OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI-16-004

Re: Department of Communities, Land, and Environment

Prince Edward Island Information and Privacy Commissioner
Karen A. Rose

April 29, 2016

Summary:

Two separate applicants sought a review of the decision of a public body relating to their request for access to a report of an environmental advisory council relating to deep water wells, and, for one of the two applicants, all related documents, emails or correspondence. The public body initially refused to disclose responsive records; however, during the course of the review, the public body reconsidered its decision and granted access to responsive records, severing information pursuant to the *Freedom of Information and Protection of Privacy Act* that it classified as personal information of a third party [s. 15] or advice from officials [s. 22].

With respect to clause 22(1)(g) of the *FOIPP Act*, the Commissioner found that most of the information withheld by the public body in records 1 to 9 fit squarely within the meaning of this clause, and the head of the public body was thus required to exercise discretion regarding whether to disclose this information, or not. For record 10, the Commissioner found that clause 22(1)(g) applied only to the severed information at page 2, as the remaining severed information at pages 4 and 5 did not satisfy the requirements of this clause, and, therefore, the head of the public body was not entitled to exercise discretion to withhold this information.

With respect to records 1 to 9, the Commissioner found that the head of the public body properly exercised discretion to withhold the severed information. With respect to record 10, page 2, the Commissioner found that the head of the public body failed to consider a relevant circumstance in making the decision, and the Commissioner, therefore, required the head of the public body to re-exercise discretion, taking into consideration the relevant circumstance.

The second applicant raised clause 30(1)(b) of the *Freedom of Information and Protection of Privacy Act* in support of disclosure of the records at issue. The Commissioner found that clause 30(1)(b) does not apply, as the circumstances raise no clear or compelling public interest in the disclosure of the severed information in the records at issue.

The Commissioner also found, pursuant to section 8 of the *Freedom of Information and Protection of Privacy Act*, that the head of the public body failed in a duty to assist the second applicant, as there was an unreasonable delay in providing record 10 to that applicant. The Commissioner stated that, in future, where a public record has already been disclosed to one applicant, subsequent applicants should be provided the same record without delay.

With respect to section 15 of the *Freedom of Information and Protection of Privacy Act*, the applicant had no issue with the public body withholding the names and email addresses of the authors of the first nine records. Therefore, section 15 was not an issue of this review.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, ss. 1(i), 2, 7, 15, 22, 65, 68(1.1); *Environmental Protection Act*, RSPEI 1988, c E-9, s. 4

Decisions Considered: *Edmonton Police Service* v. *Alberta (Information and Privacy Commissioner)*, 2009 ABQB 593 (CanLII)
Order No. FI-10-005, *Prince Edward Island (Department of Education and Early Childhood Development) (Re)*, 2010 CanLII 97256 (PE IPC)
Order No. FI-06-004, *Re Department of Health*, 2006 CanLII 39087 (PE IPC)
John Doe v. *Ontario (Finance)*, 2014 SCC 36
Order F2008-008, 2008 CanLII 88742 (AB OIPC)
Order F2004-026, 2006 CanLII 80886 (AB OIPC)
Order F2014-23, 2014 CanLII 34105 (AB OIPC)
Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23 (CanLII)
Order F2013-17, 2013 CanLII 32052 (AB OIPC)
Order F2014-25, 2014 CanLII 40745 (AB OIPC)
Order 2000-023, 2001 CanLII 38149 (AB OIPC)

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

I. BACKGROUND

[1] Two applicants (the "Applicants") made separate requests pursuant to section 7 of the *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01 (the "*FOIPP Act*"), for access to a report of an environmental advisory council relating to deep water wells. The first applicant ("Applicant One") requested the report only. The second applicant ("Applicant Two") also requested access to all related documents, emails or correspondence. The access requests were submitted, within four months of each other, to the public body formerly referred to as the Department of Environment, Labour and Justice.

[2] The head of the public body initially refused to disclose any responsive records pursuant to section 22 of the *FOIPP Act*, advice from officials, explaining that section 22 is intended to protect candor and the giving of advice and formulation of proposals, analyses, policy options, recommendations, and related alternatives for potential courses of action. The Applicants requested a review of the public body's decision. Due to the overlap, former Information and Privacy Commissioner Maria MacDonald proposed that the two reviews be combined as one; the Applicants and the public body agreed.

[3] During the course of the review, the head of the public body reconsidered the decision and granted access to the responsive records, severing information from an eight-page document, entitled "High Capacity Irrigation Wells", that was considered to be advice from officials [s. 22 of the *FOIPP Act*]. The head of the public body also severed personal information of third parties [s. 15 of the *FOIPP Act*] and information considered to be

advice from officials [s. 22 of the *FOIPP Act*] from the nine additional responsive records to Applicant Two's request.

[4] Without the benefit of the severed information, Applicant One submits that the severed information in the eight-page document is information contemplated by clauses 22(2)(c) and (e) of the *FOIPP Act*, and, therefore, is not subject to the exception of subsection 22(1). Applicant Two argues that disclosing the information would clearly be in the public interest, as contemplated by clause 30(1)(b).

[5] Upon reviewing the responsive records, former Commissioner MacDonald confirmed with the Applicants that the 8-page document, entitled "High Capacity Irrigation Wells", contains recommendations developed by or for a public body, pursuant to subsection 22(1) of the *FOIPP Act*. With respect to clauses 22(2)(c) and (e), she confirmed that the responsive records do not cite any testing or research, and that she received no evidence that the records were the result of either environmental testing or background research of a scientific or technical nature. She also confirmed that the personal information severed from the nine additional responsive records consists of the author's name and, in the case of email correspondence, email address. Further, she determined, having received no contest from Applicant Two, that section 15 was not an issue of the review.

[6] Due to a reorganization of the government's administration subsequent to the commencement of the review, it was established that the designated public body for the purposes of the review is the Department of Communities, Land and Environment (the "Public Body").

II. RECORDS AT ISSUE

[7] There are ten records at issue in this review ("the records at issue"):

Record 1: one-page e-mail from a member of the Environmental Advisory Committee to the Director of Policy Development, copied to another party, dated July 19, 2013, re Deep Water Wells, severed pursuant to section 15 and clause 22(1)(g) of the *FOIPP Act*;

Record 2: one-page e-mail from a member of the Environmental Advisory Committee to the Director of Policy Development, copied to the Administrative Assistant to the Director of Environment, dated July 31, 2013, re Deep Well irrigation, severed pursuant to section 15 and clause 22(1)(g) of the *FOIPP Act*;

Record 3: two-page e-mail from a member of the Environmental Advisory Committee to the Director of Policy Development, dated July 25, 2013, re Response to Deep Well Irrigation Proposal, severed pursuant to section 15 and clause 22(1)(g) of the *FOIPP Act*;

Record 4: one-page e-mail trail between the Administrative Assistant to the Director of Environment, the Director of Policy Development, and a member of the Environmental Advisory Committee, dated between July 19 and 22, 2013, re Request for Information, severed pursuant to section 15 and clause 22(1)(g) of the *FOIPP Act*;

Record 5: one-page e-mail trail between the Administrative Assistant to the Director of Environment, the Director of Policy Development, and a member of the Environmental Advisory Committee, dated between July 19 and 22, 2013, re Request for Information, severed pursuant to section 15 and clause 22(1)(g) of the *FOIPP Act*;

Record 6: two-page letter from a member of the Environmental Advisory Committee, dated August 5, 2013, re Request for Information, severed pursuant to section 15 and clause 22(1)(g) of the *FOIPP Act*;

Record 7: two-page recommended action plan from a member of the Environmental Advisory Committee, undated, severed pursuant to section 15 and clause 22(1)(g) of the *FOIPP Act*;

Record 8: two-page submission from a member of the Environmental Advisory Committee, undated, severed pursuant to subsection 15(1) and clause 22(1)(g) of the *FOIPP Act*;

Record 9: two-page e-mail from a member of the Environmental Advisory Committee to the Director of Policy Development, copied to the Director of Environment, dated

September 19, 2013, re EAC position on High Capacity Irrigation Wells, severed pursuant to section 15 and clause 22(1)(g) of the *FOIPP Act*; and

Record 10: eight-page document entitled, "High Capacity Irrigation Wells", dated September 19, 2013, severed pursuant to clause 22(1)(g) of the *FOIPP Act*.

III. ISSUES

[8] The issues to this review are:

(i) Did the head of the Public Body correctly decide that the records at issue contain advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council, that would be revealed if disclosed, pursuant to clause 22(1)(g) of the *FOIPP Act,* and, if so, did the head of the Public Body properly exercise discretion to withhold information in the records at issue, based on this exception?

(ii) Does the information in the records at issue satisfy subsection 30(1) of the *FOIPP Act*, and, particularly, clause 30(1)(b), being information the disclosure of which is, for any other reason, clearly in the public interest?

(iii) Did the head of the Public Body meet the duty to assist the Applicants, as provided for under subsection 8(1) of the *FOIPP Act*?

IV. BURDEN OF PROOF

[9] Section 65 of the *FOIPP Act* places the burden of proof for a review by the Information and Privacy Commissioner on specified parties, depending on the type of record, or type of information contained in the record that is subject to a public body's decision under review.

[10] This review relates to a decision of the Public Body to refuse the Applicants access to all or part of the records at issue pursuant to clause 22(1)(g) of the *FOIPP Act*. The Public Body severed information from the records at issue that it considered to be advice, proposals,

recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council. As the information at issue is not information about a third party, it is up to the head of the Public Body to prove that the Applicants have no right of access to the records, or part of the records, and that the Public Body properly exercised its discretion to refuse the Applicant access to the information [s. 65(1) of the *FOIPP Act*].

[11] Section 65 does not indicate who bears the burden to prove a public body has satisfied its obligations under section 8 of the *FOIPP Act* in its duty to assist an applicant. However, previous decisions of this office have established that the burden rests with the public body, as confirmed by the Alberta Court of Queen's Bench in *Edmonton Police Service* v. *Alberta (Information and Privacy Commissioner)*, 2009 ABQB 593 (CanLII), which discusses the duty to conduct a search for records, as part of the general duty to assist:

> [53] As recognized by the Commissioner, it would be impractical to require the head of a public body to either conduct or supervise the searches mandated by *FOIPP*. This obligation can be delegated. However, the public body must be in a position to establish that reasonable efforts were taken to search records in order to be able to respond openly, accurately and completely to the request. It follows that the person to whom the obligation is delegated must be in a position to provide evidence sufficient to establish what was done.

V. ANALYSIS OF THE ISSUES

Subsection 22(1) – Advice from officials

Did the head of the Public Body correctly decide that the records at issue contain advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council, that would be revealed if disclosed, pursuant to clause 22(1)(g) of the *FOIPP Act,* and, if so, did the head of the Public Body properly exercise their discretion to withhold information in the records at issue, based on this exception?

[12] The Public Body relies on section 22 of the *FOIPP Act* for severing information from all ten records at issue. Section 22 of the *FOIPP Act* excepts from disclosure records containing various types of advice from officials, as described under subsection 22(1). Subsection 22(2) describes types of advice from officials that do not apply to the exception.

[13] Former Commissioner Judith Haldemann provides insight into the purpose of the exception under section 22 of the *FOIPP Act* in Order No. FI-10-005, *Prince Edward Island (Department of Education and Early Childhood Development) (Re)*, 2010 CanLII 97256 (PE IPC). Commencing at page 13, she states,

> . . . One aspect of the business of government is the development of policies and procedures for a variety of matters that may result in heated criticism by the media and members of the public, as well as politicians. There are some aspects of governing which require an assurance that a decision maker may rely on his or her advisors and may require those advisors to develop and discuss various policy options that may be available to carry out a particular task that government has set itself. I agree with the Public Body that in order to carry out its policy work . . . effectively, the decision maker must be able to consult, deliberate, receive advice and analysis and other matters described in subsection 22(1) before coming to the final decisions on the issue. On the one hand, the public has a right to know what government is doing with the taxpayers' money or what decisions are being made on the public's behalf; on the other hand, a public body has to have working room to study and analyze the various issues before it reaches and announces its decision.

[14] A public body may exercise its discretion to decide whether or not to provide an applicant access to records containing information that satisfies section 22 of the *FOIPP Act*. However, a public body must first determine that the information is a type that actually satisfies the provisions of subsection 22(1), before it may exercise that discretion.

[15] In this review, the Public Body has determined that the information it severed from the records at issue is the type described under clause 22(1)(g) of the *FOIPP Act*, which states:

> 22. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal
>
> . . .
>
> (g) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council;

[16] The terms describing the type of information a public body may except from disclosure under subclause 22(1)(g) of the *FOIPP Act*, "advice", "proposals", "recommendations", "analyses" and "policy options", are not defined in the *FOIPP Act*. I find the general definitions of these terms in the Prince Edward Island *Freedom of Information and Protection of Privacy Guidelines and Practices Manual* (May 2006), at page 107, to be acceptable:

> The term *recommendations* refers to formal recommendations about courses of action to be followed which are usually specific in nature and are proposed mainly in connection with a particular decision being taken.
>
> *Advic*e, on the other hand, refers to less formal suggestions about particular approaches to take or courses of action to follow.
>
> *Proposals* and *analyses or policy options* are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of actions.

[17] It has been and remains the position of this office that exceptions being relied on by public bodies to refuse an applicant access to information should be interpreted narrowly. In Order No. FI-06-004, *Re Department of Health*, 2006 CanLII 39087 (PE IPC), at page 18, I cite, with approval, from a finding of the Ontario Court of Appeal:

> Similarly, in Ontario (Ministry of Transportation) v. Cropley (2005), the Ontario Court of Appeal said the following in relation to the definition of "advice" within a freedom of information statute:
>
> The most fundamental principle of interpretation is that words

> must be understood in light of the context and purpose of the whole statute....
> In my view, the meaning of "advice" urged by the ministry would not be consonant with this statement of purpose. The public's right to information would be severely diminished because much communication within government institutions would fall within the broad meaning of "advice", and [section 22(1)(g)] would not be a limited and specific exception. I conclude, in the words of the Divisional Court that "the Commissioner's interpretation complies with the legislative text, promotes the legislative purpose, and is reasonable".

[18] The wording of clause 22(1)(g) of the *FOIPP Act* does not include a requirement that the advice be provided, but only that it be developed by or for a public body or member of Executive Council. I discuss the interpretation of clause 22(1)(g) in Order No. 06-004, *supra*, at page 17, relying upon Alberta Order 96-006:

> …to correctly apply section 22(1)(g), a public body must show that there is advice, proposals, recommendations, analysis or policy options ("advice") developed by or for a public body or a member of the Executive Council, and the "advice" should be:
>
> (1) sought or expected, or be part of the responsibility of a person by virtue of that person's position;
> (2) directed toward taking an action; and
> (3) made to someone who can take or implement the action.
>
> The second part of the test requires a nexus between the advice and the taking of some action. Thus, in order to satisfy this part of the test the advice must contain more than mere factual information and must relate to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process. A factual summary, without more, is not enough to satisfy this part of the test.

The above-noted three requirements of "advice" in clause 22(1)(g) are cited in the Public Body's submissions in this review.

[19] The Supreme Court of Canada, in *John Doe* v. *Ontario (Finance)*, 2014 SCC 36, analyzes Ontario's similar, but not identical, equivalent to our section 22 of the *FOIPP Act*. Our highest Court also rules that it is not necessary to prove an actual communication to someone in order to apply this exception to disclosure. The Court concludes:

> [53] It was unreasonable for the IPC Order to require disclosure of the Records on the basis that most of their contents did not reveal a suggested course of action. This decision was based on definitions of "advice" and "recommendations" that left no room for the terms to have distinct meanings. It was also unreasonable for the IPC Order to require that there be evidence that information in the Records at issue in this case had been communicated in order to qualify for the s. 13(1) exemption. Policy options prepared in the course of the decision-making process such as those contained in the Records here, whether communicated or not, are within the meaning of "advice or recommendations" in s. 13(1) and qualify for exemption from disclosure.

While it is notable that the Supreme Court of Canada includes "policy options" as part of the definition of "advice" under the Ontario legislation, clause 22(1)(g) of our *FOIPP Act* includes "policy options" as a separate category, and, thus, it is not necessary to read in such language to our own legislation.

[20] The Public Body describes the records at issue from which it severed information pursuant to clause 22(1)(g) of the *FOIPP Act*, the first paragraph describing Records 1 to 9, and the last paragraph describing Record 10, as follows:

> There are two sets of records at issue that require clarification. The first set is the e-mails and letters stating the personal opinions of individual members of the Environmental Advisory Committee (EAC). These were provided to an employee of the Public Body.
>
> . . .
>
> The second set of records is a document prepared, on behalf of the EAC, by an employee of the public body based on their e-mails and letters from the individual members of the EAC. As part of the records provided to you on April 2, 2014, the document was mistakenly labeled as a report which was

presented to the Minister. The EAC has not provided the Minister with this document or any reports regarding deep water wells, high capacity wells or similar topics.

[22] The Public Body informs that the Environmental Advisory Committee (the "EAC") is an advisory board to the Minister responsible for environment, whose members are appointed by the Lieutenant-Governor in Council under section 4 the *Environmental Protection Act*, RSPEI 1988, c E-9, which subsections relevant for the purposes of this review include:

> 4. (1) The Lieutenant Governor in Council may appoint an Environmental Advisory Council.
>
> (2) The Council shall
>
> (a) serve as an advisory board to the Minister; and
>
> (b) perform such functions as may be prescribed by regulations.
>
> . . .
>
> (8) The Council shall submit annual reports to the Minister on matters dealt with by the Council including
>
> (a) submissions received by the Council;
>
> (b) investigations conducted by the Council;
>
> (c) reports made by the Council; and
>
> (d) recommendations of the Council.

[22] While none of the regulations to the *Environmental Protection Act* prescribe particular functions to the EAC, it is clear by the wording of the legislation alone that the EAC is a body formed to provide advice and recommendations to the Public Body, and, in particular, the Minister.

Records 1 to 9:

[23] Records 1 through 9 consist of email and letter correspondence from individual members of the EAC to employees of the Public Body. The information severed from the records includes summary and opinion information, and feedback relating to a particular presentation that had recently been made to the EAC. Each of the nine records was

provided by individual EAC members, and most of them in response to a direct request from an employee of the Public Body regarding their "thoughts" on the presentation, in order to prepare for the next meeting of the EAC. The individual opinions in Records 1 to 8 would not be considered the position of the EAC as a whole relating to high capacity irrigation wells; they are individual comments following the presentation that was made by Cavendish Farms and the PEI Potato Board to the EAC on July 15, 2013, about the benefits of high capacity wells for irrigation potato fields in PEI.[1.] As noted below, Record 9 appears to represent the position of all board members, and it is not in response to the request from the Public Body employee regarding the presentation.

[24] It is the substance of the opinions that is at the heart of the Public Body's exercise of discretion to withhold the information in the records at issue. While individual comments and opinions of the members of the EAC relate to the presentation, they also raise policy options and make recommendations. Based on a thorough review of the contents of Records 1 to 9, I find that most of the information severed by the Public Body raises the exception of clause 22(1)(g) of the *FOIPP Act.* As set out below, this is precisely the type of information clause 22(1)(g) is designed to apply to.

[25] In Alberta Order F2008-008, 2008 CanLII 88742 (AB OIPC), dealing with public responses to a survey, the adjudicator stipulates, at paragraph 43, that "the position of the party providing information under section 24(1)(a) [the equivalent of clause 22(1)(g) of the *FOIPP Act*] – or the relationship between that party and the public body – should be such that the public body has specifically sought or expected, or it is the responsibility of the informing party to provide, more than merely thoughts, views, comments or opinions on a topic." I agree, and I find that this requirement has been established by the Public Body. Based on the evidence before me, including the legislated mandate of the EAC, and the

1 Prince Edward Island Environmental Advisory Council 2013 Annual Report at page 5 as found at: http://www.gov.pe.ca/photos/original/leg_s14arPEIEAC.pdf

fact that the Public Body, via its employee, specifically requested that the EAC members provide their comments relating to deep water irrigation, I conclude that the EAC members have a relationship with the Public Body such that their advice and recommendations are sought and expected, directed toward taking an action, and made to the Minister, whose mandate includes implementing such action. The requirement of clause 22(1)(g), that the advice, proposals, recommendations, analyses or policy options be "by or for" the Public Body, is thus satisfied.

[26] Despite the evidence that the members of the EAC were only asked to provide their thoughts relating to the presentation, I confirm that Records 1 to 9 contain proposals, recommendations, analyses and policy options of a broader nature. These are not simply comments off the top of the authors' heads; they are thorough analyses and proposals reflecting the diverse backgrounds upon which the members were, no doubt, selected, and demonstrating a balancing of interests beyond the particular presentation, but within the topic of deep water irrigation. More particularly, examining each of the first nine records at issue, I find the following:

Record 1: in this one-page e-mail from a member of the Environmental Advisory Committee to the Director of Policy Development, the author specifically prefaces the content of their four numbered recommendations by noting that they are making the submission "as a member of the EAC with a mandate to advise the Minister of Environment", clearly indicating that their intention is to provide advice, which they proceed to submit.

Record 2: in this one-page e-mail from the same member of the Environmental Advisory Committee to the Director of Policy Development, the author provides three further numbered recommendations for consideration, which options are clearly indicated by the preamble, which states, "As time goes on one comes up with other options that could be considered".

Record 3: in this two-page e-mail from a member of the Environmental Advisory Committee to the Director of Policy Development, referenced as "Response to Deep Well Irrigation Proposal", the author makes proposals based on their analysis of evidence presented at the last board meeting.

Record 4: in this one-page e-mail trail between the Administrative Assistant to the Director of Environment, the Director of Policy Development, and a member of the Environmental Advisory Committee, the author comments on the presentation itself, and then goes on to suggest more general policy options relating to how best to approach these types of questions.

Record 5: in this one-page e-mail trail between the Administrative Assistant to the Director of Environment, the Director of Policy Development, and a member of the Environmental Advisory Committee, the first sentence is simply a comment relating to the fact that the EAC members have been asked to respond. The next paragraph begins with a sentence commenting upon the impression the author was left with, following the last meeting. The remainder of the severed information relates directly to the matter of deep water irrigation and how best to proceed with the analysis of this issue.

Record 6: in this two-page letter from a member of the Environmental Advisory Committee, dated August 5, 2013, the member appears to be responding to the employee's request noted above, although the response is beyond the deadline given by the employee. The severed portion of the letter makes recommendations relating to deep well irrigation.

Record 7: in this two-page recommended action plan from a member of the Environmental Advisory Committee, undated, the member also appears to be responding to the employee's request noted above. Although the first paragraph is simply summary information, the remainder of the severed information provides recommendations and the reasoning for these recommendations.

Record 8: in this two-page submission from a member of the Environmental Advisory Committee, undated, the member also appears to be responding to the employee's request noted above, and, following the first paragraph, provides informed opinions and policy options.

Record 9: in this two-page e-mail from a member of the Environmental Advisory Committee to the Director of Policy Development, copied to the Director of Environment, dated September 19, 2013, re EAC position on High Capacity Irrigation Wells, the content appears to reflect a consensus of the members of the EAC. One member is providing a position on behalf of "our members". It is notable that the first paragraph is in quotation marks, suggesting it is intended to be quoted by the Public Body. The record contains recommendations of the EAC and background information regarding deliberations.

[27] While I have found that Records 1 to 9 contain advice, proposals, recommendations, analyses or policy options, satisfying clause 22 (1)(g) of the *FOIPP Act*, I have also determined that the first two sentences of Record 5 and the first paragraph of Record 7 are summary information and do not satisfy the requirements of clause 22(1)(g). Therefore, these sentences should be disclosed to Applicant Two.

[28] I have determined that, apart from the specific sentences described in Records 5 and 7 above, the information severed from Records 1 to 9 satisfies the elements of clause 21(1)(g) of the *FOIPP Act*, and that the head of the Public Body was authorized to exercise discretion to refuse to disclose it. I will discuss the Public Body's exercise of discretion later in this order, with reference to all ten records at issue.

Record 10:

[29] With regard to Record 10, Applicant One argues that the eight-page document does not satisfy the requirements necessary for the exception at clause 22(1)(g) of the *FOIPP Act*, because the record was not provided to the Public Body's Minister. Applicant One submits,

> As you know, information may be withheld if it is "advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive CounciL" However, the Public Body's letter of July 4,2014 states emphatically that the document was not provided to the Minister. One could then assume that the EAC was just musing about ideas for its own discussion. In any case, by not providing these ideas, they cannot be said to crystallize into "recommendations" and cannot be said to have been developed by or for a Public Body or member of Executive Council. Indeed, they were specifically stated to not have been provided to the relevant member of Executive Council.

[30] The evidence indicates that, despite the title page, Record 10 was created by the Public Body, and not the EAC. Record 9 indicates that a document was sent to the EAC for input, which input was provided by virtue of Record 9, under a tight timeline, and was then

inserted into page 2 of Record 10 on that same date, September 19, 2013. Based on a review of all the recommendations contained in Records 1 to 9, it is clear that only page 2 of Record 10 contains the advice of the EAC. The remainder of the information in Record 10 originates from the Public Body. The Public Body itself describes the makeup of the eight-page document as including a one-page cover, a one-page e-mail from the EAC containing recommendations on the subject of high capacity wells, and six pages of background information.

[31] The Public Body severed page 2 of Record 10 in its entirety, part of page 4 and all of page 5. I confirm that the information severed from page 2 of the document contains advice and recommendations of the EAC, as it contains the same information contained in Record 9. In contrast, I do not find that the information severed from pages 4 and 5 contains advice or recommendations. As described below, it contains a policy statement of the Public Body, which, as indicated in Record 10, is not the policy of the EAC.

[32] A thorough reading of pages 4 and 5 of Record 10 leads me to conclude that the severed information consists of a statement of policy of the Public Body. The wording is reflective of a final decision, and, as noted above, the information would not satisfy the requirements for exception under clause 22(1)(g) of the *FOIPP Act.* It may well be that this statement of policy is in draft form; however, I have been provided with no evidence of that. Rather, upon a reading of Record 9, it seems that the Director of Policy of the Public Body had forwarded Record 10 to the EAC, with pages 4 and 5 already in place, and asked for the EAC's input, which was then inserted at page 2 of Record 10. Further, the Record 9 communication, and the insertion of that communication into Record 10, occurred on the same date. If Record 10 is in draft form, the Public Body did not make this claim, nor did it raise clause 22(1)(f), which states,

> 22. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

. . .

(f) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision

[33] The Public Body has provided no evidence, or argument, to support a position that the information severed from pages 4 and 5 of Record 10 satisfies any other discretionary clause of the *FOIPP Act.* I have not been provided with any record or evidence that indicates why Record 9 was sent to the Public Body, nor the purpose of Record 10. I have only the records themselves to draw my conclusions, and the statement of the Public Body that an employee of the Public Body prepared Record 10. The Public Body is silent as to details of the origin or status of pages 4 and 5 of Record 10, and describes the final six pages, which includes pages 4 and 5, only as "background information". As the information does not satisfy clause 22(1)(g), I will be ordering the head of the Public Body to release this information to the Applicants.

Subsection 22(2)

[34] The grounds upon which Applicant One bases the request to review the decision of the Public Body to withhold the records at issue includes provisions from subsection 22(2) of the *FOIPP Act*, which lists circumstances wherein the subsection 22(1) exception does not apply. Applicant One raises clauses 22(2)(c) and (e), which state:

22. (2) Subsection (1) does not apply to information that

. . .

(c) is the result of a product or environmental testing carried out by or for a public body, which is complete, or on which no progress has been made for at least three years, unless the testing was done

(i) for a fee as a service to a person other than a public body, or

(ii) for the purpose of developing methods of testing or testing products for possible purchase;

. . .

(e) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal, which is

complete, or on which no progress has been made for at least three years

[35] Applicant One presents his argument as follows:

> It is the [Applicant]'s belief that the report of the Environmental Advisory Committee is indeed the result of environmental testing carried out for a public body and is complete. As such, it is an exception to the discretionary jurisdiction discussed in s.22(1) and therefore the public body, the Department of Environment Labour and Justice may not refuse to disclose the requested information.
>
> . . .
>
> It is the [Applicant]'s belief that the said report of the Environmental Advisory Committee is the result of background research of a scientific nature done in connection with the formulation of a policy proposal. Specifically, the [Applicant] believes that there is a policy proposal regarding access to deep well water underneath Prince Edward Island's provincial territory and the said report was made "in connection" with that. That the research is complete is made evident by dint of the report being submitted to the Minister responsible. As such, and in conjunction or in alternative to s.22(2)(c), s.22(2)(e) renders the information request an exception to the discretionary jurisdiction discussed in s.22(1) and therefore the public body, the Department of Environment Labour and Justice may not refuse to disclose the requested information.

Applicant One accurately points out that, ironically, this position can only be substantiated by revealing the information.

[36] Upon a review of the records at issue, former Commissioner Maria MacDonald confirmed to the parties that the records at issue are not the result of testing or research, and that she received no evidence that the records were the result of either environmental testing or background research of a scientific or technical nature. She determined that none of the provisions of subsection 22(2) of the *FOIPP Act* apply to the information contained in the records, including clauses 22(2)(c) and (e). On my review of the records at issue, I concur with this determination. I find that none of the clauses of subsection 22(2) apply to the information contained in the records at issue.

Exercise of Discretion

[37] As stated in paragraph [14] above, upon determining that the information at issue is a type that satisfies one or more of the provisions of subsection 22(1) of the *FOIPP Act*, and none of the provisions of subsection 22(2), the head of a public body may exercise discretion regarding whether or not to provide an applicant access to the information in the records at issue.

[38] It is the opinion of former Alberta Commissioner Frank Work, and I agree, that a public body's discretion to disclose or withhold information is to be exercised with consideration, not only to the purposes of the *FOIPP Act*, but also to the purposes of the particular provision upon which the public body is relying. Order F2004-026, 2006 CanLII 80886 (AB OIPC) states:

> [para 46] In my view a Public Body exercising its discretion relative to a particular provision of the Act should do more than consider the Act's very broad and general purposes; it should consider the purpose of the particular provisions on which it is relying, and whether withholding the records would meet those purposes in the circumstances of the particular case. I find support for this position in orders of the British Columbia Information and Privacy Commissioner. Orders 325-1999 and 02-38 include a list of factors relevant to the exercise of discretion by a public body. In addition to "the general purposes of the legislation (of making information available to the public) the list includes "the wording of the discretionary exception and the interests which the section attempts to balance". It strikes me as a sound approach that the public body must have regard to why the exception was included, and whether withholding the information in a given case would meet that goal.

[39] This approach is an established methodology used by information and privacy commissioners in their analysis of a public body's exercise of discretion when determining whether the discretion was exercised properly. The burden of proof lies with the public body, and it is incumbent on the head of a public body to show that all relevant factors for and against access was considered in a balanced and judicious manner when making such

a determination. This discretion is to be exercised on a case by case basis [Alberta Order F2014-23, 2014 CanLII 34105 (AB OIPC), at para 74].

[40] In Order F2014-23, *supra*, the Alberta Commissioner, relying upon the Supreme Court of Canada decision of *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), pointed out that, in order to exercise its discretion properly, the head of the public body must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly [at para 72].

[41] To support its decision to sever the information from the records at issue pursuant to clause 22(1)(g) of the *FOIPP Act*, the Public Body argues that the EAC was created to provide advice to the Minister, and submits:

> The EAC relies on "deliberative space" in order to provide advice, carrying on consultations and making recommendations, in order to produce records with candour and cover all options. Therefore, in order to maintain the free exchange of opinions it is essential that the EAC confidence be maintained. The Minister relies on the frank, honest advice from the EAC members, however, it is the decision of the Minister to accept or reject the advice and recommendations.
>
> If the opinions and recommendations of the EAC are disclosed there is the real possibility, the advisory process would become less candid and comprehensive. The consultations and deliberations would be less frank, thereby hindering the Minister's decision-making process.

[42] The purpose of the exception at clause 22(1)(g) of the *FOIPP Act* is stated aptly by the Public Body: to protect the "deliberative space" of the Public Body as it seeks advice from the EAC. A core purpose of the *FOIPP Act* is stated at clause 2(a), to allow any person a right of access to records in the custody or under the control of a public body, subject to limited and specific exceptions as set out in the Act. Clause 22(1)(g) is one such limited and specific exception. Despite the broad goals of openness, transparency and

accountability, the clause 22(1)(g) exception is still a necessary limit upon access to government records, as it ensures the very best decisions are made by those tasked with making them. Such decisions are made following input from advisors such as the EAC, and judicious deliberation using such input.

[43] I agree that advisory bodies require "deliberative space" and an assurance that their dialogue remains confidential in some circumstances, but not in every circumstance. Discretion must be exercised on a case-by-case basis. While the purpose of section 22 is to protect this “deliberative space”, this does not mean that advice and recommendations will always be withheld by a public body. The head of a public body must, in every case, exercise their discretion in a judicious manner, taking into consideration all relevant circumstances. The Public Body submits that without the assurance of confidentiality, its advisory and decision making processes would be hindered. Again, this will not be so in all circumstances.

[44] In Order F2013-017, 2013 CanLII 32052 (AB OIPC), the Alberta adjudicator raises the issue of decisions being made regarding contentious matters. At paragraph [204], the adjudicator states, and I agree:

> [para 204] In cases where changes made to a decision before it is released in its final form are substantive, such that a draft would reveal that a decision maker was considering taking other courses of action, then I agree with the Public Body that protecting such information, particularly if the matter is contentious, will usually outweigh public and private interests in disclosing the information. However, in cases where a draft differs from the final, public version of a decision, only with regard to punctuation and phrasing, then it is unclear how the interests in withholding the information would outweigh the right of access. When substantive information has already been made public, or is inferable from other information that has been made available to the public, there is little reason to withhold the information, even with respect to minor variations in grammar or punctuation.

[45] The issue of deep water wells is an important issue facing today's provincial government. I agree with the Public Body that, if the opinions and recommendations of the EAC severed from Records 1 to 9 are disclosed, it is probable that the advisory process would become less candid and comprehensive, thereby hindering the Minister's decision-making process. Disclosing the severed information in Records 1 to 9 would interfere with the decision-making of government unnecessarily. I confirm that this is a relevant factor weighing in favour of refusing the Applicant's access to the severed information in Records 1 to 9.

[46] I confirm the Public Body's judicious exercise of discretion to withhold information in the individual emails and letters of the EAC members, which are Records 1 to 9. However, I find that the discretion exercised by the head of the Public Body with respect to page 2 of Record 10 may require further consideration. Page 2 represents a consensus of EAC members, inserted into a report that had some purpose. I find that the purpose of the report deserved consideration by the Public Body as it exercised its discretion. A question worthy of consideration is whether disclosure of page 2 of Record 10 would harm the "deliberative space" that should be protected. There is no evidence before me to support a conclusion that Record 10 was intended to be confidential. The report was certainly meant to be disclosed to someone; otherwise, it would not have existed. Further, it does not appear to be an internal document, as it combines distinct policy approaches of two bodies: the EAC and the Public Body. Once again, the Public Body has provided no evidence to me regarding the nature of Record 10, other than that it was prepared by an employee of the Public Body, and it is severed on the basis that it contains advice and recommendations of the EAC.

[47] It is notable that Ontario's legislation exempts committee reports from the application of their equivalent of section 22 of the *FOIPP Act*. The exceptions set out in Ontario's section 13(2), paragraphs (j) and (k), require reports of committees to be disclosed, even if they contain advice or recommendations, if the purpose of the committee was to prepare such

reports. While the *FOIPP Act* contains no such clause, I find that the purpose of Record 10 is a relevant consideration that the Public did not take into account when exercising its discretion.

[48] It is within my authority to quash the Public Body's decision not to disclose information pursuant to a discretionary exception, and to return the matter to the head of the Public Body for reconsideration. For the reasons noted above, I will return only one record to the head of the Public Body, to reconsider the exercise of discretion: Record 10. As only page 2 is subject to clause 22(1)(g) of the *FOIPP Act*, I will order the head of the Public Body to re-exercise his discretion regarding whether to withhold that information from the Applicants, or not, having regard to the purpose of Record 10.

Subsection 30(1), Public Health and Safety

Do the records at issue satisfy the provision of clause 30(1)(b) of the *FOIPP Act*, being information the disclosure of which is, for any other reason, clearly in the public interest?

[49] Applicant Two submits that the issue of the use of groundwater is in the public interest, and argues that clause 30(1)(b) of the *FOIPP Act* supports a decision by the Public Body to disclose the records at issue. Applicant Two submits,

> I would argue this case falls under section 30(1)(b). Clearly the issue of groundwater availability is in the public interest. This is an issue which could impact groundwater resources, PEI's only source of drinking water, and it's in the public interest to know what the panel appointed to advise the minister on environmental issues had to say on lifting the moratorium on high-capacity wells for irrigation. It would also serve the public interest to know what draft policies on this issue government is supporting, even if those policies have not yet been implemented.

[50] Section 30 of the of the *FOIPP* Act falls under Division 4, entitled "Public Health and Safety", and allows a public body to disclose information if there is a risk of harm to the

environment or to public health. The Applicant relies on clause 30(1)(b), which, read alone, gives the reader a different understanding than if the section is read as a whole. Section 30, read as a whole, provides the reader with a greater understanding of its intended purpose. It states,

Division 4
Public Health and Safety

> 30. (1) Whether or not a request for access is made, the head of a public body shall without delay, disclose to the public, to an affected group of people, to any person or to an applicant
>
> (a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant; or
>
> (b) information the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.
>
> (3) Before disclosing information under subsection (1), the head of a public body shall where practicable
>
> (a) notify any third party to whom the information relates;
>
> (b) give the third party an opportunity to make representations relating to the disclosure; and
>
> (c) notify the Commissioner.
>
> (4) If it is not practicable to comply with subsection (3), the head of a public body shall mail a notice of disclosure in the prescribed form
>
> (a) to the last known address of the third party; and
>
> (b) to the Commissioner.

[51] Order No. FI-10-005, *supra*, provides an accurate and helpful analysis of the intent of section 30 of the *FOIPP Act*. Former Commissioner Judith M. Haldemann explains at page 17, as follows:

> 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.

[52] In the review before me, it is clear that the issue of the use of our province's ground water, and the potential of lifting a moratorium protecting its groundwater, holds "the interest of the public in the sense of an interest in a current political issue". I acknowledge that decisions relating to the future use and preservation of this natural resource are of grave importance to the citizens of Prince Edward Island. I do not find, however, that the issue satisfies the urgency required by section 30 of the *FOIPP Act*. It is not a situation, for example, where our waters have been contaminated and a public warning is required to notify citizens to immediately refrain from drinking it.

[53] In Alberta Order F2014-25, 2014 CanLII 40745 (AB OIPC), the Applicant raises section 32, Alberta's equivalent of section 30 of the *FOIPP Act*, and the Commissioner states, as follows:

> [para 98] The Applicant bears the burden of establishing that section 32 applies in this inquiry, in that he must show that the public interest in disclosure of the requested information overrides the public interest that the Act has recognized by way of the applicable exceptions to disclosure (Order F2006-010 at para. 31). The Applicant argues that both section 32(1)(a) and (b) apply.
>
> . . .
>
> [para 101] For section 32(1)(b) to apply, there must be circumstances *compelling* disclosure, or disclosure *clearly* in the public interest, as opposed to a matter that may be of interest to the public (Order F2004-024 at para. 57). The Public Body argues that the Applicant has not provided sufficient evidence of a compelling public interest in disclosure as required by section 32.

[54] The Alberta Commissioner has also stated, and I agree, that its equivalent of section 30 of our *FOIPP* Act must be interpreted narrowly [Alberta Order 2000-023, 2001 CanLII 38149 (AB OIPC), at para 72].

[55] Based on my review of the records at issue, and interpreting section 30 narrowly, I find that there is no clear or compelling public interest that would lead the head of the Public Body to immediately disclose the severed information in the records at issue in this review.

Subsection 8(1), Duty to Assist

Did the head of the Public Body meet the duty to assist the Applicant, as provided for under subsection 8(1) of the *FOIPP Act*.

[56] It is the practice of this office to examine the performance of a public body in carrying out its duty to assist an applicant in the manner outlined in the *FOIPP Act,* pursuant to section 8. 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.

[57] Part I, Division 1 of the *FOIPP Act* contains instructional provisions for both applicants and public bodies about the process of obtaining access to records under the *FOIPP Act*, commencing at section 6, which sets out an applicant's information rights.

[58] The issue of delay has been raised in this review, with respect to Applicant Two. Access to Record 10 was originally denied by the Public Body. Applicant One was denied access by letter dated February 20, 2014, and Applicant Two was denied access on July 2, 2014. Two days later, by letter dated July 4, 2014, and after the commencement of Applicant One's review by this office, the Public Body revisited its original decision and disclosed Record 10

to Applicant One, with information severed pursuant to clause 22(1)(g) of the *FOIPP Act*. The same re-consideration of Record 10 was not afforded to Applicant Two at that time.

[59] Processing notes presented to this office for the purposes of this review provide a chronology of events. They indicate that Applicant Two communicated with the Public Body on July 23, 2014, questioning the existence of Record 10. The Public Body confirmed with the Access and Privacy Services Office ("APSO") that the report was already in the public domain, and that it would be appropriate to release it to other applicants, if requested. On August 12, 2014, APSO was contacted by Applicant Two for access to Record 10. APSO advised Applicant Two that because the document is in the public domain, it could be released outside of the FOIPP process, and that it would be redacted. Applicant Two received the document on August 12, 2014, 39 days after its release to Applicant One.

[60] In failing to be more timely in its disclosure of Record 10 to Applicant Two, I find that the head of the Public Body failed in a duty to assist Applicant Two under section 8 of the *FOIPP Act*. In future, and especially in view of the existence of APSO, a centralized access and privacy services office, public bodies should immediately release to all applicants, responsive public records that have already been released to one applicant.

VI. SUMMARY OF FINDINGS

[61] My findings in this review are as follows:

i. I find that Records 1 to 9 contain advice, proposals, recommendations, analyses or policy options, satisfying clause 22 (1)(g) of the *FOIPP Act*, except for the following information, which does not satisfy the requirements of clause 22(1)(g) of the *FOIPP Act*: the first two sentences of Record 5, and the first paragraph of Record 7.

ii. I find that page 2 of Record 10 contains advice, proposals, recommendations, analyses or policy options, satisfying clause 22 (1)(g) of the *FOIPP Act*, but that

pages 4 and 5 do not contain such advice, proposals, recommendations, analyses, or policy options, thus not satisfying clause 22(1)(g) of the *FOIPP Act.*

iii. With respect to the exercise of discretion by the head of the Public Body, I find that discretion was properly exercised with regard to the severed information in Records 1 to 9.

iv. With respect to the exercise of discretion by the head of the Public Body, I find that discretion was not properly exercised with regard to the severed information at page 2 of Record 10, as the head of the Public Body failed to consider the purposes of Record 10, and the relevance of whether the severed information was intended to be confidential.

v. With respect to clause 30(1)(b) of the *FOIPP Act*, I find that there is no clear or compelling public interest in disclosure of the severed information in the records at issue in this review.

vi. With respect to section 8 of the *FOIPP Act*, I find that, in failing to be more timely in disclosing Record 10 to Applicant Two, the head of the Public Body failed in a duty to assist Applicant Two.

VII. ORDER

[62] Based on the above findings, I confirm the decision of the head of the Public Body to withhold the severed information in Records 1 to 9, pursuant to clause 22(1)(g) of the *FOIPP Act,* with the exception of the following information, which I order the head of the Public Body to disclose to Applicant Two: the first two sentences of Record 5, and the first paragraph of Record 7.

[63] With regard to Record 10, I order the head of the Public Body as follows:

1. To disclose the information at pages 4 and 5 to the Applicants; and

2. To reconsider the decision regarding the information at page 2, taking into account the purpose of Record 10, and whether Record 10 was intended to be a confidential document, and in exercising discretion in a fair and judicious manner. The reconsideration by the head of the Public Body should include the balancing of all relevant factors, including the objects and purposes of the *FOIPP Act*. Once the decision has been reconsidered, I order the head of the Public Body to provide written reasons for his decision to the Applicants and to the Information and Privacy Commissioner.

[64] In future, and in view of the existence of APSO, Prince Edward Island's centralized access and privacy services office, public bodies should promptly release to all applicants, responsive public records that have already been released to one applicant.

[65] I thank all three parties for their submissions. In accordance with subsection 68(1.1) of the *FOIPP Act*, the head of the Department of Communities, Land and Environment 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*, R.S.P.E.I. 1988, c. J-3.

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Karen A. Rose
Information and Privacy Commissioner