OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI-19-008

Re: Department of Environment, Water and Climate Change

June 25, 2019

Prince Edward Island Information and Privacy Commissioner
Karen A. Rose

Summary: An applicant asked the Department of Environment, Water and Climate Change for access to records relating to impacts of carbon pricing. The Department refused to provide the 22 pages of responsive records to the applicant, on the basis of sections 19 and 22 of the *FOIPP Act*.

The applicant asked the Commissioner for a review. The Commissioner found that the Department had properly applied clause 19(1)(b) of the *FOIPP Act,* as the disclosure of the 22 pages could reasonably be expected to reveal information supplied in confidence by the Federal government, and the Federal government did not consent to disclosure.

As the Commissioner found 19(1)(b) applied to the records at issue, it was no longer necessary for her to consider section 22.

The applicant raised section 30 of the *FOIPP Act*, which permits a public body to disclose information if there is a risk of harm to the environment or to public health. The Commissioner found that section 30 does not apply to permit disclosure of the records.

The Commissioner confirmed the decision of the Department to withhold the records in their entirety.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, ss. 6(2), 7, 19, 30, 65, 68(1.1)

Decisions Considered: Order F2006-010, *Re: Edmonton Police Commission*, 2007 CanLII 81649 (AB OIPC)

Order FI-16-006, *Re: Justice and Public Safety*, 2016 CanLII 48838 (PE IPC),

Order FI-19-005, *Re: Department of Workforce and Advanced Learning*, 2019 CanLII 32855 (PE IPC)

Order No. FI-10-005, *Re: Department of Education and Early Childhood Development*, 2010 CanLII 97256 (PE IPC)

Order FI-16-004, *Re: Communities, Land, and Environment*, 2016 CanLII 48836 (PE IPC)

Other Resources Cited: "Economic Analysis of the Pan-Canadian Framework", Online: Government of Canada <https://www.canada.ca/en/services/environment/weather/climatechange/climate-action/economic-analysis.html>

I. BACKGROUND:

[1] In 2018, a new carbon tax was introduced across Canada, which is sometimes referred to as carbon pricing. There are different taxation or pricing models, depending on the jurisdiction. An applicant ("the Applicant") made an access to information request, pursuant to section 7 of the *Freedom of Information and Protection of Privacy Act* ("the

FOIPP Act"), to the Department of Communities, Land and Environment, now known as the Department of Environment, Water and Climate Change ("the Public Body") for the following:

> All research undertaken of the potential impacts of different carbon pricing models that could be introduced in PEI to meet our obligations under the Pan-Canadian Framework on Clean Growth and Climate.

The time period requested for the records is January 1, 2015 to August 3, 2018.

[2] The Public Body located and retrieved 22 pages of responsive records. After consultations with the government that supplied the information in the responsive records, the Public Body decided to withhold the records under two clauses of section 19, which relate to intergovernmental relations, and two clauses of section 22, which relate to deliberations and consultations, and negotiations by or on behalf of the Public Body.

[3] The Public Body had initially claimed two other clauses of section 22, but in the course of the review amended their position, and they no longer rely on these other two clauses.

[4] The Applicant requested a review of the Public Body's decision. The Applicant also requests disclosure based on subsection 30(1) of the *FOIPP Act*, which compels a public body to disclose information if the information is about a significant risk of harm to environment or public health, or if disclosure is clearly in the public interest. This provision is sometimes referred to as the public interest override.

[5] In the course of the review, the Public Body considered subsection 30(1) of the *FOIPP Act*, and respectfully disagreed that it applies in these circumstances.

II. THE ISSUES

[6] The issues in this review are:

Issue 1: Did the head of the Public Body properly apply clause 19(1)(a) and/or clause 19(1)(b) of the *FOIPP Act* [intergovernmental relations]?

Issue 2: Did the head of the Public Body properly apply clause 22(1)(a) and/or clause 22(1)(b) of the *FOIPP Act* [consultations and deliberations, and information relating to negotiations]?

Issue 3: Did the head of the Public Body properly apply subsection 30(1) of the *FOIPP Act*?

III. RECORDS AT ISSUE

[7] The Public Body's description of the 22 pages of responsive records ("the records at issue") is as follows:

> The Records contain information about positions which were being considered by the Government of Prince Edward Island or possible scenarios being looked at in relation to negotiations related to carbon pricing. The following parts of the Records may be described as follows:
>
> - Pages 1-4 of the Records contain an outline of assumptions related to an overview and analysis of the positions or possible scenarios prepared for the Government of Prince Edward Island, including the Public Body; and
>
> - Pages 5-22 contains sensitive and confidential data, including comparative data, for positions or possible scenarios provided to the Government of Prince Edward Island. The information in these pages includes considerations that relate to the said positions or possibilities being considered during negotiations related to carbon pricing.

IV. BURDEN OF PROOF

[8] The head of the Public Body has refused to provide the Applicant with access to the records at issue, in their entirety. Pursuant to section 65(1) of the *FOIPP Act,* as 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 records at issue. The Public Body must present evidence which shows, on a balance of probabilities, that they have properly applied section 19 and/or section 22.

[9] The Applicant argues that the Public Body is compelled to disclose the records under subsection 30(1), the public interest override. Alberta's *Freedom of Information and Protection of Privacy Act* has a substantially similar provision. In Order F2006-010, *Re: Edmonton Police Commission*, 2007 CanLII 81649 (AB OIPC), at paragraphs 30-31, and other orders, the Alberta Information and Privacy Commissioner has held that the burden of proof is initially on the Applicant to show that either of the preconditions of subsection 30 exist. The applicant must show that there is a risk of significant harm to the environment or to the health or safety of someone, or that disclosure of the information is clearly in the public interest. If so, then the public body must show that the decision not to disclose the information is rationally defensible. I adopt this approach.

V. ANALYSIS

Issue 1: Did the head of the Public Body properly apply clause 19(1)(a) and/or clause 19(1)(b) of the *FOIPP Act* [intergovernmental relations]?

[10] The Public Body claims that clause 19(1)(a) and (b) of the *FOIPP Act* apply. They address clause 19(1)(b) first, which I will also do in this Order. Subsection 19(1) states:

> 19. Disclosure harmful to intergovernmental relations
> (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm relations between the Government of Prince Edward Island or its agencies and any of the following or their agencies:

(i) the Government of Canada or a province or territory of Canada,

(i.1) a municipality,

(ii) the government of a foreign state, or

(iii) an international organization of states; or

(b) reveal information supplied, explicitly or implicitly, in confidence by a municipality or by a government or an organization listed in clause (a) or its agencies.

….

Consent of organization, etc.

(3)The head of a public body may disclose information referred to in clause (1)(b) only with the consent of the municipality, government or organization that supplies the information, or its agency.

Historical records

(4)This section does not apply to information that has been in existence in a record for 15 years or more.

[11] Clause 19(1)(b) was considered in Order FI-16-006, *Re: Department of Justice and Public Safety*, 2016 CanLII 48838 (PE IPC). To properly rely on the exception under clause 19(1)(b) of the *FOIPP Act*, a public body must establish four components, which I will review in sequence:

1. a government or organization listed in clause 19(1)(a) of the *FOIPP Act* supplied the information;

2. the information was supplied in confidence, implicitly or explicitly;

3. disclosure could reasonably be expected to reveal this information; and

4. the information has been in existence in a record for less than 15 years.

Supplied by a government or agency listed in clause 19(1)(a)

[12] I am persuaded that a government listed in clause 19(1)(a) of the *FOIPP Act,* supplied the information. The author or provider of the information does not appear on the face of the records at issue. In addition, there is no signature or letterhead, nor are there any accompanying records, such as a covering email or letter. However, I am satisfied, based on the content of the processing documents provided by the Public Body, that the records were supplied to the Public Body by the Department of Environment and Climate Change Canada (the "ECCC"), which is part of the Government of Canada.

Supplied in confidence

[13] With respect to the second criteria about whether the ECCC supplied the information in the records at issue in confidence, the supply may be explicit, or implicit. The Public Body does not allege that the ECCC supplied the records at issue in explicit confidence. There are no confidentiality markings or statements relating to confidentiality in the content of the records at issue. Rather, the Public Body submits that the records at issue were supplied by the ECCC implicitly in confidence.

[14] In Order FI-16-006, *Re: Justice and Public Safety*, *supra,* at paragraph 19, our office adopted remarks of the British Columbia Information and Privacy Commissioner about information submitted implicitly in confidence. To assess whether another government supplied the information at issue in confidence, "there must be an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information." A non-exhaustive list of factors to consider when determining whether such an understanding exists includes the following specific factors which I find to be relevant:

1. What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?

2. Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?
3. Was the record supplied voluntarily or was the supply compulsory? Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in legislation relevant to the compulsory supply that establish confidentiality. (The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.)
4. Do the actions of the public body and the supplier of the record - including after the supply - provide objective evidence of an expectation of or concern for confidentiality?

[15] I have considered all four factors described above, to determine whether the ECCC provided the records at issue to the Public Body, implicitly in confidence.

[16] The Public Body submits:

> The protected information has been identified as extremely sensitive in nature, information that would ordinarily be kept confidential, and information prepared for a purpose that would not be expected to lead to disclosure.

[17] The Public Body also points out that the ECCC voluntarily supplied the records at issue and has expressly confirmed in writing that the subject-matter related to the protected information is complex and sensitive. The fact that providing the records at issue was not required by the ECCC, weighs in favour of a finding that they were supplied in confidence, but this factor is not determinative.

[18] In support of its submission regarding the sensitive nature of the information, the Public Body also points out that the ECCC has confirmed that the protected information is, in the words of the ECCC, “extremely sensitive and its disclosure would be injurious” to intergovernmental relations as well as their internal operations and on-going negotiations. The Public Body provided a copy of the consultations between them and

the ECCC relating to the Applicant's request, confirming the ECCC's position that the information in the records at issue is extremely sensitive.

[19] The records at issue were created in the context of the Federal government's negotiations with multiple provincial and territorial governments. On December 9, 2016, the First Ministers of Canada agreed to the Pan-Canadian Framework on Clean Growth and Climate Change. Under the agreement, all provinces and territories of Canada would be required to implement a specified level of carbon tax, unless the given province or territory could provide an adequate emissions plan to the Federal government. Several provinces and territories developed emissions plans which were approved by the Federal government, and other provinces are subject to the Federal carbon tax.

[20] Each province or territory negotiated separately with the Federal government. The ECCC provided analysis of proposals received, if the province or territory requested. The records at issue were generated by such a request by an employee of PEI's provincial government. The Public Body then used the analysis to negotiate and, ultimately, reach an agreement with the Federal government.

[21] The Public Body submits that the records at issue are sensitive because they contain positions developed for consideration or contemplation by the Government of Prince Edward Island in the context of intergovernmental negotiations. In addition, some of the information in the records at issue may be used by the ECCC in relation to intergovernmental exchanges and negotiations with other jurisdictions.

[22] As the Federal government points out in its economic analysis of carbon pricing, two main factors determine the effects of a given jurisdiction's carbon pricing plan:

> The specific impacts of the carbon pricing system within a given province or territory will depend on the design of the system and how that jurisdiction chooses to recycle any revenue that it generates by the carbon price. ("Economic Analysis of the Pan-Canadian Framework", Government of Canada)

Thus, a given jurisdiction's carbon pricing system may differ from others, based on these factors. The corresponding analysis of proposed carbon pricing plans will also differ between jurisdictions.

[23] The Applicant points out that PEI's carbon pricing plan has been negotiated and, as of October 23, 2018, there is no longer a risk to negotiations. However, the ECCC's position in support of withholding the records at issue is dated November 14, 2018, after PEI's carbon pricing plan was accepted, implying that the harm to negotiations is ongoing. The Public Body also refers to the ECCC's negotiations with other provinces and territories, which adds to the need for confidentiality. I accept that new decisions may be made by a jurisdiction, which may require the re-opening of negotiations.

[24] Based on my review of the content of the records at issue, the submissions of the parties, and the context within which the records at issue were prepared, I find that a reasonable person would regard the information in the records at issue as confidential. Given the purpose of the preparation on the records at issue, I find that they would not be expected to lead to disclosure in the ordinary course.

[25] I am satisfied that the ECCC supplied the records at issue to the Public Body in implicit confidence.

Disclosure could reasonably be expected to reveal the information in the records at issue

[26] To the best of the Public Body's knowledge, the information in the records at issue has not been made available to the public. The Public Body notes that as the

records at issue relate to intergovernmental negotiations, they were given to the heads of all public bodies involved in the negotiations.

[27] I have reviewed the information provided by the Applicant, which was tabled by the Premier in the PEI Legislature on November 29, 2018. This information consists of a ten-page document entitled "Carbon Pricing Plan: Prince Edward Island submission to Environment and Climate Change Canada on Carbon Pricing" dated September 2018, and a four-page letter from the Public Body to the ECCC, dated October 22, 2018, referencing "Carbon Pricing – Amendment to September 2018 submissions from Prince Edward Island". The ten-page document describes three key target areas for emissions reductions, PEI's greenhouse gas emissions from 1990 to 2016, and government efforts to address climate change. The four-page letter proposes an amendment to PEI's carbon pricing plan, as the original submission of September 5, 2018, was not accepted. While the information in the ten-page document is similar in nature to the records at issue, it is not the same information. It is also apparent from the four-page letter that some carbon pricing will undergo a review in 2020 "to determine the path forward", implying that carbon pricing is subject to evolving decision making, as noted in the discussion of whether the records at issue were supplied in confidence, above.

[28] I am persuaded that condition 3 is satisfied. The information in the records at issue is not publicly available, and I find that this information would be revealed if the Public Body provided access to the Applicant.

The information in the records at issue has been in existence for less than 15 years

[29] The records at issue are dated February, 2018. As a result, I confirm that the information has been in existence for less than 15 years.

Subsection 19(3)

[30] I have determined that the four conditions are met, and clause 19(1)(b) applies to the records at issue. The Public Body is entitled, therefore, to exercise its discretion relating to whether to provide the Applicant with access to the records at issue. Subsection 19(3) of the *FOIPP Act* places a limit on the Public Body's discretion. As was found in Order FI-19-005, *Re: Department of Workforce and Advanced Learning*, 2019 CanLII 32855 (PE IPC), at paragraph 34, when clause 19(1)(b) applies, a public body may only disclose the information with the consent of the jurisdiction that provided the information. The ECCC has not consented to the Public Body providing the information in the records at issue to an applicant, although they were consulted. Therefore, the Public Body may not exercise discretion to provide the records at issue to the Applicant.

Conclusions regarding clause 19(1)(b) of the FOIPP Act:

[31] Based on the foregoing analysis, I am persuaded that the Public Body properly applied clause 19(1)(b) of the *FOIPP Act* to the records at issue.

[32] The Applicant questions whether the Public Body could have severed the record, pursuant to section 6(2) of the *FOIPP Act*. As I have found that clause 19(1)(b) of the *FOIPP Act* applies to the records at issue, in their entirety, the Applicant does not have a right to access any information in the record at issue. Therefore, subsection 6(2) of the *FOIPP Act* does not apply. In addition, it is not necessary for me to consider whether clause 19(1)(a) or either clause of section 22 of the *FOIPP Act* applies to the records at issue.

[33] The Applicant states that it was not their intention to seek details of confidential negotiations between governments, but to understand the facts upon which policy decisions were made. Although I have found that the Public Body was authorized to withhold the records at issue, I note that the records which were tabled in the Legislature on November 29, 2018, show transparency on the part of the PEI

government in providing facts underpinning the government's carbon pricing plan, as does the government's commitment to report on its carbon policy in annual reporting under the Climate Action Plan.

Issue 3: Did the head of the Public Body properly apply subsection 30(1) of the *FOIPP Act* ?

[34] Section 30 of the of the *FOIPP* Act permits 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)(a):

> 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.

[35] The Applicant has a knowledgeable understanding of the impacts of climate change, and points out, for example:

> Scientists from around the world are warning us that we must change our behaviour immediately. The recent report by the Intergovernmental Panel on Climate Change released in October

> 2018 reviewed over 6,000 scientific studies and came to the conclusion that we have a mere 12 years to radically reduce greenhouse gas emissions if we want to avoid cataclysmic climate change.
> …
> A number of the harms directly facing Prince Edward Island include acidification of the Gulf of Saint Lawrence, coastline erosions, crop failures resulting for [sic] drought, more extreme weather events that could result in flooding, storm damage to property (both public and private), and sea level rise that would eventually submerge parts of the Island.

[36] In Order No. FI-10-005, *Re: Department of Education and Early Childhood Development*, 2010 CanLII 97256 (PE IPC), former Commissioner Judith Haldemann explains the narrow interpretation of section 30 of the *FOIPP Act*, at page 17:

> 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.

[37] In Order FI-16-004, *Re: Communities, Land, and Environment*, 2016 CanLII 48836 (PE IPC), the Commissioner found that section 30 of the *FOIPP Act* must be interpreted narrowly. There must be circumstances compelling disclosure, or disclosure must clearly be in the public interest, in order to invoke section 30 (at paragraphs 53-54).

[38] The Public Body, in support of their decision that section 30 of the *FOIPP Act* does not apply to the records at issue, submits:

> While environmental issues and decisions relating to the environment are important to Islanders, the issues raised by the Applicant and the circumstances do not satisfy the urgency required to mandate disclosure of the Records.

[39] I agree with the Applicant that it is widely accepted that climate change poses a clear and present danger to our planet. Declarations of a climate emergency have been made by governments across Canada. The carbon tax is one method chosen by our Federal government to reduce the greenhouse gas emissions which drive climate change. Even in the context of a climate emergency, I must look to the records at issue themselves to determine whether there is a clear or compelling public interest in their disclosure.

[40] The records at issue are simply an analysis of particular carbon pricing plan(s). They are similar in nature to the records provided by the Applicant, which were tabled in the Prince Edward Island Legislature, which also analyze the impact of PEI's chosen carbon pricing plan.

[41] I find that there is no clear or compelling public interest that would lead the head of the Public Body to immediately disclose the records at issue.

[42] I find that the head of the Public Body has properly applied subsection 30(1) of the *FOIPP Act,* in deciding that it does not apply to the records at issue.

VI. FINDINGS

[43] I find that the head of the Public Body has properly applied clause 19(1)(b) of the *FOIPP Act* to the records at issue.

[44] I further find that the head of the Public Body has properly applied subsection 30(1) of the *FOIPP Act,* in deciding that it does not apply to the records at issue.

VII. ORDER

[45] As I have determined that the head of the Public Body is authorized to refuse access to the records at issue under clause 19(1)(b) of the *FOIPP Act*, and that subsection 30(1) of the *FOIPP Act* does not apply, I do not require the Public Body to provide the Applicant with access to the records at issue. I confirm the decision of the head of the Public Body.

[46] I thank both parties for their submissions. In accordance with subsection 68(1.1) of the *FOIPP Act*, the Public Body shall not take any steps to comply with this order until the end of the time 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