



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

**Order No. FI-20-007**

**Re: Department of Economic Growth, Tourism and Culture**

**June 9, 2020**

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

**Summary:**

Two applicants requested reviews of five decisions of the Department of Economic Growth, Tourism and Culture (EGTC), regarding access to information from a named government employee's emails in 2011. In each review, the applicants questioned whether the EGTC had fulfilled their duty to assist the applicants by conducting a reasonable search. The applicants also questioned whether the EGTC had been open, accurate and complete in their responses to the applicants, as the EGTC had not advised the applicants that emails of the government employee, during the period requested, were missing and not recoverable.

In all reviews, the Commissioner found that the EGTC had conducted a reasonable search, but that they had not responded to the applicants openly, accurately and completely. The Commissioner ordered the EGTC to refund the applicants their fees paid.

The applicants also raised the possibility that someone had intentionally deleted the missing emails, to avoid public access. The Commissioner concluded that there was insufficient evidence to make such a finding, but found that the EGTC failed to comply with rules relating to the destruction of records, in violation of the *Archives and Records Act*.

**Statutes Cited:** *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, s. 2, 7, 8, 9, 12, 56(4), 66(3), 68(1.1), 75

*Archives and Records Act*, RSPEI 1988, c. A-19.1, s. 15, subsequently amended by *An Act to Amend the Archives and Records Act*, SPEI 2017, c. 60

**Decisions Cited:** Order No. FI-11-001, *Re: Department of Agriculture*, 2011 CanLII 91839 (PE IPC)

Order FI-19-013, *Re: Transportation, Infrastructure and Energy*, 2019 CanLII 93497 (PE IPC)

Order No. FI-15-011, *Re. English Language School Board*, 2015 CanLII 98413 (PE IPC)

Order No. FI-15-013, *Re: Office of the Premier*, 2015 CanLII 98414 (PE IPC)

Order FI-11-002, *Re: Department of Agriculture*, 2011 CanLII 91841 (PE IPC)

Alberta Report 2001-IR-004, *Re: Edmonton Public Schools*, June 6, 2001, Investigation No. 2095 (AB OIPC)

Report 2001-IR-010, *Re: Alberta Transportation and Utilities*, November 29, 2001, Investigation No. 1643 (AB OIPC)

**Other resources:** Report of the Auditor General of Prince Edward Island, *Special Assignment: Government Involvement with the E-Gaming Initiative and Financial Services Platform*, October 4, 2016.

Transcripts of the Prince Edward Island Legislative Assembly, Standing Committee on Public Accounts, 18 January 2017, 11 January 2017, 1 February 2017.

## I. BACKGROUND

- [1] Two applicants made a total of five access to information requests under section 7 of the *Freedom of Information and Protection of Privacy Act* (“the FOIPP Act”) to the Department of Economic Growth, Tourism and Culture (“EGTC”). I will refer to the applicants as “Applicant One” and “Applicant Two” throughout this order, and collectively as “the Applicants”.
- [2] The access requests all relate to email communications of a named employee of the provincial government, during 2011, which include various individuals’ or businesses’ names. The EGTC responded by providing the Applicants with the following responsive records:
- Request One: 4 pages of responsive records, consisting of appointment postings from the named provincial government employee, dated February and July 2011;
  - Request Two: 1 responsive record, an appointment posting for the named provincial government employee dated February 2011;
  - Request Three: 9 pages of responsive records, consisting of a form relating to a feasibility study and market presentation, a contract, proof of payment to the contractor, and an invoice from the contractor;
  - Request Four: 25 pages of responsive records, consisting of an infrastructure proposal, a non-disclosure agreement, a signed engagement form, and two pages of notes; and
  - Request Five: 8 pages of responsive records, consisting of emails to and from the named provincial government employee, with other provincial government employees.
- [3] The Applicants questioned why so few records were provided to them by the EGTC in response to their access requests. In all five access requests, the Applicants requested a review by the Information and Privacy Commissioner (“the Commissioner”).

## II. ISSUES

[4] There is one main issue in this review, which I will address in the first part of this Order:

Issue One: Did the head of the EGTC fulfill their duty under section 8 of the *FOIPP Act* by making every reasonable effort to assist the Applicants, and by responding to the Applicants openly, accurately, and completely?

[5] As the reviews progressed, the Applicants questioned whether someone had intentionally deleted emails, to avoid public access. I have considered the Applicants' submissions, as they relate to section 75 of the *FOIPP Act*. I will address this second issue in the latter part of this Order:

Issue Two: Did an employee of the EGTC wilfully destroy records subject to the *FOIPP Act*, or direct another person to do so, with the intent to evade a request for access to the records, contrary to clause 75(1)(e) of the *FOIPP Act*?

## III. BURDEN OF PROOF

[6] Section 8 of the *FOIPP Act* establishes the duty of a public body to assist an applicant, and to respond to an applicant openly, accurately and completely. Under subsection 8(1) of the *FOIPP Act*, a public body's duties to an applicant are mandatory. Although an applicant must have a basis for requesting a review of a public body's duties, the burden of proof under section 8 of the *FOIPP Act* lies with the public body [Order No. FI-11-001, Re: *Department of Agriculture*, 2011 CanLII 91839 (PE IPC), at paragraphs 17-18].

[7] The burden of proof with regard to clause 75(1)(e) of the *FOIPP Act* is upon the party alleging that records were wilfully destroyed. However, the Commissioner will also rely on the evidence of the EGTC with regard to the circumstances surrounding destruction of records.

#### IV. ANALYSIS

**Issue One: Did the head of the EGTC fulfill their duty under section 8 of the *FOIPP Act* by making every reasonable effort to assist the Applicants, and by responding to the Applicants openly, accurately, and completely?**

[8] Section 8 of the *FOIPP Act* sets out two duties of a public body; to assist applicants, and to respond to applicants openly, accurately and completely, as follows:

8. Duty to assist applicants

(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.

#### **Duty to Assist**

[9] Compliance with a public body's duty to assist is determined by how a public body processes a request for access to information. The procedures and required elements for processing an access request are found under Division 1 of Part I of the *FOIPP Act*, at sections 6 to 13. To determine whether a public body has satisfied their duty to assist, the Commissioner must review the interactions between the public body and the applicant. In this matter, the Applicants' concerns relate to the delays of the EGTC in processing access requests and the adequacy of the EGTC's searches for records.

#### *Delay*

[10] At the outset of their request for review, the applicant who first requested a review (Applicant One) raised the point that the EGTC's response to their access request was beyond the 30 day response period. The EGTC acknowledges that the response to Applicant One was 12 days late. The EGTC concedes that they should have exercised their discretion to extend the response time pursuant to subsection 12(1) of the *FOIPP Act*. However, they did not indicate on what grounds they would have been entitled to exercise their discretion to extend their response time, nor is it apparent from the processing records.

[11] Under ordinary circumstances, a public body has up to 30 days to respond to an applicant's request for access, pursuant to subsection 9(1) of the *FOIPP Act*. A public body is entitled to extend the time for responding up to a further 30 days, pursuant to subsection 12(1) of the *FOIPP Act*, as follows:

12. (1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period if

- (a) the applicant does not give enough detail to enable the public body to identify a requested record;
- (b) a large number of records is requested or must be searched, and responding within the period set out in section 9 would unreasonably interfere with the operations of the public body;
- (c) 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; or
- (d) a third party asks for a review under subsection 60(2).

[12] A public body is not required to ask the Commissioner, but pursuant to subsection 12(4) of the *FOIPP Act*, they must inform an applicant of the reason for the extension. Applicant One did not receive communication from the EGTC notifying Applicant One of an extension of time. The additional 12 days was not an authorized time extension under subsection 12(1) of the *FOIPP Act*. Failure to respond within 30 days, or with an authorized time extension, is deemed to be a refusal to provide access, pursuant to subsection 9(2) of the *FOIPP Act*.

[13] Applicant Two also raised the point of delay in one of their four requests for review. In their submissions, the EGTC provided the following timeline of the processing of Applicant Two's access request:

Time to Respond to the Access Request

[The Commissioner] asked the Public Body to provide a timeline explaining the processing of this access request. The timeline is as follows:

- On January 25, 2019, the Access and Privacy Services

Office ("APSO") received the request and issued an acknowledgement to the Applicant;

- On February 4, 2019, the FOIPP Coordinator contacted the Applicant to clarify the access request and scope of the search;
- On February 15, 2019, the searcher prepared and signed a search form;
- On February 20, 2019, the FOIPP Coordinator issued a thirty-day extension letter for consultation pursuant to s. 12 of the *Act*;
- On account of multiple and concurrent requests, the FOIPP Coordinator contacted [the Commissioner] on March 25, 2019, to request an extension to process records for seven similar requests and to obtain additional time to issue third party consults as needed. The Public Body believed it would be reasonable to issue decisions for all seven requests at the same time;
- On March 26, 2019, [the Commissioner] denied the Public Body's request for a general extension on the processing of the seven requests; however, [the Commissioner] granted thirty-day extensions to those files requiring third party consultation. This access request required third party consultation;
- On April 15, 2019, the FOIPP Coordinator issued a third party consultation letter;
- On May 1, 2019, the FOIPP Coordinator issued a notice to the Applicant in relation to the third party consult and advised that the Public Body would make a decision concerning disclosure by May 14, 2019;
- On May 6, 2019, APSO received a response from the third party; and,
- On May 22, 2019, the decision letter was approved and signed by the head of the Public Body at which time the decision letter together with processed Records were sent to the Applicant.

The Public Body acknowledges that there has been delay in the processing of this access request. The Public Body notes that the delay occurred in the context of a public body having to process multiple access requests. However, the delay is not remediated by operation of the *Act*. The Public Body apologizes for this delay.

[14] The timeline provided by the EGTC is accurate in all but one respect. The Commissioner did not grant thirty day extensions for those files requiring third party consultation. The EGTC requested a two week extension, which the Commissioner granted. EGTC did not

issue the third party consultation letter within two weeks, and did not seek a further extension from the Commissioner during this time. Instead, third parties were consulted 20 days later. The additional 6 days was not an authorized time extension under subsection 12(1) of the *FOIPP Act*. EGTC's delay is deemed to be a refusal to provide access, pursuant to subsection 9(2) of the *FOIPP Act*. The EGTC made a decision on the access request in due course, but was already in a deemed refusal position once the two-week time extension had expired.

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

66. (3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:

...

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

[16] Based on the unauthorized delay in processing Applicant One's access request, and one of Applicant Two's access requests, I find that the EGTC did not fulfill their duty to assist the Applicants, as required by section 8 of the *FOIPP Act*. I am authorized to reduce the Applicants' fees in these circumstances. Therefore, I find it appropriate to refund Applicant One's initial application fee, and Applicant Two's initial application fee in one review, which are the only fees charged to them by the EGTC for these two access to information requests.

#### *Adequate Search*

[17] Conducting an adequate search is considered to be part of a public body's duty to assist. The Commissioner has found, in previous orders, that a public body fulfills their duty to assist an applicant in this regard when they make every reasonable effort to search for



responsive records and, in a timely way, inform the applicant what they have done [Order FI-11-001, *supra*, at paragraph 18].

[18] As the EGTC points out, the test to determine whether a public body has satisfied their duty to assist an applicant under subsection 8(1) of the *FOIPP Act* is based on reasonableness. A public body is not held to a standard of perfection [Order FI-19-013, *Re: Transportation, Infrastructure and Energy*, 2019 CanLII 93497 (PE IPC), at paragraph 55].

[19] During the EGTC's initial search for records relating to the named employee, they discovered that a block of emails, for the relevant time period, were missing from electronic storage. The EGTC enlisted the help of Information Technology Shared Services (ITSS) to attempt to retrieve the emails.

[20] When responding to the Applicants' access requests, the EGTC did not advise the Applicants of the missing emails. This inaction will be described more fully below, in the discussion of EGTC's duty to respond openly, accurately and completely. My task at this point is to determine whether a reasonable search for records was conducted by EGTC in any or all of the five access requests.

[21] The evidence required to establish that a reasonable search was conducted includes who conducted the search, the steps taken to identify and locate the responsive records, the scope of the search, and the reasons the public body believes that all responsive records have been identified [Order No. FI-15-011, *Re: English Language School Board*, 2015 CanLII 98413 (PE IPC), at paragraph 81].

[22] The EGTC points out that the wording of the access requests made it challenging to search paper records, as the requests were not related to a particular subject matter. Rather, the requests were for all records relating to individuals' or businesses' names. Without further information from the Applicants, it was sometimes difficult to conduct a

paper records search. For example, if the Applicants requested emails between John Smith and the named government employee, but did not provide the context of why the employee would be corresponding with John Smith, then the only search tool the EGTC had at their disposal was electronic keyword searches.

[23] The EGTC provided evidence related to their searches, including the following:

*Who conducted the search:*

Although the named employee participated in carrying out the search, his administrative assistant primarily conducted the search.

*Scope of the search, including steps taken by the Public Body to identify and locate records responsive to the Applicant's access request, and all possible locations of records responsive to the access request:*

The Applicants' access requests were limited to records of one individual, the named employee. The named employee met with his Administrative Assistant to identify and locate all possible places where the responsive records may be found.

The EGTC identified the following as locations where responsive records may be found:

- The named employee's calendar, email inbox, email sent box and archived emails;
- The named employee's administrative assistant's email inbox, email sent box and archived emails;
- The named employee's directory for his computer; and
- The shared directory used by the named employee and his administrative assistant.

The EGTC also identified additional areas, depending on the particular access request, including the following:

- A binder identified as the only physical location where responsive records may be found (the EGTC later clarified that the binder was created to contain records relating to the e-gaming initiative and another project, and was the only physical location where the EGTC believed there may be responsive records);
- File cabinets of the named employee and his administrative assistant; and
- Central records with the Records Officer

The first four of the above locations were electronically searched using key word searches, as outlined in the search forms. The paper records were reviewed.

*Reasons the Public Body believes that no more responsive records exist than the ones that have been identified:*

Following receipt of the Applicants' access requests, the EGTC undertook a reasonable effort to identify, locate and search the named employee's records that are in its custody and control.

[24] During the review of Applicant One's access request, EGTC conducted a second search for responsive records, but was unable to find additional records responsive to Applicant One's request. The EGTC also conducted a second search for one of Applicant Two's access requests, and found and provided Applicant Two with an additional record.

[25] Applicant One provided a copy of eleven records in their possession, which Applicant One submits should have been responsive to the request. The EGTC respectfully disagrees that eight of the records that Applicant One provided are responsive to their access request:

First, appendices 112, A, B, C and D are not records of [the named employee].

Second, appendices F, G and J do not appear to be records of [the named employee]; but, they do appear to relate to the appointment requests that were provided to the Applicant in response to his access request. We believe that appendix F relates to page 1 of the records disclosed; appendix G relates to page 2 of the records disclosed; and, appendix J relates to page 4 of the records disclosed because the dates of these appointment postings disclosed share similar dates and the same subject lines as the said three appendices provided by the Applicant.

Third, appendix K is an email dated outside of the time frame of the Applicant's request.

- [26] I have reviewed the copies of records which Applicant One claims should have been responsive to their request. I agree with the EGTC with regard to the appendices described above. With regard to three records, Appendices E, H and I, EGTC conceded that if these records had been found in their search, they may have been considered responsive to Applicant One's access request. I find that these records, if they had been found in the records search, would have been responsive to Applicant One's request for access.
- [27] Applicant Two also provided records which should have been responsive to their access requests. The EGTC agreed and, in May 2019, stated that they are "not able to identify a particular reason for this result", after two searches for records. Later, the EGTC identified a reason for missing records, and this will be discussed under the EGTC's duty to be open, accurate and complete.
- [28] The Applicants have provided a reasonable basis for concluding that responsive records existed, but have not been located by the EGTC. However, this fact alone does not lead to a finding that the EGTC did not conduct a reasonable search for records. I must look at all the circumstances.
- [29] Applicant One suggests that the EGTC should have consulted with the Public Archives and Records Office ("PARO") as well as its Records Management Liaison Officer ("RMLO") when conducting their record search, to ensure that nothing was overlooked. The EGTC responds that such action would not be considered a component of a reasonable search. The EGTC relies upon paragraphs 30-33 of Order No. FI-15-013, *Re: Office of the Premier*, 2015 CanLII 98414 (PE IPC). The referenced paragraphs set out the evidence required of a public body to show they conducted a reasonable search, which is also set out above.

[30] The PARO website describes the records in their custody and control as follows:

The mandate of the Public Archives and Records Office is to acquire, preserve and make available for public research, the government records of PEI and those private sector records of individuals, companies and institutions, deemed to be of historical value as they pertain to the history of Prince Edward Island. Along with textual documents such as correspondence files, diaries, journals, and newspapers, the Public Archives also holds materials in other formats including photographs, architectural drawings, maps, microforms, film and sound recordings...

[31] There is no evidence that PARO would have any reason to have responsive records to any of these five access requests in their custody or control. I agree with the EGTC that consulting with PARO would not have been part of a reasonable search in these circumstances.

[32] Based on the contents of the processing files, and the submissions of the EGTC relating to their searches for responsive records, I find that the employees who conducted the searches were knowledgeable and experienced, that the EGTC took reasonable steps to identify and locate responsive records, and that areas searched were appropriate. The EGTC conducted exhaustive electronic searches for records, and involved ITSS in attempts to find further emails. Given EGTC's efforts to retrieve missing emails, which is discussed in more detail below, there is no reason to believe more responsive records currently exist other than those that were provided to the Applicant. The EGTC made every reasonable effort to search for responsive records. I find that, for all five access requests, the EGTC conducted an adequate search.

**Duty to respond openly, accurately and completely**

[33] I have found that the EGTC conducted adequate searches. However, the search for records is only part of a public body's duty under section 8 of the *FOIPP Act*. Section 8 includes a duty to respond to an applicant openly, accurately, and completely. The

Applicants have expressed concerns relating to this duty of the EGTC, most prominently about the EGTC's failure to advise the Applicants, at any point during the access to information process, that emails they requested were no longer accessible by the EGTC.

[34] The named employee reported to ITSS, on March 17, 2015, that they had discovered time periods of missing emails from their archive. At that time, ITSS investigated, and was unable to retrieve the missing emails from backup.

[35] The EGTC was asked whether the named employee offered an explanation for their missing emails, or whether the time periods of the access request correspond with a change of position for the employee, or period of absence from work. The EGTC responded as follows:

This matter was discussed with [the named employee] at length. He is not able to nor is he technically qualified to provide a technical explanation for the apparent loss of emails. The time periods in question do not correspond with a change of position, or a period of absence from work.

[The named employee] reports that in 2015 he was looking through his archive for emails. It was at this time that he discovered that emails in his archive for periods of time appeared to be missing. [The named employee] states that he did not understand what had happened as he could not locate emails for many files and contacts throughout 2011 and 2012. Although [the named employee] advises that he does delete some transitory emails that he won't use again (as is permitted), he unequivocally states that he has not and does not intentionally delete other emails. He states that he was distressed by the discovery of missing emails.

He reports that following his discovery he immediately reached out to ITSS to report the problem.

[The named employee] also reports that in early 2015 he had a mobile phone upgrade, a few months prior to his discovery, and he believes that this upgrade is related to the apparent loss of emails.

[The named employee] noted that despite the existence of this issue he has participated in and arranged for searches for each and every access request related to his records, when asked to do so. In fact, he has had ITSS assistance with searches earlier this year to help him ensure that searches were carried out appropriately within the limitations of the GroupWise program.

[36] From the beginning, Applicant One expressed concern that records may not have been properly retained. Applicant One makes the following comments regarding their access request:

That “copy of the records” [see attached] which I received contained just four pages, with just one 'calendar record' notation that looks more like redacted meta-data from an email header than a calendar record. At any rate, each of these four 'documents' refer to a meeting/event which should have generated other government records; however, none were provided to me. I am therefore asking that [the Commissioner] investigate whether other records related to these four meetings/events exist, or existed at one time but were not retained and archived as required under provisions of the *FOIPP Act* and/or *Archives and Records Act*.

[37] Applicant One’s concerns resulted from their own deductions, as at that point in the review process, Applicant One had not been made aware of the missing emails by the EGTC. Although the named employee knew about missing emails almost four years earlier, for the time period covered by the access requests, this information was not passed on to either of the Applicants. After the reviews were requested by the Applicants, one of the processing documents provided to the Commissioner, dated February 2019, alludes to a “lost email timeline”, but further explanation was not provided. It was not until the EGTC’s submissions to the Commissioner in July 2019 that the Applicants were advised of the missing emails in the archive of the named employee.

[38] The *FOIPP Act's* intent of openness through access is supported by a public body's obligation to provide information to an applicant regarding their search efforts (see Order No. FI-11-001, *supra*, at paragraph 18). Applicant One submits that the head of the EGTC not only did not fulfill their duty to respond openly, accurately, and completely, but they deliberately misled Applicant One about the reasons that no records were found responsive to their request. Applicant One comments as follows:

... I deeply regret that the PEI Government decided not to disclose to me from the outset that there would be no point looking for responsive records for my Access request for [the named employee] records when I first filed over a year ago (October 28, 2018). Even after I requested a review with the OIPC, the Public Body continued to lead me – and you – to believe that there were records for [the named employee] for the responsive period of my request – just not responsive records for my particular request.

In his February 21, 2019 letter to you, [the head of EGTC] indicated that “[the named employee] met with his Administrative Assistant to identify and locate all possible places where the responsive records could be found,” as part of his evidence that the Public Body was providing assistance to me in compliance with section 8 of the Act. That was deceptive. There were no records to look for anywhere for that time period, and that fact was known to the Public Body when [the head of the Public Body] wrote those words.

[39] Applicant One's access request was submitted on October 31, 2018. The processing records provided by the EGTC indicate that the EGTC was aware of lost emails in February 2019, and requested the assistance of ITSS. It was determined that archived emails were missing between June 2010 and April 2012, which dates are coincident with the dates of the records requested in all five access requests.

[40] During the reviews, after the EGTC advised the Applicants of the missing emails in July 2019, Applicant Two made the following submission:

Firstly, this admission would have been extremely relevant from the Public Body from the first FOIPP we filed this past January. In



fact, the amount of time, cost and effort wasted caused by the Public Body denials of missing emails before this July 10, 2019 admission is unacceptable for a Government.

...

At all material times, [the named employee] and presumably the Public Body were, or ought to have been, aware that the FOIPP requests fell within the timeframe of the emails that were already deleted. Although [the named employee] stated these deleted emails caused him distress, [the named employee] and the Public Body have been dishonest throughout the FOIPP process since January.

- [41] Both Applicants make reference to a previous access request which had been made in May or June 2014, by Applicant Two, which returned no responsive records. Applicant Two submits:

This FOIPP was dealt with quickly without any need for an extension or third party requests. It was returned in letter dated June 2, 2014 by [the Deputy Minister] returning the \$5.00 payment fee stating: No Records Found (#112 Appx B). Therefore the same group of emails that [the named employee] states he found were missing on March 17, 2015 were gone before May 2014.

- [42] The Acting Director of ITSS advises that there are currently three tiers of servers, one which is the backup. Back-ups are used if there is need for disaster recovery, are kept for 365 days, and are automatically overwritten. If an employee discovers that emails for a particular period of time are missing, and ITSS cannot find them in the backups, then they conclude they were gone more than 365 days ago. Applicant Two's submission is consistent with the evidence, as ITSS was unable to retrieve the archived emails, indicating that they had been gone for more than one year.

[43] Applicant One also provided the following submission:

I suspect [the named employee] knew his emails were gone much earlier than March, 2015. A June, 2014 Access Request seeking e-gaming records from [the named employee], for the same time-period as with the current files you're working on, and the response came back, "no records found". Surely [the named employee] was involved with that 2014 Access search, or was at least notified about it, and learned at that time that the emails were missing? So, why would he now be saying he first found out in 2015?

[44] Applicant One's above submission is based on conjecture. I am persuaded that the initial discovery of missing emails by the named employee was in March 2015. If the named employee conducted a keyword search for an access request a year earlier, which resulted in no responsive records, the named employee may not have questioned this result. It is only when the named employee searched for particular emails in March 2015 that, he states, he realized that emails were missing, and contacted ITSS for assistance.

[45] As the Commissioner discussed in Order FI-15-013, *supra*, at paragraph 35, the duty to be open, accurate and complete includes a duty to provide applicants with information explaining why no responsive records were found:

In a recent order, Order No. FI-15-006, *supra*, I examine a public body's obligation to inform an applicant, including when a search results in no responsive records. At paragraph [29], I agree with a decision of the British Columbia Information and Privacy Commissioner in *British Columbia (Re)*, 2013 BCIPC 7 (CanLII), that, where government does not have records responsive to an access request, the public body should provide an explanation to the applicant as to why this is the case.

[46] In Order FI-11-002, *Re: Department of Agriculture*, 2011 CanLII 91841 (PE IPC), at paragraph 105, the duty of a public body to communicate with an applicant was further discussed as follows:

[105] The underpinnings of public bodies' duty to engage in discussions with applicants and to assist in narrowing requests flow naturally from the circumstances of each access request. A public body is the party that has the background knowledge and familiarity, not only with the records in its possession, but also with the *FOIPP Act* and its Regulations. An applicant is at a disadvantage as a newcomer to this process, and it is up to the public body to guide the applicant. I find that this is an integral part of a public body's duty to assist applicants.

[47] I find that the EGTC did not fulfill their duty to be open, accurate and complete when responding to the Applicants, by failing to explain why very few responsive records were found. I further find that the EGTC deliberately withheld this important information from the Applicants, which is a violation of their section 8 duty. I would have expected the gap in the named employee's emails to be one of the first facts to be communicated to the Applicants, following the EGTC's realization that their search could not be properly completed. Instead, the EGTC provided the few records they had to the Applicants, and remained silent about the possibility that there could have been more, but they had not been retained.

[48] I am at a loss to explain the motivation of the EGTC in withholding such key information from the Applicants. I have overseen many access reviews since November, 2002, and have observed that public bodies are forthright in their dealings with applicants, even when the information the public body must provide is embarrassing, or does not place the public body or a given employee in the best light. In such circumstances, public bodies prioritize their duty to respond openly, accurately and completely. Why the EGTC chose to keep the fact of missing emails from the Applicants remains a mystery, even after multiple submissions to the Commissioner by the EGTC in these reviews.

[49] I am authorized to reduce the Applicants' fees in these circumstances. I have already ordered the return of Applicant One's initial application fee to them, and one of Applicant Two's initial application fees. I find it appropriate to order a refund of the remainder of Applicant Two's applications fees as well. The Commissioner's powers are

limited, even where there has been an egregious violation of a public body's section 8 duties. Ordering the EGTC to conduct another search for responsive records would be fruitless in these circumstances. I trust that the predominant consequence of my finding will be the EGTC's commitment to communicate with applicants openly, accurately and completely in similar future circumstances.

**Issue Two: Did an employee of the EGTC wilfully destroy records subject to the *FOIPP Act*, or direct another person to do so, with the intent to evade a request for access to the records, contrary to clause 75(1)(e) of the *FOIPP Act*?**

*Wilful destruction of records*

[50] The Applicants' interest in the responsive records relate to their interest in the "e-gaming file". Applicant One states:

Although not directly related to your work or this review, it's worth noting that the records in question are of immense importance to understanding what transpired at this critical juncture in the e-gaming saga, and that work [the named employee and another individual] were involved in together during this seven-month period are anything but trivial. I would therefore respectfully ask that every possible measure be taken to get to the bottom of what happened to those records.

[51] The Applicants convey exasperation in their submissions, with both the lack of proper record-keeping, and the apparent lack of transparency from government. Applicant One also states:

To allow such behaviour to continually happen without any significant penalties and/or legal consequence is to turn a blind eye to the deliberate subversion of our democratic institutions by those entrusted with the protection of same. It doesn't happen elsewhere (e.g., Judge Lipson's ruling in the Livingston scandal in Ontario) and it shouldn't happen here. If the evidence on this file brings no resolution of these issues of secrecy, cover-up, subversion of our own laws, etc., it's hard to imagine a review that would.

[52] Clause 75(1)(e) of the *FOIPP Act* states that it is an offence to deliberately delete government records for the purpose of evading a freedom of information request, as follows:

75. Offences

(1) A person shall not wilfully

...

(e) destroy any records subject to this Act, or direct another person to do so, with the intent to evade a request for access to the records;

[53] To make a finding that clause 75(1)(e) of the *FOIPP Act* applies, there must be reasonable and probable grounds that records subject to the *FOIPP Act* were destroyed, and that the destruction was wilful and with the intent to evade an access request (see Alberta Report 2001-IR-004, *Re: Edmonton Public Schools*, June 6, 2001, Investigation No. 2095, at paragraph 37). The EGTC submits that the allegations of the Applicants are more appropriately addressed outside the review process. This submission is not consistent with subsection 56(4) of the *FOIPP Act*, which permits the Commissioner to disclose to the Minister of Justice and Public Safety and Attorney General information relating to the commission of an offence, if the Commissioner considers there is evidence of an offence. If the Commissioner believes that such reasonable and probable grounds exist, then the Commissioner may refer the matter to the Crown Attorney's office to determine whether further proceedings are warranted. If the Commissioner does not believe that reasonable and probable grounds exist, the investigation is concluded (see Alberta Report 2001-IR-010, *Re: Alberta Transportation and Utilities*, November 29, 2001, Investigation No. 1643, at paragraphs 46-47).

[54] In order to put the Applicants' submissions in context, it is helpful to describe the background of those aspects of e-gaming which relate to records management. On October 4, 2016, PEI's Auditor General issued a report entitled *Special Assignment: Government Involvement with the E-Gaming Initiative and Financial Services Platform* ("Special Report"). The Special Report analyzed three initiatives which government considered in 2010-2012, but did not implement. One initiative, referred to as e-

gaming, was an idea to create a platform for the unregulated internet gaming market (paragraph 3.2, Special Report). A further component was to establish a financial services platform, an IT infrastructure to allow processing of a large volume of financial transactions in various currencies and with financial institutions around the world (paragraph 2.12, Special Report). The third initiative was a loyalty card program in which tourists could use a specialized customer card at participating businesses to accumulate rewards (paragraph 4.2, Special Report).

[55] Records management was a key focus of the Special Report investigation, and two of the 15 recommendations related to records management. The two recommendations of the Auditor General in the Special Report were:

- The Public Archives and Records Office, in cooperation with public bodies, should monitor compliance with records management policies and procedures and submit compliance reports to the Minister of Education.
- The Minister of Education, as the minister responsible for the *Archives and Records Act*, should take necessary action to enforce compliance with the *Act*.

[56] The Auditor General described the investigation of records management at a Public Accounts Committee meeting on January 18, 2017:

...At the outset of this assignment we did not intend to examine records management in government. Due to difficulties encountered in obtaining government records, we reviewed selected practices and policies related to the management of government records. We found that not all government records were being managed and safeguarded as required by legislation and policy.(page 53)

[57] The Special Report also made the following findings:

- Email records of three individuals who were no longer with government were not retained, and further, no records relating to e-gaming were available from any of these three individuals (Page 1, Public Accounts Committee, January 11, 2017); and

- The *Archives and Records Act* was not followed, in the management of government records relating to e-gaming (Special Report, and page 2, Public Accounts Committee, January 11, 2017).

[58] Following the recommendations of the Special Report, the province developed a three year plan to improve records management in government. In December, 2016, these steps were incorporated into an action plan to take place over three years. In addition to the three-year plan, amendments to the *Archives and Records Act* were proclaimed on May 12, 2017, and include a penalty of up to \$10,000 for wilful violation of the legislation. Further, as pointed out by the Minister of Education at the February 1, 2017, Public Accounts Committee meeting (page 87), going forward, a report of records management will be provided to the Legislative Assembly once per year, indicating which government departments are complying, and which are not.

[59] Applicant Two submits that for the e-gaming file, there were four “key players” within government, for the financial platform and recruiting. In his submission in support of his contention that emails were intentionally deleted, he states:

There is not one email available for any of them during this time period. How could this not be considered a cover-up?

[60] Applicant One also submits that the probability of the named employee’s emails accidentally going missing for precisely the period of time during which the e-gaming file was open, is “infinitesimally small”.

[61] While I understand the basis for the Applicants’ suspicions, it is incumbent upon me to examine all of the circumstances surrounding the missing emails to determine whether clause 75(1)(e) of the *FOIPP Act* applies. To do so, I also rely on the submissions of the EGTC, the Special Report of the Auditor General, and the evidence gathered from the Acting Director of ITSS, some of which is set out below.

[62] As the requests for access relate to emails from 2011, the Commissioner sought information regarding whether record-keeping, particularly email record-keeping practices, had changed in the province over the years. The Commissioner interviewed the Acting Director of ITSS.

#### Email Archives

[63] As the Applicants' access requests relate to emails from eight years earlier, the question of email archives was explored. The Acting Director advises that, up until 2015, there were no centralized email archives in government, and individual employees were using GroupWise archives differently. Each employee could set whether they wanted to archive emails, and if so, how and where to save their archives.

[64] The Acting Director provided two examples of why an employee would wish to archive email records:

- 1) GroupWise (the software with which provincial government employees send and receive emails) tends to react slowly if there are a lot of active emails; and
- 2) GroupWise might react slowly when accessed remotely from a location with poor internet connection, for example if an employee was travelling or otherwise working remotely.

[65] In either of the above scenarios, an employee would archive a group of email records, to speed up their GroupWise account activity, to send and receive emails more quickly.

Prior to 2015, an employee could set up their emails to automatically archive after a period of time, or could manually move an email, or block of emails, to their archives.

An employee could store their archive(s) in three places:

- 1) on their local "C" drive of their PC or laptop;
- 2) on their network, either on their shared "G" drive, or their personal "H" drive; or
- 3) on a removable medium such as a flash drive or CD.



[66] As a result of the various methods of archiving emails to various locations, prior to 2015, an individual employee could have several different archives, stored in different locations.

[67] ITSS embarked on a centralized archiving project in 2014-2015. ITSS advises that when the archiving project was carried out, only one archive was identified and located for the named employee. This archive was brought into the centralized location that resulted from standardization. ITSS records also confirm that, on March 17, 2015, after the named employee reported a problem to ITSS, in order to determine if there might be a technical issue with the archive, a copy of the archive was made by a technician, resulting in there being two duplicate archives. From that time forward, all archived email records of the named employee were stored in the copy of the original archive created by ITSS.

[68] The Acting Director points out that, between 2012 and 2015, ITSS undertook to better manage data across all of government. The process, which was completed in 2015, involved the following steps:

- 1) Upgrading the network;
- 2) Consolidating domains;
- 3) Upgrading connectivity; and
- 4) Virtualizing servers.

[69] The foregoing updates were necessary for a host of reasons. With specific reference to email archives, all of the foregoing was necessary in order to force standardization and consolidation of archives.

[70] Since 2015, archives are centralized, and employees cannot create, copy, or direct their archives to a particular location. Each employee has access to only one archive, which generally covers those emails which are older than 90 days. The creation of archives addresses the risk that emails will be lost if GroupWise is corrupted. They also permit GroupWise to run faster. Only the owner of an archive may search the archive unless

their access credentials (passwords) are reassigned. A Proxy can access and search current emails, but not the archive.

[71] The EGTC made the following submission when asked about possible reasons for missing emails:

Generally speaking, the Public Body understands that email loss can occur as a result of a variety of things, including following a software upgrade or device change (such as upgrading of a mobile phone); corruption in files; and, deletion. There are also instances when it is not possible to determine the reason for losses.

[72] The EGTC was also asked whether it is common to find time periods of missing emails in searching archives. The EGTC responded that they had discussed this question with the Acting Director, who advises that while not an issue arising every day, it does happen. He confirmed that it is possible for an individual government employee to have a time period or time periods of missing emails.

[73] The Acting Director was asked about the three potential explanations for a loss of a block of emails, provided by the EGTC: file corruption, upgrading phones, and upgrading software. The Acting Director offered general information about missing emails, but was not able to provide an opinion about what had occurred in this instance.

#### *File corruption*

[74] If a block of emails has been corrupted, ITSS would be able to see that the emails exist, but they would be unable to open them. This was not the case with the named employee's emails, leading the Acting Director to conclude that they were not corrupted.

### *Phone upgrade*

[75] During an upgrade of a cellular phone, GroupWise links to the mobility servers which are, in turn, linked to the phone. The provincial policy has been that ITSS will not connect an employee's cellular phone to the mobility servers if there are more than 5,000 emails in the employee's in-box. If there are more than 5,000 emails, it is too much to manage.

[76] If an employee is advised to reduce their inbox to 5,000 emails, they may decide to delete files, or archive a block of emails. Before email archives were centralized, the employee would have had to recall where they had stored their created archives.

### *Software upgrade*

[77] Electronic data may be moved or deleted during a software upgrade, but because there is a back-up system, such data may be recovered if it is discovered missing within 365 days.

### *Email Deletion*

[78] The Acting Director was also asked about whether it is possible for ITSS to determine if emails were deleted. The Acting Director advised that it is not possible to tell if an email was deleted. Such a determination would require a keystroke analysis, which is not something ITSS does.

### Retention of Emails

[79] The EGTC was asked about the policies and procedures which were in place relating to records retention for email records, during the time period relevant to the responsive records. They responded as follows:

Section 5 (Recorded Information Management) of Treasury Board's Policy and Procedure Manual is the applicable records information management policy that has been in place since 1998.

As you may be aware, this policy applies to public records (including emails) created by employees for Government departments and crown corporations.

In the Auditor General's 2016 report, she noted that the *Archives and Records Act* indicates that every public body should prepare a schedule for the retention and disposition of records. These schedules are to be approved by the Public Records Committee. At page 40 of the said 2016 report, the Auditor General indicated that the Public Body's predecessor and Innovation PEI had no approved retention and disposition schedules in place in 2013.

In 2014, a file classification plan was developed that included the approval to put in place a retention schedule for Innovation PEI. In 2015, when the other archive was created, there was no approved retention or disposition schedule in place. The Public Body continues to work on addressing this concern.

[80] The Acting Director was asked about the role of ITSS in Records Management. They advise that all employees at ITSS have taken RIM 101, part of the records management education now required by all government employees. Although the data is not ITSS data, ITSS is responsible for the storage and access to data. To ensure compliance with recently developed records management policy and procedure, ITSS regularly consults with the Province's Public Archivist. ITSS consistently requires completed forms, and sign off by managers, for various actions involving GroupWise or other electronic records.

[81] Applicant Two submits that the emails of the named employee were deleted without authorization:

How is it that both [the named employee] and the Public Body are so sure that these records were not deleted illegally when neither knows anything about the creation or deletion of the Archive? The bottom line is that the records for [the named employee] in archive PEI-10640 were deleted without being stored as required by Provincial law and policy.

[82] I agree with Applicant Two that the named employee was not authorized to delete emails which were not transitory. Section 50 of the *FOIPP Act* authorizes the Commissioner to investigate to ensure compliance with rules relating to the destruction of records set out in the *Archives and Records Act*. I conclude that the emails of the named employee went missing after 2012, and before March 2015. Prior to 2017, section 15 of the *Archives and Records Act* stated:

15. No person shall destroy, alienate or transfer to the Public Archives the records of a public body except in accordance with a records retention and disposition schedule for those records approved by the Committee pursuant to this Act.

[83] I find that the EGTC has failed to comply with rules relating to the destruction of records set out at section 15 of the *Archives and Records Act*, which was in force at the relevant time. Every public body has a duty to retain government records, including emails, in accordance with their retention and disposition schedules. By the loss of non-transitory email records, without having printed and retained paper copies, the EGTC, via the named employee, failed in this important duty.

[84] The Auditor General, in the Special Report, expressed concern about the failure of this same public body to retain emails of those employees who had left government. Now, there is evidence that emails consistent with the time period of the very same subject matter, the e-gaming initiative, from a named employee who did not leave government, are also missing, and there is no known method to retrieve them. The applicants are suspicious that this was an intentional deletion of records, and I understand the basis for their belief. However, I must look to all the evidence to determine whether clause 75(1)(e) of the *FOIPP Act* applies. How the disappearance of emails came to pass, is not readily discernible.

[85] I am inclined to agree with Applicant One's observation that the probability is small that the named employee's emails would accidentally go missing for precisely the period of

time during which the e-gaming file was open. However, I am unable to conclude that the named employee, or anyone else, deleted the named employee's emails in order to avoid public access to their emails. I make this conclusion based on the following factors:

- The named employee reported the missing archive in March 2015 when, he states, it first came to his attention;
- Deletion of emails is not a fool-proof method of deleting records. For example, emails may still be still recoverable from the email records of those individuals within government who either sent emails to the named employee, or copied the named employee on emails (in fact, this search method was used for one of Applicant Two's access requests);
- The named employee states that they did not delete the missing emails; and
- The email archiving and storage processes at the relevant time, in 2011, made it more likely that emails might go missing and the Acting Director of ITSS states that emails have, in fact, gone missing.

[86] I have no evidence, other than what has been provided to me, to assess whether anyone wilfully destroyed records to evade an access request. I have allegations and conjecture, but this is insufficient evidence that records were intentionally destroyed for the purpose of evading an access request, pursuant to clause 75(1)(e) of the *FOIPP Act*.

## **V. SUMMARY OF FINDINGS**

[87] I find that, for Applicant One's access request and one of Applicant Two's access requests, the head of the EGTC did not adhere to the timelines set out at section 9 of the *FOIPP Act*, in responding to the Applicants' requests, and therefore failed in their duty to assist the Applicants, contrary to section 8 of the *FOIPP Act*.

[88] I find that the head of the EGTC conducted an adequate search for records in response to the Applicants' access requests.

[89] I find that the head of the EGTC did not respond to the Applicants openly, accurately and completely, violating section 8 of the *FOIPP Act*, when they failed to advise the Applicants that responsive records to their access requests had been destroyed, and were no longer accessible.

[90] I find that the head of the EGTC has failed to comply with rules relating to the destruction of records set out at section 15 of the *Archives and Records Act*, as was in force prior to 2017.

[91] I find that there is insufficient evidence that a person wilfully destroyed records, or directed another person to do so, with the intent to evade a request for access to the records, pursuant to clause 75(1)(e) of the *FOIPP Act*.

## **VI. ORDER**

[92] I order the head of the EGTC to refund the Applicants their initial application fees.

[93] I thank both Applicants for their willingness to question the meager number of records provided by the EGTC in response to their access requests. I also thank them for their well-organized and thoughtful submissions.

[94] In accordance with subsection 68(1.1) of the *FOIPP Act*, the head of the EGTC 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