



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

**Order No. FI-16-001**

**Re: Department of Economic Development and Tourism**

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

**February 18, 2016**

**Summary:**

An applicant requested from the former Department of Innovation and Advanced Learning access to loans and grants approved and forwarded to a third party, including terms, amounts, interest rate, current status, outstanding balances, and defaults, from January 2010 to December 2013. The department provided the applicant with a nine-page letter of offer to finance, severing information from one page pursuant to subsection 14(1) of the *Freedom of Information and Protection of Privacy Act*. The department advised the applicant that it was protecting commercial and financial information that would be harmful to business interests of a third party if disclosed. The Commissioner determined that the severed information was commercial and financial information, but ordered the information to be disclosed, as it did not satisfy any of the three required elements of the subsection 14(1) exception.

**Statutes Considered:**

*Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, ss. 8(1); 12, 14(1), 14(3), 28, 30(1), 50, 65(1), 66(2), 68(1.1); *Financial Administration Act*, RSPEI 1988, c F-9, s. 30

**Authorities Considered:** Decision No. RI-15-003, *Department of Innovation and Advanced Learning, Re* (07 March 2015), (PE IPC)  
Order No. FI-15-002, *Prince Edward Island (Economic Development and Tourism) (Re)*, 2015 CanLII 66639 (PE IPC)  
Order No. 03-006, *Department of Development and Technology, Re*, 2003 CanLII 52562 (PE IPC)  
Order No. 06-007, *Prince Edward Island (Agriculture, Fisheries and Aquaculture) (Re)*, 2006 CanLII 60800 (PE IPC)  
Order No. FI-15-003, *Prince Edward Island (Family and Human Services) (Re)*, 2015 CanLII 66637 (PE IPC)  
Order No. FI-15-004, *Prince Edward Island (Health) (Re)*, 2015 CanLII 66640 (PE IPC)  
*Wolfville (Town)*, 2015 CanLII 39148 (NS FOIPOP)  
Order F2010-036 of the Alberta Information and Privacy Commissioner, 2011 CanLII 96613 (AB OIPC)  
Order No. FI-10-001, *P.E.I. Lending Agency (Re)*, 2010 CanLII 7313 (PE IPC)  
Order 97-013, 1997 CanLII 15922 (AB OIPC)  
Order FI-12-001, *Department of Tourism and Culture (Re)*, 2012 CanLII 99857 (PE IPC)  
Order 99-003, 1999 CanLII 19668 (AB OIPC)  
Order No. FI-10-005, *Prince Edward Island (Department of Education and Early Childhood Development) (Re)*, 2010 CanLII 97256 (PE IPC)  
Order No. FI-11-001, *Prince Edward Island (Department of Agriculture) (Re)*, 2011 CanLII 91839 (PE IPC)  
Order No. FI-15-012, *Prince Edward Island Liquor Control Commission, Executive Council Office, Office of the Premier, Re* (31 December 2015), Charlottetown FI-15-012 (PE IPC)

**Other Resources Cited:** Prince Edward Island *Freedom of Information and Protection of Privacy Guidelines and Practices Manual* (May 2006)  
*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)

## I. BACKGROUND

- [1] The Applicant applied to a department formerly referred to as the Department of Innovation and Advanced Learning ("the department") for access to loans and grants approved and forwarded to a third party organization, including terms, amounts, interest rate, current status, outstanding balances, and defaults, from January 2010 to December 2013.
- [2] Upon inviting the third party organization ("the Third Party") to make submissions regarding releasing two records responsive to the request, and upon considering the Third Party's submissions to withhold the records, the department decided to disclose the records, severing information from one record that it determined is commercial and financial information that would harm the Third Party's business interests, as required by subsection 14(1) of the *Freedom of Information and Protection of Privacy Act* ("FOIPP Act"), and severing information from a second record that it determined was personal information of a third party, as required by section 15, to protect personal privacy.
- [3] The Applicant requested a review of the decision of the department. At the commencement of the review, it was established that the Department of Economic Development and Tourism is the appropriate public body (the "Public Body") for the purposes of the review.
- [4] During the course of the review, upon reconsideration, the Public Body decided to disclose the information severed from the second record pursuant to section 15 of the *FOIPP Act* to the Applicant. As a result, section 15 is not an issue to this review, and, as the second record is fully disclosed, only the first record is subject to review.

## II. RECORD AT ISSUE

- [5] The record at issue is a one-page appendix that forms part of a nine-page letter of offer to finance from Island Investment Development Inc. to the Third Party, titled 'Schedule "A"' ("the record at issue"). The only information in the record at issue that is not severed is the name of the Third Party, the page number, the date, and the title of the page. As described by former Commissioner MacDonald in Decision No. RI-15-003, *Department of Innovation and Advanced Learning, Re* (07 March 2015), (PE IPC), the subtitle of the record at issue is "Proposed Budget", and it includes deliverables, time line dates, and dollar amounts (para [3]).

## III. ISSUE

- [6] There is one issue to be determined in this review, as follows:

***Did the head of the Public Body accurately apply subsection 14(1) of the FOIPP Act in refusing the Applicant access to information in the record at issue?***

## IV. BURDEN OF PROOF

- [7] Section 65 of the *FOIPP Act* places the burden of proof on different parties, depending on the decision being reviewed. According to subsection 65(1), the burden of proof in this review lies with the Public Body, who has refused the Applicant access to information contained in the record at issue. Subsection 65(1) states as follows:

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

[8] As noted in Order No. FI-15-002, *Prince Edward Island (Economic Development and Tourism) (Re)*, 2015 CanLII 66639 (PE IPC), at paragraph [10], a third party is also advised to provide submissions relating to section 14 of the *FOIPP Act*, as it will likely have special knowledge of the three factors to be assessed in a determination of whether section 14 applies. In the review before me, the Third Party was invited to provide submissions in support of its position not to disclose information in the record at issue to the Applicant.

## V. DISCUSSION OF THE ISSUE

[9] Subsection 14(1) of the *FOIPP Act* is a mandatory exception to disclosure. Before refusing an applicant access to information under subsection 14(1), a public body is required to satisfy all three of the clauses of subsection 14(1), as they relate to the information it has refused to disclose. Subsection 14(1) states as follows:

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.

[10] The Applicant is aware of the requirement to satisfy all three clauses of subsection 14(1) of the *FOIPP Act*. In the Applicant's request for review, she argues that the Public Body's decision letter to her cites only one of the three required clauses for refusing to provide the Applicant access to the information in the record at issue:

I will note that section 14 (1) of the FOIPP Act requires the public body to satisfy all three of the provisions of (a), (b) and (c). In this case, the public body cites only one of those provisions -"harmful to business interests of a third party." It gives no reason as to why this would cause harm to the third party and does not address the other three provisions of this section of the act.

During the course of this review, the Public Body provided submissions relating to all three clauses of section 14.

[11] The first listed purpose of the *FOIPP Act*, as set out at clause 2(a), is 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 the *FOIPP Act*. I will examine each of the three clauses of subsection 14(1) below, in relation to the evidence provided by the parties, keeping in mind this primary purpose of the *FOIPP Act*, and balancing it with the exception relating to third party business interests.

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

*Type of Information*

[12] Clause 14(1)(a) of the *FOIPP Act* requires that disclosure would reveal a certain type of information, as described under subclauses 14(1)(a)(i) and (ii). The Public Body submits that the severed information in the record at issue is commercial and financial

information, being two of the five types of information listed under subclause 14(1)(a)(ii). The Public Body submits as follows:

Page 9 contains commercial and financial information relating to the dealings of the third party. The FOIPP Guidelines and Practices Manual references "financial information" as "relating to money and its use or distribution or to assets with monetary value such as securities or stock options. Common examples are financial forecasts, investment strategies, budgets, and profit and loss statements." "Commercial information" is referenced as "information concerning the sale, purchase or exchange of goods or services, such as pricing structures, market research, business plans, and customer records" [emphases added]. As previously stated, the third party objected to the disclosure of the record in full, and underscored its particular concern with the release of Page 9 as containing financial and commercial information related to its dealings.

[13] In one of the first orders of this office analyzing section 14 of the *FOIPP Act*, Order No. 03-006, *Department of Development and Technology, Re*, 2003 CanLII 52562 (PE IPC), I state that, because the definitions of "commercial" and "financial" information are not set out in the *FOIPP Act*, they should be interpreted by their ordinary dictionary meanings [page 9].

[14] In Order No. FI-06-007, *Prince Edward Island (Agriculture, Fisheries and Aquaculture) (Re)*, 2006 CanLII 60800 (PE IPC), I refer to Alberta's Freedom of Information and Protection of Privacy Guidelines and Practices Manual (2005), accepting the following definitions at page 8, as follows:

"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.

"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.

[15] As noted above, the record at issue is a one-page appendix to a nine-page letter of offer to finance from Island Investment Development Inc. to the Third Party, titled 'Schedule "A"'. Paragraph 1.2 of the letter of offer to finance establishes that Schedule "A" is a summary of the costs upon which the disbursement of a loan is to be based.

[16] I have considered the content of the record at issue to properly determine whether the severed information satisfies the definition of commercial or financial information. As the record at issue describes, generally, how the proceeds of the loan are to be directed by the Third Party, I accept that the severed information contained in the record at issue is commercial information. Further, as the record at issue breaks the deliverables down by dollar amount, I accept that the severed information contained in the record at issue is financial information. However, this in itself does not satisfy the first provision of subsection 14(1) of the *FOIPP Act*. A careful reading of clause 14(1)(a) reveals that there are three elements that must be met: (i) the information must be of the type identified in its subclauses, which I have confirmed; (ii) the information must be of the third party; and (iii) the information would be revealed if it was disclosed to the public. The latter two requirements are discussed below.

*Information of a third party*

[17] Having identified the severed information in the record at issue as commercial and financial information, I must now determine if the commercial and financial information is “of the third party”. I speak to this requirement in Order No. FI-15-003, *Prince Edward*

*Island (Family and Human Services) (Re)*, 2015 CanLII 66637 (PE IPC) at paragraph [26], as follows:

[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>

[18] As I discussed in Order FI-15-004, *Prince Edward Island (Health) (Re)*, 2015 CanLII 66640 (PE IPC), information resulting from negotiation between parties is not “of a third party” (para [39]). In addition, information that originates from a third party can be modified by the negotiation process such that it clouds the third party’s claim to a proprietary interest in the information [*Wolfville (Town)*, 2015 CanLII 39148 (NS FOIPOP), para 27]. There is evidence that such negotiation took place between the Public Body and the Third Party, as is reasonably foreseeable in situations where organizations propose project funding from government. Indeed, there is evidence that some of the information in the record at issue was modified from its original state. In my view, this evidence contributes to a finding that the information in the record at issue is not “of a third party”.

[19] I am ever cognizant that the requirement of clause 14(1)(a) of the *FOIPP Act* is for the protection of a third party, and not of commercial matters of a public body. In this review, I have not been provided sufficient evidence from the Public Body or the Third

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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

Party that the severed information is proprietary information of the Third Party. Rather, the information severed from the record at issue lists merely the deliverable tasks required by the Public Body, the date upon which each task is expected, and the round budget amount for fulfilling each task, which budget amounts sum to the full amount of the financing offer. These are requirements upon which the Public Body's offer to finance is based, relating directly to a commercial matter (project financing) of the Public Body.

[20] As noted below, I accept the Public Body's evidence that the severed information contained in the record at issue was originally provided by the Third Party. However, once this information became a part of the record at issue, which is attached to and forms part of a letter of offer to finance by the Public Body to the Third Party, it was no longer proprietary to the Third Party, but belonged to both parties. At its most basic description, the severed information in the record at issue is simply a general breakdown, in round numbers, of how the loan proceeds, provided by the Public Body, will be used by the Third Party. This financial information reveals nothing about the business interests of the Third Party, and nothing about the financial status of the Third Party. It reveals only generally what the proceeds from the financing will be used for, for this particular, narrowly defined, venture. In my view, the record at issue reveals information about the business of the Public Body, as it reveals the basis upon which the Public Body agreed to provide the financing for the venture described in the letter of offer to finance.

[21] The record at issue is as much the information of the Public Body as it is of the Third Party, because it results from negotiation, and it reveals the fundamental project estimates upon which the letter of offer to finance is based. Based on this conclusion, I find that the information in the record at issue is not "of the Third Party", and, therefore, is not subject to the exception set out at clause 14(1)(a) of the *FOIPP Act*.

Information revealed by disclosure

- [22] The final element of the first provision of subsection 14(1) of the *FOIPP Act* is whether the severed information contained in the record at issue would be revealed if disclosed. No evidence has been provided that the severed information is in the public realm. I also note the efforts of the Public Body and the Third Party not to reveal the specifics of the content of the record at issue to the Applicant during the course of this review. The Third Party has been clear in its submissions that it does not grant permission to the sharing with the Applicant of its submissions, or to the sharing of the paragraph of the Public Body's submissions that cites from the Third Party's submissions. This is further evidence in support of my finding that the information would be revealed by disclosure.
- [23] In my review of the record at issue, I note that a third party business is named, associated with deliverable #8. The Public Body did not make a submission relating to this particular item of information. In Order F2010-036 of the Alberta Office of the Information and Privacy Commissioner, 2011 CanLII 96613 (AB OIPC), it was found that the Legislature did not intend clause 16(1)(a) [the equivalent of our clause 14(1)(a) of the *FOIPP Act*] to encompass business contact information of employees, consultants, or contractors. More specifically, the adjudicator states:
- [para 38] I find that the names, titles, and business contact information of employees, consultants, or contractors of third party businesses is not commercial information or information to which section 16(1)(a) applies. I therefore find that this kind of information cannot be withheld under section 16.
- [24] Likewise, I find that the name of the third party business consultant associated with deliverable #8 does not fall into any of the categories of information that clause 14(1)(a) of the *FOIPP Act* protects.

[25] I find that the Public Body has satisfied only two of the three required elements of clause 14(1)(a) of the *FOIPP Act*, in that the severed information in the record at issue is commercial and financial information that would be revealed if disclosed. However, as discussed above, I find that the Public Body has not provided sufficient evidence that the information is “of the Third Party”.

[26] I find that the requirements of clause 14(1)(a) of the *FOIPP Act* have not been met. As the Public Body must satisfy all three clauses of the subsection 14(1) exception to disclosure, I find that the Public Body was not required or entitled to withhold the record at issue from the Applicant. Although not required to do so, but in the alternative, I continue my analysis, and address the second requirement under clause 14(1)(b).

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

***Information supplied by a third party***

[27] Clause 14(1)(b) of the *FOIPP Act* requires that the information in the record at issue be supplied, explicitly or implicitly, in confidence. I point out that there are two elements of this provision that must be met for the provision to be satisfied: (i) the information must have been supplied; and (ii) the information must have been supplied in confidence. The Public Body submits that the severed information in the record at issue was supplied by the Third Party in confidence. It states:

The record at issue was originally submitted by the third party in support of a proposed endeavour, the pursuit of which was kept in strict confidence by all parties so as not to jeopardize the competitive position of its proponents. Indeed, in its December 19, 2014 submissions, the third party wrote that "the documents contain highly sensitive information, and at all times all information was explicitly supplied in

confidence." The fact that the third party believed the information was submitted in confidence is compelling (see Alberta Order 97-013).

It should be noted that all proposals and plans that are submitted to government by third parties are held in strict confidence by the department where they contain sensitive financial, commercial and competitive information of their authors, as is the case here.

We therefore concluded that the information at issue was supplied in confidence.

[28] The letter of offer to finance states that the offer is based on an application for a loan submitted by the Third Party, together with supporting financial statements, and other information provided. As the name of the document suggests, the letter of offer to finance describes a financing offer being presented to the Third Party for acceptance, the disbursement of which would be based on actual invoiced costs. As it could not be determined by the wording of the offer that information was supplied by the Third Party, the Public Body was asked to provide a copy of the Third Party's actual application for the loan, or any other document that shows the severed information contained in the record at issue was supplied to the Public Body by the Third Party. The Public Body provided me with a copy of the Third Party's "originally submitted" proposal, dated September, 2011.

[29] I confirm that the document provided is a proposal of the Third Party. Although there is nothing accompanying the document, or within the document, that suggests the document was submitted to the Public Body for the purposes of supporting an application for a loan, I confirm that the document contains information similar to the severed information contained in the record at issue. However, there are distinctions. For three of the "deliverables" listed, the estimated budget increased substantially from

the proposal to the record at issue. In addition, one deliverable was added to the record at issue, as it was not contained in the Third Party proposal.

- [30] The Public Body relies on the premise that the Third Party supplied the information in the record at issue in support of an application for a loan, in confidence, and that the Public Body holds all proposals and plans it receives in strict confidence. In Order No. FI-10-001, *P.E.I. Lending Agency (Re)*, 2010 CanLII 7313 (PE IPC), regarding an applicant's request for access to third party loan and grant amounts, former Commissioner Judith M. Haldemann makes a distinction between information submitted in support of an application for which one is seeking approval, and information contained in an approved agreement, by pointing out the latter is the decision of a public body, and, therefore, not something supplied by a third party [page 10].
- [31] Similarly, it is the Public Body who made the offer to finance to the Third Party. While some of the budget estimates may have been originally provided by the Third Party, it is clear that, between September 2011 and December 2011, discussions and/or negotiations took place that changed some of the budget estimates, and added one deliverable. The Public Body is, in effect, stating that it will finance the Third Party's project on the basis that the proceeds be used in the manner indicated in "Schedule A", the record at issue. The record at issue is thus inextricably linked to the Public Body's document, the letter of offer to finance.
- [32] Several orders and decisions of this office, and the offices of my provincial counterparts, have established guidelines for a finding that information at issue was supplied to a public body by a third party. I discuss these guidelines at length in Order No. FI-15-004, *supra*, at paragraphs [54] to [56]. In that order, I agree with provincial counterparts in Nova Scotia and British Columbia that contractual terms are not considered "supplied" if they are negotiated, even where there is little or no overt negotiation preceding a

contract. I also recognize the following exceptions to this general rule: information will be found to be supplied if it is relatively “immutable” or not susceptible of change; and, if its disclosure would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was “supplied” by the third party, that is, about information not expressly contained in the contract.

[33] Based on a reading of the documents provided, and considering the context within which the information in the record at issue was exchanged between the parties, I confirm that the information was not immutable, and was susceptible to change. In fact, it did change. Further, I am unable to identify any accurate inferences that could be drawn about underlying confidential information supplied by the Third Party, not expressly contained in the letter of offer to finance. The Public Body presented no such evidence.

[34] The Public Body has not persuaded me, on a balance of probabilities, that the Third Party supplied the information severed from the record at issue. I find that the Public Body has failed to meet its burden that the information severed from the record at issue was supplied to the Public Body by the Third Party. Despite this finding, I will continue to analyze the second required element of clause 14(1)(b) of the *FOIPP Act*, that the information must be supplied in confidence.

*Information supplied in confidence*

[35] The Public Body must establish that the Third Party had a reasonable expectation of confidentiality, implicit or explicit, at the time the Third Party provided it with the information. As noted above, the Public Body argues the information was supplied by the Third Party in confidence. There is no explicit statement within the document provided by the Public Body that the information in the record at issue was supplied in confidence. The Public Body submits the fact that the Third Party believed the

information was submitted in confidence is compelling, pursuant to Alberta Order 97-013, 1997 CanLII 15922 (AB OIPC).

[36] Former Commissioner Maria MacDonald, in Order FI-12-001, *Department of Tourism and Culture (Re)*, 2012 CanLII 99857 (PE IPC), discusses acceptable evidence to prove an implicit confidentiality. At paragraph [44], she states:

[44] It is not enough to say that a third party, or even a public body for that matter, considered the information to be confidential. The expectation of confidentiality must be based on reasonable and objective grounds. Tourism PEI provided no argument of reasonable and objective grounds for an expectation of confidentiality for me to consider. As noted, Tourism PEI previously disclosed the dollar value of the contract. In addition, both Tourism PEI and the third party publicly promoted their relationship. Tourism PEI did not meet its burden of proof.

[37] The Public Body submits that the Third Party's pursuit of a proposed endeavor was kept in strict confidence by all parties so as not to jeopardize the competitive position of its proponents. However, I note from paragraph 12.1 of the letter of offer to finance, it was acknowledged that the Public Body may arrange for a public announcement of the essential facts of the offer, including the estimated capital costs. The Third Party was required to keep the offer confidential until such announcement, which was subject to the Public Body's discretion. In my view, by agreeing to this paragraph, and the ensuing paragraph, which notes that the offer is treated in accordance with the *FOIPP Act*, the Third Party abandoned any claim to confidentiality it may have had.

[38] The Public Body has not persuaded me, on a balance of probabilities, that the information severed from the record at issue was supplied, implicitly or explicitly, in confidence. As I have insufficient evidence, the Public Body has failed to meet its

burden of proof, and has not satisfied the second element necessary under the second requirement of the clause 14(1)(b) exception to disclosure under the *FOIPP Act*, that information was supplied implicitly or explicitly in confidence.

- [39] Although all three clauses of subsection 14(1) of the *FOIPP Act* must be satisfied to engage this exception to disclosure, and I have found that the Public Body has not satisfied either clauses 14(1)(a) or 14(1)(b), I will nonetheless continue with an analysis of clause 14(1)(c).

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

- [40] The third requirement for information to qualify for an exception to disclosure under subsection 14(1) of the *FOIPP Act* is that its disclosure would cause one of the four harms described under clause 14(1)(c). The Public Body must prove that if the information in the record at issue were disclosed it would be reasonable to expect that the Third Party would probably suffer a harm set out in clause 14(1)(c). It is not necessary to prove that the harm will definitely occur, but speculating or merely stating that it would occur is not sufficient to satisfy this clause. As noted in Order FI-15-002, *supra*, the evidence must be detailed and convincing (para [63]).
- [41] The Third Party submissions to the Public Body, upon which the Public Body relies for the purposes of this review, argue against disclosing the letter of offer to finance in its entirety, and not just the record at issue. Although the Third Party claims that disclosure would result in the harms set out in subclauses 14(1)(c)(i) and (ii) of the *FOIPP Act*, the Public Body relies only on subclause 14(1)(c)(i).
- [42] The Public Body submits that disclosing the severed information contained in the record at issue would significantly harm the Third Party's competitive position, or significantly

interfere with the negotiating position of the Third Party, as found under subclause 14(1)(c)(i) of the *FOIPP Act*. The Public Body refers to the submissions it received from the Third Party, and states,

Based on these submissions, we concluded that subsections 14(1)(c)(i) was applicable - not to the entire loan document - but only to the information contained on Page 9, given the specificity of the information and the fact that it relates to strategy and plans in pursuit of an endeavour in a competitive marketplace.

[43] The Third Party submits that the nature of the project it was contemplating is extremely competitive on a global scale, and disclosing the document, especially the detailed information contained in the record at issue, would significantly jeopardize its competitive position, and put the project at risk. The Third party also argues that disclosure would impact how it would pursue economic development initiatives with the province in the future [subclause 14(1)(c)(ii) of the *FOIPP Act*].

[44] It has been well-established by an abundance of decisions over the past decade what level of detailed evidence is required to meet the standard of proof under section 14 of the *FOIPP Act*. Orders of this office have repeated, time and again, that bald assertions of harm will not suffice.

[45] The Prince Edward Island *Freedom of Information and Protection of Privacy Guidelines and Practices Manual* (May 2006) gives instruction at page 63, and states:

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

- there is a clear cause and effect relationship between the disclosure and the alleged harm;

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

[46] I have found that the information in the record at issue is not proprietary to the Third Party. This information would not reveal any proprietary information of the Third Party, or any information unique to the Third Party. I have not been provided with any evidence of existing competition of the Third Party, nor have I been provided with evidence of what unfair advantage competitors could gain from disclosure of the record at issue.

[47] I have received little evidence to support the Public Body's position of an expectation of harm. There is no supporting evidence within the Third Party's originally submitted proposal. Indeed, it appears that there are few sources to measure the extent of the type of business endeavor the Third Party had been proposing. Further, with reference specifically to the record at issue, I cannot identify any information that, if disclosed, would garner any unfair advantage to potential competitors. I am not convinced that any competitive position, or negotiating position, would be interfered with, or would be lost by providing the Applicant with access to the record at issue. As described above, the severed information refers only to general deliverables, and round budget estimates.

[48] The Public Body has not persuaded me, on a balance of probabilities, that the information severed from the record at issue, if disclosed, would significantly harm the Third Party's competitive position, or significantly interfere with the negotiating position of the Third Party, as found under subclause 14(1)(c)(i) of the *FOIPP Act*. As I have

insufficient evidence, the Public Body has failed to meet its burden of proof, and has not satisfied the third provision of the subsection 14(1) exception to disclosure.

Subclause 14(1)(c)(ii):

- [49] The Public Body cited the Third Party's concern that, if the record at issue is disclosed, it would impact how the parties deal with one another, and what information can be included in future projects. This implies a reliance on subclause 14(1)(c)(ii) of the *FOIPP Act*, that disclosure could reasonably be expected to 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.
- [50] In my view, subclause 14(1)(c)(ii) of the *FOIPP Act* does not apply to the circumstances of this review. If the Third Party refuses to supply such budget information in future proposals for project financing, the Public Body will not be in a position to make an offer to finance. Third party applicants for government loans have an obligation to continue to supply this type of information. The Public Body would surely not offer to finance any third party endeavor without setting out its expectations of what the financing proceeds would be used for. The record at issue contains only that information.
- [51] As a result of the foregoing analysis of the evidence provided, I conclude that the parties have provided insufficient evidence that the Third Party would suffer a harm set out in clause 14(1)(c) of the *FOIPP Act*. The parties' evidence is neither detailed nor convincing; rather, I find it to be speculative.
- [52] I find that the Public Body has failed to meet its burden of proof required to refuse the Applicant access to the record at issue under subsection 14(1) of the *FOIPP Act*, and that the Public Body was not legally authorized to refuse to disclose the record at issue. I

will, therefore, be ordering the head of the Public Body to disclose the record at issue to the Applicant, in its entirety.

## **VI. SUPPLEMENTARY ISSUES**

[53] The Applicant raises public interest as an additional argument in support of disclosing the record at issue. The Applicant states,

. . . I would argue that, considering this is was offer by the public body of financing to the third party, the financial information on this page would be laying out details of public funds to be loaned to the third party. The public is entitled to know how public funds are allocated and spent, as detailed in the Financial Administration Act. This includes loans to third parties. In layman's terms -Islanders have a right to know to know how their tax dollars are spent.

. . .

I would argue the information withheld by the public body under this request should be released based on my assertion it is in the public's right to know. The public has recently come to know some of the details of the province's attempt to become an Internet regulator for Canada, which is the project this loan intended to fund. There has been considerable public interest in this file, including multiple local and national media stories. It was also a key issue of concern among the public in the recent provincial election. There was a significant amount of government involvement in this initiative and, if it had gone ahead, would have had a tremendous financial impact on the province -a windfall of millions of dollars in online gaming revenues. The loan in question includes a provision that, if the project did not go ahead, repayment of the loan, including interest, is void. The project did not go ahead, which now means the province will not receive repayment of this loan nor has it receive any payment of interest. The taxpayers of Prince Edward Island are now responsible for the repayment of this loan. How can the public body argue against releasing to the public details of a loan and cite concerns for personal privacy when it is the public that has now been left financially responsible? Since it is the taxpayers of P.E.I. who must repay

this loan, the taxpayers of P.E.I. have a right to know how it was allocated, where it was spent and any other relevant information.

Considering this was an initiative of the province that used taxpayer's dollars; considering the high level of public interest and considering my firm belief the details withheld as part of this FOIPP request fall within the public's right to know, I would request that you please review the decision of the public body to withhold some of the information I requested regarding details of the \$950,000 loan to the [Third Party] to pay for the province's failed E-gaming initiative.

Clause 30(1)(b):

- [54] The only provision of the *FOIPP Act* under which this submission of the Applicant could fall is clause 30(1)(b), which states:

30(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant

...

(b) information the disclosure of which is, for any other reason, clearly in the public interest.

- [55] The Alberta Information and Privacy Commissioner considered Alberta's equivalent to our clause 30(1)(b) of the *FOIPP Act* in Order 99-003, 1999 CanLII 19668 (AB OIPC). That order stated, in part, as follows:

[para 39.] The Applicant submitted that it is in the public interest to disclose records including cash flow reports, budget estimate reports and financial reports required under the Al-Pac Pulp Mill Project Credit Agreement to ensure that all leverages available were maximized by the Government of Alberta.

[para 40.] As I stated in Order 96-011, for section 31(1)(b) to apply, the matter must be of "compelling public interest". In the Applicant's submissions, the Applicant has not established that this is a matter of

“compelling public interest”. Therefore, I find that section 31(1)(b) does not apply to the Records. Alberta Treasury is not required to disclose the Records under section 31(1)(b).

- [56] Former Commissioner Judith M. Haldemann also discusses the term "public interest" as it relates to access to information in Order No. FI-10-005, *Prince Edward Island (Department of Education and Early Childhood Development) (Re)*, 2010 CanLII 97256 (PE IPC). At page 17, she states:

The words “public interest” in subsection 30(1) mean, reading the section as a whole, the public interest in a broad sense. The public interest as used in the subsection does not mean the interest of the public in a particular area or county of the province, except insofar as there is an urgency, in most cases dealing with health or safety. In my opinion, this section does not include the interest of the public in the sense of an interest in a current political issue. It should also be noted that subsection 30(3) requires that a public body notify the Commissioner if it intends to release information under subsection (1). This requirement in itself is an indication that section 30 will apply only rarely, and, time permitting, the Commissioner might have very different views from the public body as to what might be “clearly in the public interest” to disclose.

- [57] In my view, the Applicant has not established that the record at issue relates to a matter of “compelling public interest”, nor has the Applicant satisfied the requirement of urgency. Based on the evidence, I do not find that there is an urgent need for the Public Body to disclose the information at issue. Section 30 of the *FOIPP Act* does not apply to the circumstances of this review.

Clause 14(3)(b):

- [58] Subsection 14(3) of the *FOIPP Act* sets out an exception to subsections 14(1) and (2). It states, in part,

14. (3) Subsections (1) and (2) do not apply if

...

(b) an enactment of Prince Edward Island or Canada authorizes or requires the information to be disclosed;

[59] The Applicant suggests that the *Financial Administration Act*, RSPEI 1988, c F-9, entitles the public to access to how public funds are allocated and spent. While there is no provision in the *Financial Administration Act* specifically entitling a person to access to loan information, there is also no provision that restricts public access to it. As well, pursuant to section 30 of the *Financial Administration Act*, a report of all loans and advances must be submitted to the Legislative Assembly. However, there does not appear to be a provision that requires or authorizes the Applicant to have access to the type of information in the record at issue. I find there is insufficient evidence to apply clause 14(3)(b) of the *FOIPP Act*.

Subsection 8(1):

[60] This office includes a public body's duty to assist as an issue to every review. The duty to assist underlies the integrity of the access process. Clause 50(1)(g) of the *FOIPP Act* permits the Commissioner to bring any failure by a public body to assist applicants under section 8 to the attention of the head of a public body. Further, clause 50(2)(a) permits the Commissioner to investigate and attempt to resolve complaints that a duty imposed by section 8 has not been performed.

[61] A public body is obligated under subsection 8(1) of the *FOIPP Act* to assist applicants when processing a request for access to information. Subsection 8(1) 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.

- [62] To meet the standard of duty expected of a public body, it must adhere to the processing requirements set out in sections 6 to 13 of the *FOIPP Act*, which give guidance relating to notifying and responding to an applicant, and timeliness in processing the request.
- [63] In processing an applicant's request for access to information, a public body is expected to be open, accurate, and complete. The relationship between a public body's duty to assist and the purposes of the *FOIPP Act* has been discussed in numerous orders of my provincial counterparts, and of this office. This duty includes the obligation to keep an applicant fully informed of the public body's 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]).
- [64] It is a public body's burden to prove it has met its duty to assist. The content of a public body's processing file should provide sufficient supporting evidence to satisfy its burden. For the reasons set out below, it is my finding that the head of the Public Body has not met his duty to assist in the processing of the Applicant's request under review.
- [65] Under section 12 of the *FOIPP Act*, a public body may extend the time to process an access request up to an additional 30 days for specific reasons, including when more time is needed to consult with a third party or another public body before deciding whether or not to grant access to a record [s. 12(1)(c)]. A third party must also be notified when a public body is considering giving access to a record that affects the interests of a third party under section 14. Pursuant to section 28, the third party then has 20 days after notice is given to consent to disclosure, or make representations to the public body explaining why the information should not be disclosed.

[66] The Public Body received the Applicant's access request on November 27, 2014. The Public Body notified the Third Party of the access request on December 3, 2014, and received a response within 16 days, by December 19, 2014. The Third Party asked that the records not be released. On January 8, 2015, the Public Body contacted the Applicant by email to extend the time to respond to the Applicant by an additional 25 days, with no explanation. After a further 21 days, on January 29, 2015, the Public Body again contacted the Applicant by email, attaching a letter dated January 28, 2015, advising the Applicant it had decided to give the Applicant access to the records requested, subject to excepting information under sections 14 and 15 of the *FOIPP Act*. In explaining its decision relating to the nine-page letter of offer to finance, and the one-page, computer-generated printout of the transaction details of the loan, the Public Body advised the Applicant as follows:

. . . We intend to protect several records under section 14(1) harmful to business interests of a third party and we are obligated to sever information to protect personal privacy (section 15(1)) on one record.  
[underline emphasis added]

[67] The Public Body further advised the Applicant that it had notified the Third Party of its decision, and the Third Party had 20 days to request a review with this office. If the Third Party did not request a review, the Public Body was prepared to give the Applicant access to the records on February 17, 2015, a total of 84 days after it received the Applicant's request. A request to review the Public Body's decision was submitted to this office by the third party, which request was refused [Decision No. RI-15-003, *supra*].

[68] In Order No. FI-15-012, *Prince Edward Island Liquor Control Commission, Executive Council Office, Office of the Premier, Re* (31 December 2015), Charlottetown FI-15-012 (PE IPC), I advise public bodies to be cautious when using the additional 30 day period provided for under the *FOIPP Act*, and I caution public bodies to be able to support their

use of such extensions, to advise applicants of the section 12 extensions before the initial 30 day time limit has expired, and to provide an estimated date upon which applicants may expect to receive responsive records (para [133]).

- [69] My first observation relating to the time extension is that the Public Body had only to process two records, the nine-page letter of offer to finance, and the one-page, computer-generated printout of the transaction details to the loan. Aside from the time necessary to consult with the Third Party, the location, retrieval, preparation, and handling of these records should have been achievable well within the 30 day time limit, without the Public Body exercising its discretion to extend the time by a further 30 days.
- [70] My second observation surrounds the Public Body's duty to accurately and completely inform the Applicant. As noted above, the Public Body advised the Applicant it had several records that required protection under section 14 of the *FOIPP Act*; however, the search retrieved only two records, and during the course of this review, the Public Body provided only two records. I find that the use of the word "several" in describing the records to the Applicant to be in error, and misleading to the Applicant. Certainly, it violates the Public Body's obligation to respond openly, accurately, and completely.
- [71] Due to an unwarranted delay in processing the Applicant's request, and a failure to respond to the Applicant openly, accurately, and completely, I find that the head of the Public Body has not satisfied his duty to assist the Applicant, pursuant to section 8 of the *FOIPP Act*.
- [72] No order will result from my finding that the head of the Public Body failed in his duty to assist, as the request process has been completed, and there are no fees to be refunded to the Applicant. However, I would remind the head of the Public Body to be cognizant of adhering to the timelines set out in the *FOIPP Act*, and communicating openly,

accurately, and completely with those who request access to records in the custody and control of the Public Body.

## **VII. SUMMARY OF FINDINGS**

[73] 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.

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

74.1 I find that the head of the Public Body has not satisfied clause 14(1)(a) of the *FOIPP Act* with respect to any of the information in the record at issue. Although the record at issue contains commercial and financial information that would be revealed by disclosure, it is not information of the Third Party.

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

75.1 I find that the head of the Public Body has not satisfied clause 14(1)(b) of the *FOIPP Act* with respect to the information in the record at issue, as none of the information was supplied by the Third Party to the Public Body in confidence.

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

76.1 I find that the head of the Public Body did not meet his burden of proof and did not provide sufficient evidence that disclosing any of the information in the record at issue would significantly harm the Third Party's competitive position, or significantly interfere with its negotiating position, as found at subclause 14(1)(c)(i) of the *FOIPP Act*.

76.2 I find that there is also insufficient evidence that disclosing any of the information in the record at issue could reasonably be expected to 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, as found at subclause 14(1)(c)(ii) of the *FOIPP Act*.

[77] I find that the head of the Public Body did not meet his burden to prove that the required elements of subsection 14(1) of the *FOIPP Act* apply to the information in the record at issue.

[78] I find that the head of the Public Body did not fulfill his duty to assist the Applicant in the processing of the Applicant's access request, as required by subsection 8(1) of the *FOIPP Act*.

## **VII. ORDER**

[79] Pursuant to subsection 66(2) of the *FOIPP Act*, I order the head of the Public Body to disclose the record at issue to the Applicant, in its entirety.

[80] I thank the parties for their submissions. 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