



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

**Order No. FI-15-007**

**Re: Department of Economic Development and Tourism  
(Island Investment Development Inc.)**

**Prince Edward Island Information and Privacy Commissioner  
Karen A. Rose**

**September 30, 2015**

**Summary:** An applicant requested a review of a decision of the Department of Innovation and Advanced Learning, now known as the Department of Economic Development and Tourism (the “Public Body”) and Island Investment Development Inc., regarding access to information related to the activities of seven companies approved by the Public Body to be financial intermediaries under the Provincial Nominee Program, and to their administration of the Rejected Investor Trust Fund of the Provincial Nominee Program - Immigrant Partner Category. During the review, the head of the Public Body provided the applicant with a fee estimate of \$193.75 to process the records. The applicant questioned the fee estimate, and requested a fee waiver based on the applicant’s submission of his inability to pay, and that the records relate to a matter of public interest. The head of the Public Body denied the fee waiver, and confirmed the appropriateness of the fee. The Commissioner reduced the fee estimate to \$120.20. With regard to the applicant’s request for a fee waiver based on of his inability to pay, the Commissioner found that the applicant had not provided sufficient evidence. However, the Commissioner found that the records do relate to a matter of public interest, and allowed a full fee waiver.

- Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, s. 2, 6(2), 7, 8, 11(2), 66(3), 68(1.1), 76(1), 76(3), 76(4), 76(5); *General Regulations to the FOIPP Act*, PEI Reg EC564/02, s. 9(4), 9(5), 11(1), Schedule 2.
- Decisions Considered:** Order No. 03-001, *Department of Development and Technology, Re*, 2003 CanLII 52558 (PE IPC)  
Order No. FI-13-001, *Health PEI (Re)*, 2013 CanLII 89281 (PE IPC)  
Order F2009-034, 2010 CanLII 98664 (AB OIPC)  
Order No. FI-11-002, *Prince Edward Island (Department of Agriculture) (Re)*, 2011 CanLII 91841 (PE IPC)  
Order No. FI-11-001, *Prince Edward Island (Department of Agriculture) (Re)*, 2011 CanLII 91839 (PE IPC)  
Order F2011-R-001, 2011 CanLII 96586 (AB OIPC)
- Other Resources Cited:** PE, Legislative Assembly, *Report of the Auditor General of Prince Edward Island 2009* (March 2009)

## I. BACKGROUND

- [1] An applicant (“the Applicant”) made a request to the Department of Innovation and Advanced Learning, now referred to as the Department of Economic Development and Tourism (the “Public Body”), pursuant to section 7 of the *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01 (the “FOIPP Act”). The Applicant requested access to information held by Island Investment Development Inc. (“IID”) regarding the Rejected Investor Trust Fund of the Provincial Nominee Program - Immigrant Partner Category. IID is a crown corporation of the Public Body, and the Rejected Investor Trust Fund is administered by seven companies that were approved by IID to be the financial intermediaries under the Provincial Nominee Program (“PNP”).
- [2] The Applicant requested access to the following information:
- (i) quarterly updates provided to the department on the activities

within the replacement investor trust fund administered by the intermediaries from inception of updates to present;

(ii) policy analysis provided to senior officials on what the expected rejected rate of immigrants is from 2007 to present;

(iii) how many immigrants to date have received their refunds through this fund from 2007 to present; and

(iv) indications of how many immigrant investors have received full refunds of their investments after rejection, and how many have not since 2007 to present.

The Applicant indicated at the outset that the request was made as a matter of public interest, and the Applicant asked that all fees be waived.

[3] The Public Body created a one-page record summarizing the information the Applicant requested. The Applicant was not satisfied with the information he received, and submitted a request for a review of the Public Body's decision. As stated by the Applicant, the Public Body "contends that quarterly reports cannot be released without disclosing private information that would cause harm to the participants in the program." The Applicant argued that the names can be omitted and the remainder of the reports provided.

[4] The Public Body requested approval from the Commissioner to provide the Applicant with the severed records before proceeding to a formal review. Former Commissioner Maria C. MacDonald allowed the request. The head of the Public Body subsequently exercised his discretion and issued a fee estimate to the Applicant. The fee estimate was to be paid before the Public Body would provide the Applicant with the requested records.

[5] The Applicant asked that the review continue, and that it include a review of the Public

Body's fee estimate, and of its refusal to provide a fee waiver.

## II. RECORDS

[6] The responsive records to the Applicant's access request ("the Records at issue") include 241 pages of reports, with cover letters/emails from agents for each of the seven intermediaries to the Public Body about the Rejected Investor Trust Fund and Agent Holdback. The Public Body proposes to withhold the cover letters, leaving 215 records. The Records at issue are not the subject of this review, although their number and content is relevant to the determination of the issues to this review, which issues are set out below.

## III. ISSUES

[7] The issues addressed in this review are as follows:

**Issue 1:** Did the head of the Public Body reasonably calculate the fee estimate in conformity with the guidelines under the *FOIPP Act* and its regulations, as required under subsections 76(1) and (5) of the *FOIPP Act*?

**Issue 2:** Regarding the Applicant's request for a fee waiver, and subject to clause 76(4)(a) of the *FOIPP Act*:

(a) Has the Applicant proven that he cannot afford the payment?

(b) If the Applicant has proven that he cannot afford the payment, did the head of the Public Body reasonably exercise his discretion in denying the request for a fee waiver?

**Issue 3:** Regarding the Applicant's request for a fee waiver, and subject to clause 76(4)(b) of the *FOIPP Act*:

(a) Do the Records at issue relate to a matter of public interest?

(b) If the Records at issue relate to a matter of public interest, did the

head of the Public Body reasonably exercise his discretion in denying the request for a fee waiver?

**Issue 4:** Did the head of the Public Body fulfill his duty under section 8 of the *FOIPP Act* by making every reasonable effort to assist the Applicant and by responding to the Applicant openly, accurately and completely?

[8] The Public Body states that section 14 of the *FOIPP Act* will apply to confidential information in the Records at issue. As the Applicant has not yet received access to the Records at issue, section 14 is not an issue to this review.

#### **IV. ANALYSIS OF THE ISSUES**

**Issue 1:** *Did the head of the Public Body reasonably calculate the fee estimate in conformity with the guidelines under the FOIPP Act and regulations, as required under subsections 76(1) and (5) of the FOIPP Act?*

[9] Schedule 2 of the *General Regulations* to the *FOIPP Act*, PEI Reg EC564/02 (the “regulations”), limits the amount of fees a public body can charge for each of the various services it carries out in processing an access request. The schedule sets out the maximum dollar figure for each service. However, the fees charged to an applicant by a public body cannot exceed the actual amount it costs the public body to carry out the services involved [s. 76(5) of the *FOIPP Act*].

[10] **Burden of Proof:** Subsection 76(1) of the *FOIPP Act* gives a public body the discretion to decide whether or not to charge an applicant fees for the services and expenses of processing an access request. A public body bears the burden of proof for the calculation of the fees in its estimate [Order No. 03-001, *Department of Development and Technology, Re*, 2003 CanLII 52558 (PE IPC) at para 5].

[11] In this case, the Public Body’s fee estimate includes a charge for the time and cost of

severing the Records at issue, and a charge for the cost of copying the Records at issue. The Public Body charged the Applicant \$140.00 for seven hours of severing at \$20.00 per hour, and \$53.75 for copying 215 pages of records at \$0.25 per page, for a total fee of \$193.75. The Public Body submits that it “considers the fee that was given to the Applicant as a fair reflection of the additional work involved in preparing the documents”.

[12] Locating and retrieving a record: To accurately calculate a reasonable fee estimate, I consider the amount of time a public body may require to search, locate and retrieve the records being requested. I have reviewed the Records at issue in this case, and I find that the quarterly reports of the Rejected Investor Trust Fund and Agent Holdback submitted by each of the seven intermediaries over a two-year period would reasonably be contained in one or more files, but no more than seven, and that they would be housed in the same or close proximity to each other. Over a two-year period, each intermediary would submit eight reports. Under the circumstances, I find a reasonable amount of time to search, locate and retrieve the Records at issue would be minimal. I note that the Public Body did not charge the Applicant for locating and retrieving the Records at issue, which decision I find to be reasonable.

[13] Preparing and handling a record for disclosure: The act of severing a record is described in Schedule 2 of the regulations as preparing and handling a record for disclosure. A public body can charge up to \$10.00 per half hour for this service. Subsection 9(5) of the regulations stipulates that an applicant is not to be charged for the time it takes a public body to review the record.

[14] It has been established that two minutes per page is a reasonable estimate for the time to sever a record where only a few severances per page are required, and that the percentage of records to be severed is a factor to be considered. “Expressed in a

formula, the estimate of the time to sever a record is: *(estimated number of pages) X (2 minutes/page) X (estimated % of records to be severed).*" [Order No. FI-13-001, *Health PEI (Re)*, 2013 CanLII 89281 (PE IPC) at para 24]

[15] A public body does not have the discretion to charge any fees over and above the initial \$5.00 fee for processing an access request until the amount of time a public body spends processing the request exceeds two hours. Subsection 9(4) of the regulations, *supra*, says,

9. (4) In addition to the initial fee, fees in accordance with Schedule 2 may be charged if the amount of time spent, as estimated by the public body to which the request has been made, exceeds two hours.

[16] The Public Body estimates it would take nine hours to sever the Records at issue. The Public Body has reduced its estimated time to sever the Records at issue by two hours, which is a practice of all public bodies, and has charged the Applicant \$140.00 for seven hours of severing.

[17] Based on my examination of the Records at issue, each page contains between four and seven columns of information, some of which are formatted in a table. In most cases, one or two columns of information on each page of each report contains personal information that requires severing, being the names of the immigrant investors participating in the PNP. However, I note that in Record 5, the names of the immigrant investors are not stated. Considering the ease with which the Public Body can sever all contents of one column of information on a page, I accept that each Record at issue requires only minimal severing per page.

[18] By applying the accepted formula used to estimate the time to sever records, I calculate

a reasonable estimate as follows:

215 pages x 2 minutes = 430 minutes or 7 hours 10 minutes

In accordance with the Public Body's practice, reducing this estimated time by two hours would result in a total time of 5 hours and 10 minutes to sever the Records at issue.

- [19] It has been established in previous orders that a rate of \$20.00 per hour is a reasonable rate for an employee who has enough knowledge and experience to prepare the records in an effective and efficient manner. Therefore, based on the total time of 5 hours and 10 minutes to sever the Records at issue, the total charge would be \$103.00.
- [20] Copying a record: Clause 11(1)(b) of the regulations allows a public body to charge for the cost of copying a record, but not the time it takes to make the copy. The maximum allowable fees listed in Schedule 2 of the regulations to charge an applicant for making a paper copy of a record is \$0.25 per page. At \$0.25 per page, the Public Body estimated it would cost \$53.75 to copy 215 pages of records.
- [21] Subsection 76(1) of the *FOIPP Act* permits a public body to charge an applicant fees for services as provided in the regulations; however, subsection 76(5) stipulates that the fees shall not exceed the actual costs of the services. I am aware that a commercial copying rate can be as low as \$0.08 a page, and that rate would include a margin of profit. I am also aware that this province's Document Publishing Centre charges a rate less than \$0.08 for copying. Further, this province entertains a low cost for paper due to mass purchases. Similar to the findings in Order No. FI-13-001, *supra*, at paragraphs 34 and 41, I conclude that a reasonable rate for a public body to charge for photocopying records is \$0.08 per page. I calculate that a reasonable estimate for the

Public Body to photocopy 215 pages of records at \$0.08 per page is \$17.20.

[22] I find that the Public Body's fee estimate is not an accurate or reasonable reflection of what the actual costs would be for providing the services for processing the Applicant's access request. Therefore, I do not uphold the Public Body's fee estimate. Based on the foregoing calculations, I find that a reasonable fee estimate to process the Applicant's access request is \$120.20.

***Issue 2:** Regarding the Applicant's request for a fee waiver, and subject to clause 76(4)(a) of the FOIPP Act, has the Applicant proven that he cannot afford the payment, and, if so, did the head of the Public Body reasonably exercise his discretion in denying the request for a fee waiver?*

[23] The head of a public body has the discretion to excuse an applicant from paying all or part of a fee, if any of the conditions under subsection 76(4) of the FOIPP Act apply. The Applicant claims both provisions of subsection 76(4) apply to the circumstances of this review, the first being clause 76(4)(a), which states,

76. (4) The head of a public body may excuse an applicant from paying all or part of a fee if, in the opinion of the head,  
(a) the applicant cannot afford the payment or for any other reason it is appropriate to excuse payment;

[24] *Burden of Proof:* An applicant bears the burden of proof under clause 76(4)(a) of the FOIPP Act, that the applicant cannot afford the payment, or for any other reason it is appropriate to excuse payment of a fee estimate. As was pointed out in Order 03-001, *supra*, however, it is incumbent upon the Public Body to request from the Applicant the basis for his request for a fee waiver.

[25] In arguing clause 76(4)(a) of the FOIPP Act, the Applicant provided bare submissions,

stating that the request is being made by a non-profit organization that cannot afford the fees. The Applicant states,

In general, [the] ability to pay fees is declining in public service outlets like my own, creating a de facto blockade in the Act's operations.

In addition, the Applicant submits,

Regarding ability to pay the fee, my supervisor has indicated our organization cannot afford to routinely pay this kind of fee for information that should be publicly available.

[26] The Applicant speaks to the appropriateness of excusing the payment by arguing that the fees impede one of the purposes of the *FOIPP Act* which, as found at clause 2(a), allows any person a right of access to records. Clause 2(a) 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;

[27] The Public Body submits, accurately, that during the processing of the access request, it received no supporting information from the Applicant to support the request for a fee waiver. However, at that time, no fee estimate had been provided by the Public Body, which would have necessitated supporting information. The fee waiver became an issue during the review.

[28] When claiming an inability to pay, an applicant must present evidence about its financial position. A failure to do so prevents the head of the public body from exercising discretion to waive the fees, or not. In Order F2009-034, 2010 CanLII 98664

(AB OIPC), the Alberta adjudicator states at paragraph 15, as follows:

Because access requests involve the use of public resources that are paid for by taxpayers and public bodies are accountable for the use of public resources, it is reasonable, and in fairness to all, that decisions to waive fees be based on sufficient information that clearly shows that an inability to pay exists (Order 2000-011 at para. 31).

- [29] The Applicant provided submissions relating to fee waiver during this review, but did not provide supporting documentation to show that he cannot afford the payment, or for any other reason it is appropriate to excuse payment. While I agree that fees should not impede a citizen's right to access information, it is not the taxpayers' responsibility to cover all costs on behalf of all individuals to access all information requests. If this were the case, the *FOIPP Act* would not provide for fees. On the contrary, the right to access information is subject to the discretion to charge fees. Clause 76(4)(a) of the *FOIPP Act* provides for an exception where an applicant has an inability to pay, but the inability must be proven.
- [30] The burden is on the Applicant to provide evidence and/or submissions in support of his request for a fee waiver. This burden necessitates, especially in relation to clause 76(4)(a) of the *FOIPP Act*, the gathering of evidence to provide to the Public Body and the Commissioner. Although I empathize with applicants who may be too pressed for time to comply, I cannot alleviate this requirement. Without supporting evidence of the Applicant's inability to pay, as described above, neither the Public Body, nor the Commissioner, can exercise the necessary discretion to grant a fee waiver for this reason.
- [31] I find that the Applicant has not met his burden of proof to warrant a waiver of fees under clause 76(4)(a) of the *FOIPP Act*, based on an inability to pay.

**Issue 3:** *Regarding the Applicant's request for a fee waiver, and subject to clause 76(4)(b) of the FOIPP Act, do the Records at issue relate to a matter of public interest, and, if so, did the head of the Public Body reasonably exercise his discretion in denying the request for a fee waiver?*

[32] The head of a public body has the discretion to excuse an applicant from paying all or part of a fee, if any of the conditions under subsection 76(4) of the *FOIPP Act* apply. Clause 76(4)(b) states,

76. (4) The head of a public body may excuse an applicant from paying all or part of a fee if, in the opinion of the head,  
(b) the record relates to a matter of public interest, including the environment or public health or safety.

[33] *Burden of Proof*: Both parties bear the burden of proof under clause 76(4)(b) of the *FOIPP Act* to show that the records relate to a matter of public interest. When an applicant is not yet in possession of the records, the applicant is at a disadvantage with respect to the public interest argument. Therefore, the public body must show that the records do not relate to a matter of public interest, if that is the decision it has made [Order 03-001, *supra*, at p 12].

[34] The burden upon an applicant under clause 76(4)(b) of the *FOIPP Act* is equally onerous, but here, the Applicant has made substantial submissions. The Applicant states that the Records at issue relate to a matter of public interest, including public health and public safety. He submits that his request is being made in the public interest, "particularly public discussion/debate provisions." In support of his submissions, he states:

The matter of the replacement investor fund is certainly of public interest, as demonstrated by widespread public discussion in local and

national media. The matter is ultimately a matter of public safety and health, in that when people invest their life savings with the province, their well being could be dramatically affected should the province be incapable [of] repaying the funds as invested or if intermediaries are unable to repay funds if an applicant is rejected.

[35] The Public Body fails to address the issue of public interest in its submissions. Instead, it argues that “the original records the Applicant would receive would not be useful to the Applicant”, and that “the created record which was forwarded at no cost would have sufficiently responded to [the Applicant’s] request.” The Public Body contends that “the created record did provide a more clear response to the request.” I address this in the discussion of the Public Body’s duty to assist, below. However helpful the Public Body was attempting to be, the created record was not what the Applicant requested. Consultation with the Applicant could have led to an agreement relating to the content of the record.

[36] This office has issued orders with analysis of section 76 of the *FOIPP Act* and how to approach both fee estimates and fee waivers. The first order of this office, Order No. 03-001, reviews the decisions of six public bodies relating to ten fee estimates and fee waiver requests. With respect to fee waivers based on public interest, Order No. 03-001 sets out the factors a public body should consider when making a decision on a fee waiver request, and the following two-step analysis: (1) Does the record relate to a matter of public interest?; and, if so, (2) should the fees be waived?

[37] Order No. FI-11-002, *Prince Edward Island (Department of Agriculture) (Re)*, 2011 CanLII 91841 (PE IPC), expands on the first step of the above-noted test, suggesting at paragraph [73] the following guiding questions to help determine whether records can be considered records of public interest:

1. Will the records contribute to the public understanding of, or debate

on, or resolution of a matter or issue that is of concern to the public or a sector of the public, or that would be if the public knew about it? The following factors may be relevant:

- Have others besides the applicant sought or expressed an interest in the records?
- Are there other indicators that the public has or would have an interest in the records?

2. If the records are about the process or functioning of government, will they contribute to open, transparent and accountable government? The following factors may be relevant:

- Do the records contain information that will show how the Government of PEI or a public body reached or will reach a decision?
- Are the records desirable for the purpose of subjecting the activities of the Government of PEI or a public body to scrutiny?
- Will the records shed light on an activity of the Government of PEI or a public body that has been called into question?

[38] As Commissioner MacDonald points out in Order FI-13-001, *supra*, at paragraph [52], there may be other considerations that a public body, or the Commissioner, would consider to determine whether a record relates to a matter of public interest. The facts of each review will be determinative. Commissioner MacDonald states:

[52] This is not an exhaustive list of considerations for determining whether a record(s) relates to a matter of public interest. The questions noted above are intended to provide guidance in analyzing all the circumstances of a case. The weight given to each question will vary depending on the circumstances.

[39] The Public Body was under a duty to consider the Applicant's request for a fee waiver. However, at the time of the Applicant's initial request, there was no fee to waive, as the Public Body had created the one-page record. Later, after the Applicant had requested the review of the Public Body's decision not to provide the Records at issue, the Public Body decided to issue a fee estimate.

[40] The Public Body has made no submissions with respect to the Applicant's request for a fee waiver. Former Commissioner MacDonald requested submissions from the Public Body with respect to fee waiver. She referenced four orders of this office relating to fee estimates and waivers so that the Public Body would be aware of its duty related thereto. In response, the Public Body states that it awaited the Applicant's submissions in support of a fee waiver following the Applicant's receipt of the fee estimate, but did not receive any. The Public Body advised that it would, therefore, await the Commissioner's decision. However, it is notable that the Public Body was, in fact, provided with a copy of the Applicant's submissions by this office, in support of the Applicant's request for a fee waiver in this review.

[41] The Public Body has given no evidence as to whether, and, if so, how it exercised its discretion to refuse a fee waiver based on public interest. Although it was incumbent on the Public Body to do so, and although the Public Body was directed to the decisions of this office that describe a public body's duty in this regard, I have no evidence from the Public Body as to whether it agrees or disagrees that the Records at issue relate to a matter of public interest. I will conduct an analysis in the absence of the Public Body's submissions, and exercise my discretion accordingly.

[42] The Applicant refers to the 2009 Report of the Auditor General of Prince Edward Island ("the AG Report") in his original request for access to information to the Public Body. The AG Report contains the results of a special audit and examination of the PNP. The Applicant states:

These requests are made with the intention of understanding whether immigrants are receiving their full refunds following rejection. The auditor general had expressed concerns last year that this may not occur. This request by a non-profit body and is made in the public interest, therefore I am hopeful that fees are waived.

[43] The Auditor General carries out special audits and examinations necessary to determine not only whether government is performing its statutory duties, but also whether it is doing so in an economical and efficient fashion. The resulting reports are submitted to the Legislative Assembly to assist in carrying out the Legislative Assembly's responsibility to hold the government accountable for the management of public resources.<sup>1</sup>

[44] I have reviewed the AG Report, referred to by the Applicant. When referring to immigrants arriving in Prince Edward Island through the PNP, the Auditor General specifically references the Rejected Investor Trust Fund account at page 16, stating at paragraph 3.5:

**3.5** ... Some of these applicants will be declined at the Federal level and will be seeking a refund of their investment. While there are rejected investor trust funds, it is not clear whether the funds on deposit will be sufficient. There is a potential liability issue in terms of both amount and responsibility which needs to be addressed.

[45] The Auditor General devotes pages 44 to 47 of the AG Report to providing details of the trust fund for rejected nominees, and offers the following two recommendations:

**3.115** IIDI should continue to seek legal advice on the potential liability related to investor refunds.

**3.116** IIDI should implement a reporting framework with the intermediaries to include regular reporting of balances and activities of the rejected investor trust fund accounts.

[46] In addition to the 2009 AG Report and its recommendations specific to the Rejected

Investor Trust Fund accounts, annual follow up reports were issued in 2010<sup>2</sup> and 2011<sup>3</sup> that specifically reference this fund account.

[47] I agree with the Applicant that the question of the Rejected Investor Trust Fund has been discussed in the media, as well. A quick search reveals that it was a topic of news media discussion in 2009, and continued to be a news media topic in 2012.

[48] I now address the questions set out at paragraph [37], above, which will help me to determine whether the Records at issue relate to a matter of public interest.

*1. Will the records contribute to the public understanding of, or debate on, or resolution of a matter or issue that is of concern to the public or a sector of the public, or that would be if the public knew about it?*

[49] The Auditor General found it necessary to carry out a special audit and examination of the PNP, based on its complexity and on the public interest [AG Report, para 3.8 at p 16]. With regard to the Rejected Investor Trust Fund account, the Auditor General stated there was a need to develop a strategy for follow-up, and he made recommendations for the Public Body to implement a reporting framework with the intermediaries. The Records at issue are the result of that reporting framework. I consider this a relevant factor to indicate that the Records at issue may contribute to the resolution of a matter or issue that is of concern to the public, and not just to the Applicant.

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<sup>1</sup>[http://www.gov.pe.ca/photos/original/ag\\_report2009.pdf](http://www.gov.pe.ca/photos/original/ag_report2009.pdf) at pages 13-1,4, 191-199

<sup>2</sup>[http://www.gov.pe.ca/photos/original/ag\\_report2010.pdf](http://www.gov.pe.ca/photos/original/ag_report2010.pdf) at page 118

<sup>3</sup>[http://www.gov.pe.ca/photos/original/ag\\_report2011.pdf](http://www.gov.pe.ca/photos/original/ag_report2011.pdf) at pages 140

*2. If the records are about the process or functioning of government, will they contribute to open, transparent and accountable government?*

[50] The Auditor General's special examination of the PNP and follow up reports specifically reference the Rejected Investor Trust Fund account, and recommend a reporting framework for the fund. Although the Public Body obtained a legal opinion, upon the recommendation of the Auditor General, which determined that the Public Body bore no potential liability related to the investor refund, it established a reporting system requiring intermediaries to report quarterly balances of the Rejected Investor Trust Fund accounts. The quarterly reports, being the Records at issue, are the result of a recommendation by the Auditor General to resolve an issue of concern. Based on these facts, I find that the Records at issue are about the process or functioning of government. However, I reject the Applicant's argument that the Records at issue relate to public health or safety. The Rejected Investor Trust Fund records relate to neither of these matters.

[51] I consider the Auditor General reports and recommendations, together with the Public Body's adherence to the recommendations, persuasive factors in deciding that the resulting quarterly reports, being the Records at issue, relate to a matter of public interest. The Auditor General's reports subject the activities of the Government of PEI to scrutiny, and, in this particular case, the Public Body. The Records at issue are the result of recommendations presented to the Public Body by the Auditor General. The quarterly reports shed light on an activity that has been called into question. The Applicant's request to access the Records at issue is made with the logical goal of learning more about the details of this activity.

[52] It is not necessary to determine whether each page of the Records at issue relates to a matter of public interest, but only whether the matter itself is a matter of public interest. With no evidence from the Public Body to the contrary, and for the reasons

described above, I agree with the Applicant, and find that the Records at issue relate to a matter of public interest.

[53] Public Body's Exercise of Discretion: If the Records at issue are found to relate to a matter of public interest, subsection 76(4) of the *FOIPP Act* allows a public body the discretion of waiving the fees for services, or not. A public body is not obliged to excuse all or part of the fee, but it must exercise its discretion in a judicious manner.

[54] Order No. 03-001, *supra*, at page 18, presents the following set of questions for a public body to consider as a guideline to help decide whether to allow a fee waiver:

The decision maker should consider all of the circumstances including the purposes of the Act (open and transparent government) and should be guided by the following questions:

1. Is there a reasonable expectation that the public could benefit from disclosure of this record?
2. Would waiver of the fee shift an unreasonable cost burden for responding from the applicant to the public body?
3. Would the records contribute to debate on or resolution of the matter of public interest?
4. During the Request for Access process:
  - (a) Was the public body timely in responding to the request and did it fulfill its duty to assist?
  - (b) Did the applicant, viewed reasonably, cooperate or work constructively with the public body, where the public body so requested, during the processing of the access request, including narrowing or clarifying the access request where it was reasonable to do so? and
  - (c) Has the applicant unreasonably rejected a proposal by the public body which would reduce the costs of responding to the access request?

[55] Based on the evidence provided, it appears the Public Body considered none of these factors when exercising its discretion to refuse to waive the fees charged to the Applicant. The Public Body submits the Applicant did not provide any initial information to support a fee waiver, and leaves it to the Commissioner to make a decision.

[56] As noted above, the Public Body is required to exercise its discretion in a judicious manner when responding to requests for fee waivers. I will consider the Public Body's inaction in my discussion of the Public Body's duty to assist, later in this decision. I will exercise my discretion relating to whether to refuse or allow a fee waiver in this review.

*1. Is there a reasonable expectation that the public could benefit from disclosure of this record?*

[57] In gaining access to the Records at issue, I would expect the public could benefit by confirming whether there are funds held in trust to reimburse applicants their investment pursuant to the PNP, if they are declined at the federal level, so that the required refund amounts may not be borne by taxpayers. Therefore, I consider this to weigh in favour of waiving some or all of the fees to the Applicant.

*2. Would waiver of the fee shift an unreasonable cost burden of responding from the applicant to the public body?*

[58] The second consideration is whether a waiver of the fee would shift an unreasonable cost burden for responding from the Applicant to the Public Body. While I am mindful of the fact that a waiver of fees ultimately affects the spending of taxpayer dollars, I do not consider the Public Body's fee estimate of \$193.75, or my recalculation of \$120.20 to be an unreasonable cost burden to the Public Body. I consider this conclusion to weigh in favour of waiving some or all of the fees.

*3. Would the records contribute to debate on or resolution of the matter of public interest?*

[59] The third consideration is whether the Records at issue would contribute to debate on, or resolution of the matter of public interest. As I point out at paragraph 50 above, the information being requested is the result of a recommendation by the Auditor General to resolve an issue of concern, namely, the possibility of insufficient funds to reimburse applicants of their investment in the PNP, if they are declined at the federal level. The Records at issue could contribute to the resolution of this matter, as they disclose the amounts reported as being held in the Rejected Investor Trust Fund. Therefore, I consider this to weigh in favour of waiving some or all of the fees to the Applicant.

*4. During the Request for Access process, (a) was the public body timely in responding to the request, and did it fulfill its duty to assist; (b) did the applicant, viewed reasonably, cooperate or work constructively with the public body, where the public body so requested, during the processing of the access request, including narrowing or clarifying the access request where it was reasonable to do so; and (c) has the applicant unreasonably rejected a proposal by the public body which would reduce the costs of responding to the access request?*

[60] The fourth consideration is three-tiered, and based mainly on the interactions of the parties throughout the processing of the access request, including a public body's timeliness and duty to assist, and an applicant's cooperativeness and efforts in reducing the costs of processing the request.

[61] The Applicant's access request was received by email on April 8, 2010, and initial fee of \$5.00 by post on April 27, 2010. The Public Body's decision letter is dated May 27, 2010. There is no issue with the Public Body's timeliness in responding to the request.

[62] The next consideration relates to whether the Public Body fulfilled its duty to assist. There is no evidence of any communication between the parties during the processing of the request. However, it is clear that the Applicant asked for the quarterly updates provided the Public Body by each of the seven intermediaries. Instead, the Public Body created a one-page document that summarizes the information contained in the records the Applicant sought. In creating this record, the Public Body did not seek input from the Applicant. The Applicant states,

... 'the head of a public body shall make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.' This section of the act should be considered in assessing of fees. The public agency hasn't made an effort to indicate whether the files can be provided in electronic form, thereby eliminating copying fees. I believe the information is available centrally and online, and search methods should be minimal, and there is a real question as to whether duty to assist here has fully been complied with when judge by the modern standards of FOI applications and response in provinces across Canada.

[63] The Public Body created a record for the Applicant, which the Public Body has stated, several times, is more useful for the Applicant's purposes than the underlying Records at issue. I acknowledge the Public Body's honest effort to assist the Applicant in this way. However, with respect, the Applicant asked for the Records at issue, and it was the Public Body's duty to provide them, subject, of course, to any applicable exceptions under the *FOIPP Act*. This duty, and the Public Body's failure to fulfill this duty, is discussed more fully under section 8 of the *FOIPP Act*, below. I consider the shortcomings in the Public Body's fulfillment of its duty to assist, to weigh in favour of waiving some or all of the fees.

[64] The Public Body did not attempt to contact the Applicant to discuss the request. The Applicant was not given an opportunity to cooperate or work constructively with the

Public Body, including narrowing or clarifying the access request where it was reasonable to do so. The Applicant was not given the opportunity to accept or reject any proposal by the Public Body that would reduce the costs of responding to the access request. Thus, these factors are given no weight in a decision to waive some or all of the fees.

[65] Taking into consideration the combination of the above factors as they apply to the circumstances of this review, I conclude that the head of the Public Body did not reasonably exercise his discretion in refusing to waive the fee estimate when the circumstances warranted a fee waiver. I have found that the Records at issue relate to a matter of public interest, and I exercise my discretion to allow a full fee waiver, based on the considerations set out above.

***Issue 4:*** *Did the head of the Public Body fulfill his duty to assist under section 8 of the FOIPP Act by making every reasonable effort to assist the Applicant and by responding to the Applicant openly, accurately and completely?*

[66] The predominant purpose of the *FOIPP Act*, as found at clause 2(a), is to allow a person the right to access to records held by public bodies, with limited and specific exceptions. The *FOIPP Act's* intent of openness through access is supported by the *FOIPP Act's* administrative guidance, including an obligation of a public body to keep an applicant fully informed of its actions throughout the stages of processing the access request (Order No. FI-11-001, *Prince Edward Island (Department of Agriculture) (Re)*, 2011 CanLII 91839 (PE IPC) at para [17-18]).

[67] Compliance with a public body's duty to assist is measured by how a public body processes a request for access to information, and how well it informs the applicant. The procedures and required elements for processing an access request are found under Division 1 of Part I of the *FOIPP Act*, within sections 6 to 13, and include creating

a record for an applicant if the elements required to create a record are present.

[68] Section 8 of the *FOIPP Act, supra*, stipulates the duty of a public body to assist an applicant, and to respond to an applicant openly, accurately, and completely. Section 8 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.

(2) The head of a public body shall create a record for an applicant if

(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise; and

(b) creating the record would not unreasonably interfere with the operations of the public body.

[69] To determine whether a public body has satisfied its duty to assist, the Commissioner must review the interactions between the public body and applicant, the public body's responses to the applicant, and the timeliness and quality of the responses. The bar to meet for a public body includes openness, accurateness, and completeness.

[70] The Public Body's processing documents reveal that the Public Body falls short of its obligation to inform the Applicant. The Public Body's decision letter, dated May 27, 2010, advises the Applicant that access to the requested record is being provided in an alternate format. The Public Body states:

We are pleased to provide access to the above record in a format which has been created to directly reply to your request. The creation of these records is in the spirit of the Act which indicates the creation of a new record is part of the public body's duty to assist the Applicant in locating the information that is most useful and responsive to the

request. As a result, this information has been compiled to provide accurate information to you in a timely manner.

[71] The Public Body seeks no input from the Applicant, but decides to replace the records the Applicant has requested with a document that summarizes the information contained in the records the Applicant has requested. The Public Body does not make reference to the provision of the *FOIPP Act* that gives the Public Body the authority to replace requested records with a created document, as there is no such provision. The Public Body appears to have been of the understanding that subsection 8(2) of the *FOIPP Act* permitted it to do so.

[72] Section 8 of the *FOIPP Act* deals with a public body's duty to assist applicants, and subsection 8(2) extends a public body's duty to assist by requiring a public body to create a record for an applicant in prescribed circumstances. It stipulates that, if the record can be created from a record that is in electronic form, and in the custody or under the control of the public body, using its normal computer hardware, and software, and technical expertise, then a public body is obligated to create it. The legislators placed this subsection as an extension to a public body's duty to assist an applicant, and not as an alternative method offered by a public body in providing an applicant access to a record. [Order F2011-R-001, 2011 CanLII 96586 (AB OIPC)]

[73] Section 11 of the *FOIPP Act*, *supra*, describes how access to a record will be given, and subsection 11(2) states:

11. (2) If the applicant has asked for a copy of a record and the record can reasonably be reproduced,  
(a) a copy of the record or part of it shall be provided with the response; [emphasis added]

[74] In accordance with clause 11(2)(a) of the *FOIPP Act*, the Public Body was required to

provide a copy of the Records at issue to the Applicant. As noted by the Alberta Adjudicator in Order F2011-R-001, *supra*, subsection 8(2) should not be seen as limiting the duty to provide copies under section 11 [para 21]. The adjudicator clearly notes the separateness of these two duties in the following paragraphs:

[para 23] In contrast, section 10(2) [FOIPP Act, s. 8(2)], which is a subclause under the heading “the duty to assist”, specifies one particular way in which assistance is to be given to the applicant. This particular duty is, in my view, superadded to the duty to provide access to records to which applicants have a right (which is to be done by providing copies). Even in situations in which there is no duty to give this particular type of assistance, because the terms of section 10(2) [FOIPP Act, s. 8(2)] are not met, I do not believe this is meant to obviate the duty of public bodies to provide copies under section 13 [FOIPP Act, s.11]. If it were, the legislature would have made section 13 [FOIPP Act, s. 11] subject to section 10(2) [FOIPP Act, s. 8(2)] – which it did not do. I do not believe the use of the term “create a record” in section 10(2) [FOIPP Act, s. 8(2)] can be taken as intended to limit the separate duty in section 13 [FOIPP Act, s.11] to reproduce copies just because the words “create a record” could be used to refer to reproduction of an original. The fact that “create a record” was used in one of the provisions and “reproduce a copy” was used in the other further supports the idea that there was no intention for the provisions to overlap.

...

[para 26] In view of the foregoing considerations, I believe the better interpretation of the phrase “create a record” in the context of section 10(2) [FOIPP Act, s. 8(2)] is that it does not relate to or limit the duty of a public body under section 13 [FOIPP Act, s. 11] to produce copies of records that it has decided to disclose. Rather, it creates a separate duty to assist applicants, when the terms of the provision are met, by manipulating data existing in electronic form so as to produce it in a form more usable or more economical for the applicant – for example, where a small data element is being sought from a larger database, or where unresponsive parts of documents could be removed electronically to reduce the size of the document that contains responsive data. However, even where this cannot be done because the limitations in section 10(2) [FOIPP Act, s. 8(2)] do apply, this does not obviate the duty of the public body to provide copies of as much of the database or document as it is necessary to provide, in order to satisfy the request, subject to the “reasonableness” limitation and the payment of fees.

[Reference to PEI equivalent *FOIPP Act* provisions added and emphasized]

[75] As noted by the Public Body's fee estimate, discussed above, the Records at issue could be reasonably produced. Therefore, it was incumbent upon the Public Body to produce them, whether it provided the one-page record, or not. Because of this, the Public Body failed in its duty to assist the Applicant.

[76] In its submissions, the Public Body has argued that the document it initially created was intended to provide the Applicant with a clear and informative record of what the Applicant was seeking. The Public Body submits,

- As per the Applicant's email of July 30, 2010, which stated that 'names can be omitted,' the documents were severed. There is no reference to the FOIPP Act as this was at the request of the Applicant. Therefore, the covering letters referencing the attached quarterly reports in the original records were not included as they contained names and if severed did not provide any additional information to the Applicant other than a cover sheet. It is also noted the request was specific to the quarterly reports only.

...

- The public body considers the fee that was given to the Applicant as a fair reflection of the additional work involved in preparing the documents. The preparation of these documents also had prevented the third party notification process and provided the Applicant with a reply in a timely manner.

[77] A public body has a duty to assist an applicant, and to respond to an applicant openly, accurately, and completely. In this case, it appears the Public Body's decision to create a document reflecting information contained in the requested records was done without any contact with the Applicant. Further, it appears that the Public Body's decision to provide the Applicant with the severed records upon the Applicant's request for a review of the Public Body's decision, together with its subsequent decision to

issue a fee estimate, as well as its conclusion that the created record would have sufficiently responded to the Applicant's request and that copies of severed records would not be useful to the Applicant, were all made without any input from, nor contact with, the Applicant. In failing to communicate with the Applicant, the Public Body has not met the standard intended by the *FOIPP Act* for assisting the Applicant in the processing of the access request.

[78] The Public Body's key failure in this review has been a failure to communicate with the Applicant. The duty to communicate is inextricably linked to the Public Body's duty of openness and transparency, upon which the *FOIPP Act* is based. The Public Body could have canvassed the idea of creating a record with the Applicant, but it did not. The Public Body could have advised the Applicant that a fee would be involved when it decided to provide the Records at issue, but it did not. The Public Body could have asked the Applicant upon which basis he was requesting a fee waiver, but it did not.

[79] As noted above, the Public Body also failed in its duty to assist the Applicant by failing to show how it exercised its discretion not to allow a fee waiver.

[80] For the foregoing reasons, I find that the Public Body fell short of meeting its duty to assist the Applicant when processing the access request, and, thus, the Public Body did not comply with section 8 of the *FOIPP Act*.

## **V. FINDINGS**

[81] Clause 66(3)(c) of the *FOIPP Act* gives the Commissioner the power to reduce part or all of any fees charged an applicant by a public body, and to order a refund. Clause 66(3)(c) states:

66. (3) If the inquiry relates to any other matter, the Commissioner

may, by order, do one or more of the following:

...

(c) confirm or reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met.

- [82] The Commissioner's consideration of a fee estimate and fee waiver is measured by appropriateness, all circumstances, and evidence. The Commissioner may not increase fees, but may otherwise make a "fresh" decision [Order FI-13-001, *supra*, para 68].
- [83] I find that an appropriate fee estimate for preparing and handling the records responsive to the Applicant's access request, and for copying those records, is \$120.20.
- [84] I find that the Applicant did not provide sufficient evidence of his inability to pay. Therefore, I cannot exercise my discretion to allow a fee waiver pursuant to clause 76(4)(a) of the *FOIPP Act*.
- [85] I find that the records at issue relate to a matter of public interest, pursuant to clause 76(4)(b) of the *FOIPP Act*.
- [86] I find that the circumstances of this review warrant a fee waiver, and I exercise my discretion to allow a fee waiver, as the Records at issue relate to a matter of public interest.
- [87] I find that the head of the Public Body did not meet his duty to assist the Applicant under section 8 of the *FOIPP Act* by making every reasonable effort to assist the Applicant, and to respond to the Applicant openly, accurately, and completely, when processing the Applicant's request for access to information, preparing the fee estimate, and considering the Applicant's request for a fee waiver.

**VI. ORDER**

[88] Having found that the Public Body's fee estimate is not accurate or appropriate under the circumstances, I order the Public Body to reduce the fee estimate from \$193.75 to \$120.20.

[89] I exercise my discretion to allow a fee waiver. I order the head of the Public Body to allow a full fee waiver, as the Records at issue relate to a matter of public interest, thus reducing the fee estimate to \$0.00.

[90] In accordance with subsection 68(1.1) of the *FOIPP Act*, the head of the Public Body shall not take any steps to comply with this order until the end of the period for bringing an application for judicial review of the order under section 3 of the *Judicial Review Act*.

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Karen A. Rose  
Information and Privacy Commissioner