions of harm will rarely be sufficient. Independent evidence of expectations of harm or at least evidence of harm from all third parties and the public body is helpful, evidence of previous harm from similar disclosures is also useful and evidence of a highly competitive market would all assist a decision maker in determining whether the test has been satisfied. In all cases it is evidence of a connection between the disclosure of the type of information at issue and the harm that is necessary.

[80] Further, there is a world of difference between having competition and harming the Third Parties' competitive position, as found by the British Columbia Commissioner in *Interior Health Authority (Re)*, *supra*, where he states:

[35] All these things would have assisted me in determining if disclosure of the pricing information could reasonably be expected to cause CUS "undue" financial loss or cause significant harm to CUS's competitive or negotiating position, for the purposes of s. 21(1)(c). As previous orders have noted more than once, "simply putting contractors and potential contractors to government in the position of having to price their services competitively is not a circumstance of unfairness or 'undue' financial loss or gain" for the purposes of s. 21(1)(c)(iii).[27] Heightening competition is not harm for the purposes of s. 21(1)(c)(i). A contractor's resistance to disclosure also does not amount to harm. It is necessary to show an obstruction to actual negotiations.[28] CUS has not done so.

Conclusions regarding Clause 14(1)(c)

[81] I find that the Third Parties have not met their burden of proof, and have not provided sufficient evidence or argument to persuade me that disclosing any of the information in the Records at issue would significantly harm their competitive position, or significantly interfere with their negotiating position, as found at subclause 14(1)(c)(i) of the *FOIPP Act*, nor have they satisfied any of the required elements of clause 14(1)(c).

**Conclusions under Subsection 14(1) of the *FOIPP Act***

[82] I find that the Third Parties have not met their burden to prove that the required conditions of clauses 14(1)(a), (b) and (c) of the *FOIPP Act* apply to the information in the Records at issue, and that the Public Body was not obliged or entitled to withhold the Records at issue from the Applicant.

[83] Throughout my analysis, I have been mindful of the careful balance between the spirit of openness and transparency of public bodies established by the *FOIPP Act*, and the

genuine business interests of third parties. The Public Body was also mindful of this balance, as it points out in one of its submissions:

The department also took into consideration the following excerpt from Freedom of Information and Protection of Privacy Guidelines and Practices Manual:

It is important to remember that a basic principle of the *FOIPP Act* is to give the public access to the records of a public body. Any exceptions to the right of access should be applied in a limited and specific way to provide as much access to information as possible.

[84] Applying section 14(1) of the *FOIPP Act* to requested records of a public body will yield differing decisions, depending on the particular circumstances of each case. However, in all cases, a public body should consider the purposes set out at section 2 of the *FOIPP Act*, which the Public Body has done in this review.

## **VI. FINDINGS**

[85] 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.

[86] With respect to clause 14(1)(a) of the *FOIPP Act*:

86.1 I find that the Third Parties have not satisfied clause 14(1)(a) of the *FOIPP Act* with respect to any of the information at issue in the Agreement or the MOU, as it is not information of the Third Parties.

86.2 I find that the Third Parties have satisfied clause 14(1)(a) of the *FOIPP Act* with respect to the following information in the EOI, as it is commercial and/or

financial information of the Third Parties:

Cover letter, page 2, second line	Purchase price of property
Page 8 and 9, para 3.4	Phase information
Page 11, para 4.1	Purchase price of property
Page 11, para 4.2	Capital cost and financial projections
Page 11, para 4.3	Rent supplement proposal
Page 12, para 4.4	Rent supplement proposal – 5 year projection
Page 70, Team Experience, Appendix “A” from table of contents	Examples of projects and dollar amounts
Page 82 (final page), Appendix “B” from table of contents	Projected income and expense for project

[87] With respect to clause 14(1)(b) of *FOIPP Act*:

87.1 I find that the Third Parties have not satisfied clause 14(1)(b) of the *FOIPP Act* with respect to any of the information at issue in the MOU or the Agreement, as none of the information in the MOU or the Agreement was supplied by the Third Parties to the Public Body.

87.2 I find that the Third Parties have not satisfied clause 14(1)(b) of the *FOIPP Act* with respect to any of the information at issue in the EOI, as none of the information in the EOI was supplied, explicitly or implicitly, in confidence by the Third Parties to the Public Body.

[88] With respect to clause 14(1)(c) of *FOIPP Act*:

88.1 I find that the Third Parties did not meet their burden of proof and did not provide any evidence or argument to persuade me that disclosing any of the information at issue in the Agreement, the MOU or the EOI would significantly harm their competitive position, or significantly interfere with their negotiating position, as found at subclause 14(1)(c)(i) of the *FOIPP Act*.

[89] I find that the Third Parties did not meet their burden to prove that the required elements of subsection 14(1) of the *FOIPP Act* apply to the information in the three Records at issue. I therefore find that the Public Body properly decided that subsection 14(1) of the *FOIPP Act* does not apply to the information in the three Records at issue.

## **VII. ORDER**

[90] Pursuant to subsection 66(2) of the *FOIPP Act*, I confirm the decision of the head of the Public Body to disclose the following Records at issue to the Applicant:

- (i) an 11-page agreement dated August 31, 2010, between the Public Body and the successful proponent (the “Agreement”);
- (ii) a four-page memorandum of understanding dated September 21, 2010 (the “MOU”); and
- (iii) an 82-page expression of interest relating to the redevelopment of a seniors housing complex (the “EOI”), severing third party personal information as required by section 15 of the *FOIPP Act*.

[91] I thank the parties for their submissions, and for their patience in awaiting this order. In accordance with subsection 68(1.1) of the *FOIPP Act*, the Public Body shall not take any steps to comply with this order until the end of the time period for bringing an application for judicial review of the order under section 3 of the *Judicial Review Act*, R.S.P.E.I. 1988, c J-3.

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Karen A. Rose  
Information and Privacy Commissioner