OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI-20-003

Re: Health PEI

February 24, 2020

Prince Edward Island Information and Privacy Commissioner
Karen A. Rose

Summary:

An applicant requested access to all records exchanged between the former board members of Health PEI, and between the board members and the Minister of Health and Wellness, over a three-week period. Health PEI provided the Applicant with responsive records, severing information on the basis of sections 15 (unreasonable invasion of personal privacy), 22 (advice to officials) and 25(1)(a) (solicitor-client privilege) of the *FOIPP Act*. The Applicant requested a review.

The Commissioner found that Health PEI properly applied the exceptions to disclosure when making their decision to withhold information from the responsive records.

During the review, the applicant raised section 30 of the *FOIPP Act*, which requires a public body to disclose information, without delay, if disclosure is clearly in the public interest. The Commissioner found that section 30 does not apply to the information in the responsive records.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, ss. 1(i), 7, 15, 22, 25(1)(a), 30, 37(1)(z.1), 39, 65, 68(1.1)

Decisions Cited:

Order FI-19-008, *Re: Department of Environment, Water and Climate Change*, 2019 CanLII 71191 (PE IPC)

Order FI-16-007, *Re: Health PEI*, 2016 CanLII 48833 (PE IPC)

Order 97-002, *Re: Family and Social Services*, 1997 CanLII 15913 (AB OIPC)

Order FI-19-001, *Re: Workers Compensation Board*, 2019 CanLII 7110 (PE IPC)

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

Order FI-18-013, *Re: Office of the Premier,* 2018 CanLII 130518 (PE IPC)

Order FI-18-001, *Re: Public Schools Branch*, 2018 CanLII 3930 (PE IPC)

Order No. FI-18-004, *Re: Charlottetown Area Development Corporation*, 2018 CanLII 9505 (PE IPC)

Order FI-18-005, *Re: Office of the Premier*, 2018 CanLII 54181 (PE IPC)

Order FI-16-003, *Re: English Language School Board*, 2016 CanLII 48834 (PE IPC)

Solosky v. The Queen, [1980] 1 SCR 821 (CanLII)

Alberta (OIPC) v. University of Calgary, [2016] 2 SCR 555 (CanLII)

Order F2018-26, *Re: Service Alberta*, 2018 CanLII 61327 (AB OIPC)

Order F2018-01, *Re University Of Alberta*, 2018 CanLII 1820 (AB OIPC)

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

Other Authorities Cited: Prince Edward Island FOIPP Guidelines and Practices Manual (May 2006)

I. BACKGROUND:

[1] On May 22, 2018, the Board of Directors of Health PEI resigned, en masse. Their resignations became an issue discussed in the media, and in the Legislative Assembly.

[2] Several weeks later, 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 Health PEI ("the Public Body") for the following records:

> "All memos, internal communications, e-mails, texts, documents and records exchanged between Board Members of Health PEI [list of the names of the 11 individuals] and between those board members and the Health and Wellness Minister [name] between May 1, 2018 and May 23, 2018

[3] The Public Body located and retrieved 259 responsive records. They reviewed the records and withheld some information from the Applicant on the basis of the following provisions:

- subsection 15(1) [disclosure an unreasonable invasion of third party personal privacy];
- clause 18(1)(k) [disclosure harmful to security of a property or system];
- section 21 [public body confidences];
- clause 22(1)(a) [consultations or deliberations];
- clause 22(1)(e) [contents of agendas or minutes];
- clause 22(1)(g) [advice to officials];
- clause 25(1)(a) [solicitor-client privilege]; and
- subsection 27(1) [information available to the public].

[4] The Applicant requested a review of the Public Body's decision. The Applicant also submits that information ought to be disclosed pursuant to section 39 (disclosure for research purposes) and pursuant to subsection 30(1) of the *FOIPP Act* (public interest override).

[5] During the Commissioner's review, there was significant cooperation between the Applicant, the Public Body, and a third party. As a result of the cooperation, the issues of the review were narrowed.

[6] The Applicant confirmed they do not object to the Public Body withholding some personal information pursuant to subsection 15(1) of the *FOIPP Act,* such as personal email addresses, phone numbers, details of a personal complaint, e-mail address and name of a complainant, personal comments or plans, and family information. They also do not object to the Public Body withholding the names of individuals who applied for the position of Chief Executive Officer ("CEO") of the Public Body. However, the Applicant seeks access to information related to competency or qualifications of those who have expressed an interest in the CEO position.

[7] The Applicant also confirmed they are not requesting a review of the Public Body's decision to withhold the access code for teleconferences pursuant to clause 18(1)(k) of the *FOIPP Act*, or of the Public Body's application of section 27 of the *FOIPP Act*, which relates to information that is or will be available to the public.

[8] The Public Body initially relied on subsection 21(1) [public body confidences] to withhold information from one page of the responsive records. In the course of the review, the Public Body changed their position. They decided not to rely on subsection 21(1), but continue to withhold the same information, relying on clause 22(1)(a) [consultations or deliberations] and clause 22(1)(e) [contents of agendas or minutes] of the *FOIPP Act*.

II. THE ISSUES

[9] In this order, I will consider the four remaining issues:

> Issue 1: Did the head of the Public Body properly apply section 15 of the *FOIPP Act* to information withheld from responsive records?
>
> Issue 2: Did the head of the Public Body properly apply section 22 of the *FOIPP Act* to information withheld from responsive records?
>
> Issue 3: Did the head of the Public Body properly apply clause 25(1)(a) of the *FOIPP Act* to information withheld from responsive records?
>
> Issue 4: Did the head of the Public Body properly apply clause 30(1)(b) of the *FOIPP Act* to information in the responsive records?

III. RECORDS AT ISSUE

[10] The responsive records are emails, and enclosures to emails, of five of the former board members of the Public Body. I shall refer to the five groups of records by the letters A, B, C, D, or E, and by the page number of the record. I will refer to the records, together, as "the records at issue".

IV. BURDEN OF PROOF

[11] The Applicant and the Public Body bear different burdens of proof depending on the provision at issue. Section 65 of the *FOIPP Act* describes who bears the burden of proof during an inquiry, and states in part, as follows:

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

> *Idem*, third party personal information
> (2) Notwithstanding subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.
> . . .

[12] The head of the Public Body withheld some information pursuant to sections 22 and 25 of the *FOIPP Act*. Pursuant to subsection 65(1) of the *FOIPP Act*, it is the Public Body's burden to prove they properly applied these exceptions to disclosure.

[13] The Public Body withheld some information pursuant to section 15 of the *FOIPP Act,* claiming that disclosure would be an unreasonable invasion of a third party's personal privacy. In accordance with subsection 65(2) of the *FOIPP Act*, once the Public Body establishes that the records at issue contain personal information, it is the Applicant's burden to prove that disclosure would not constitute an unreasonable invasion of personal privacy of the third party to whom the personal information relates.

[14] The Applicant relies on clause 30(1)(b) of the *FOIPP Act*, which compels a public body to disclose information if disclosure is clearly in the public interest. In Order FI-19-008, *Re: Department of Environment, Water and Climate Change*, 2019 CanLII 71191 (PE IPC), the Commissioner adopted the following approach to burden of proof:

> [9] . . . 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.

III. ANALYSIS

Issue 1: Did the head of the Public Body properly apply section 15 of the *FOIPP Act* to information withheld from responsive records?

[15] The Public Body relies on section 15 of the *FOIPP Act* to withhold information from three pages of responsive records: A27, D12 and D13. *S*ection 15 sets out the circumstances a public body must consider when assessing whether disclosure of personal information of a third party would be an unreasonable invasion of their personal privacy. Many orders of the Commissioner, including Order FI-16-007, *Re: Health PEI*, 2016 CanLII 48833 (PE IPC), at paragraph 11, outline the steps of a section 15 analysis:

> Section 15 of the *FOIPP Act* is a mandatory exception to disclosure, requiring the head of a public body to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. The established two-step process in determining whether section 15 applies to the information in the records at issue has been used by this office for reviews of section 15 since 2003 [i.e. Order No. 03-003, *Department of Tourism, Re*, 2003 CanLII 52560 (PE IPC), pages 5-6]. These two steps are more particularly described below.
>
> *Step One - Is the information severed from the Records "personal Information"?*
> . . .
> *Step Two - Would disclosing the personal information be an unreasonable invasion of a third party's personal privacy?*

Step one: Is the information personal information?

[16] The Public Body submits that pages D12-D13 contain educational and employment history, and page A27 contains opinions of an individual.

[17] Pages D12-D13 relate to an individual's expression of interest in the position of CEO of the Public Body. This is clear from the portions of pages D12-D13 that the Public Body

disclosed to the Applicant. The Applicant does not dispute that pages D12 and D13 include personal information. I have reviewed the withheld information, and find that the majority is employment and educational history of a third party individual. There is also a small amount of other personal information relating to personal circumstances of the third party, and personal information of a family member of the third party.

[18] The Applicant does not seek the name of the third party. However, based on my review of these two pages, I confirm that, even if the Public Body removed the third party's name, the third party would still be identifiable by the other information that the Public Body withheld. I find that all of the withheld information from pages D12 and D13 is personal information of a third party.

[19] The information that the Public Body withheld from page A27 is an opinion of the author of the email, a Public Body board member. There are two types of opinions that are included in the definition of personal information: opinions about other individuals, and an individual's opinions about anything else. A decision of Alberta's Information and Privacy Commissioner, Order 97-002, *Re: Family and Social Services*, 1997 CanLII 15913 (AB OIPC), sets out a widely accepted definition of "opinions" as follows:

> [42.] The Concise Oxford Dictionary defines "fact", in part, to mean "a thing that is known to have occurred, to exist, or to be true; an item of verified information". An "opinion" is defined, in part, to mean "a belief or assessment based on grounds short of proof; a view held as probable." As an example of each, a "fact" would be a person's employment position, date of employment, or reason for leaving employment. An "opinion" would be a belief that a person would be a suitable employee, based on that person's employment history.
>
> [43.] By definition, a "fact" may be determined objectively. An "opinion" is subjective in nature, and may or may not be based on facts. [underlining added]

[20] Under the *FOIPP Act,* opinions about another individual are personal information of that other individual, and opinions about anything else, are personal information of the opinion holder.

[21] Based on my review of page A27, I confirm that the severed information is not an opinion about anyone else. Therefore, I find that it is personal information of the author, a Public Body board member.

Step two: unreasonable invasion of personal privacy

[22] The second step of a section 15 analysis is to determine whether disclosure of the personal information would be an unreasonable invasion of personal privacy of the third parties to whom the personal information relates. The process of step two is set out in several orders, including Order FI-19-001, *Re: Workers Compensation Board*, 2019 CanLII 7110 (PE IPC), at paragraph 23:

> In step two, if the information at issue is found to be personal information, it must be decided whether disclosure of the personal information would constitute an unreasonable invasion of personal privacy. This analysis may involve the other subsections of section 15 of the *FOIPP Act*, as follows:
>
> (a) If a party wishes to raise subsection 15(2), it should be dealt with first. This is a deeming provision, so that certain circumstances are deemed not to be an unreasonable invasion of a third party's personal privacy. If one of the exceptions in subsection 15(2) is found to apply, the analysis is at an end, and the information should be disclosed.
>
> (b) The next analysis involves subsection 15(4), and is only reached if subsection 15(2) does not apply. Subsection 15(4) contains examples of circumstances that are presumed to be an unreasonable invasion of privacy. If one or more of the presumptions listed in subsection 15(4) applies to the information at issue, then disclosure of that information is presumed to constitute an unreasonable invasion of privacy of the third party to whom the information relates. Despite any

presumptions, however, a factor under subsection 15(5), or a combination of factors, including the other circumstances listed below, may rebut the presumption(s), and lead to disclosure of the information.

(c) In all cases, even if no presumptions of subsection 15(4) apply, all relevant factors favoring disclosure must be balanced against those favoring nondisclosure, pursuant to subsection 15(5), so that a decision can be made regarding whether disclosure would constitute an unreasonable invasion of a third party's personal privacy.

Subsection 15(2)

[23] Following the above procedure, I consider first the provisions of subsection 15(2), which lists circumstances that are deemed not to be an unreasonable invasion of a third party's personal privacy. The Applicant raises section 39, which is noted at clause 15(2)(d), and states:

15(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

. . .

(d) the disclosure is for research purposes and is in accordance with sections 39 and 40;

[24] Section 39 permits a public body to disclose personal information of a third party, without the consent of the third party, for a research purpose, under specific conditions. Section 39 states:

39. A public body may disclose personal information for a research purpose, including statistical research, only if

(a) the research purpose cannot reasonably be accomplished unless that information is provided in individually identifiable form or the research purpose has been approved by the Commissioner;
(b) any record linkage is not harmful to the individuals the information is about and the benefits to be derived from the record linkage are clearly in the public interest;
(c) the head of a public body has approved conditions relating to the following:

(i) security and confidentiality,
(ii) the removal or destruction of individual identifiers at the earliest reasonable time, and
(iii) the prohibition of any subsequent use or disclosure of the information in individually identifiable form without the express authorization of that public body; and

(d) the person to whom the information is disclosed has signed an agreement to comply with the approved conditions, this Act and any of the public body's policies and procedures relating to the confidentiality of personal information.

[25] The expressions "research" or "research purpose" are not defined in the *FOIPP Act.* The Public Body states:

> . . .We submit that "research", in this provision, is intended to refer to scientific exploration following established processes for the purpose of adding to a base of scientific knowledge or publication in a scientific journal. Sub section 39(b) references public interest, but merely in the context of record linkage, which is not at issue in the present request. Further, there is no express or implied agreement, outlining approved conditions as required in sub section 39(d), between a public body and an Applicant in the disclosure of records in response to a request for access to information. We see no relevance of section 39 to our decision to protect the personal information described under Section 15 above.

[26] Subsection 39 is an exception to the provisions relating to the protection of personal information. It permits a public body to disclose personally identifying information that would not normally be disclosed, only if all four enumerated conditions apply.

[27] Section 39 does not require a public body to disclose personal information for any research purpose. A public body has discretion to decide whether to pursue discussions relating to the enumerated conditions of section 39. The Commissioner has no jurisdiction to compel a public body to undertake such discussions. Further, on the facts before me, the Applicant has not entered into an agreement with the Public body, pursuant to clause 39(d) of the FOIPP Act. Therefore, I find that section 39 and clause

15(2)(d) of the *FOIPP Act* do not apply to the decision of whether to disclose information in pages A27 or D12-D13.

[28] I have reviewed the other provisions of subsection 15(2) of the *FOIPP Act*, and find that there are no other relevant provisions. Therefore, I find that subsection 15(2) of the *FOIPP Act* does not apply.

Subsection 15(4)

[29] Subsection 15(4) enumerates circumstances that are presumed to be an unreasonable invasion of privacy. There are no provisions of subsection 15(4) which apply to the opinion information on page A27. However, I consider clause 15(4)(d) of the *FOIPP Act* in assessing the employment and educational history on pages D12-D13.

[30] Clause 15(4)(d) of the *FOIPP Act* establishes a presumption that disclosure of information relating to employment or educational history would be an unreasonable invasion of personal privacy. The provision states, in part:

> 15(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> . . .
>
> (d) the personal information relates to employment or educational history;
>
> . . .

[31] I noted earlier that the majority of the personal information that the Public Body withheld from pages D12 and D13 is employment and educational history, which raises the presumption of unreasonable invasion of personal privacy under clause 15(4)(d) of the *FOIPP Act*. This presumption is rebuttable, and I must consider all relevant circumstances, including those enumerated in subsection 15(5).

Subsection 15(5)

[32] The Applicant claims clauses 15(5)(a) and 15(5)(c) of the *FOIPP Act* are relevant, and I have identified clause 15(5)(f) as a possible relevant circumstance. These provisions state:

> 15(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Prince Edward Island or a public body to public scrutiny;
> > . . .
> > (c) the personal information is relevant to a fair determination of the applicant's rights;
> > . . .
> > (f) the personal information has been supplied in confidence;

[33] With regard to clause 15(5)(a), the Applicant states:

> . . . Although I agree that the disclosure of the individual's name could be contrary to the act, details surrounding application of a candidate for position of the CEO may have played a role in the decision of Health PEI board members to resign. The details of what happened in this process are certainly in the public interest, as the e-mail was sent only a week before the amendments to the Health Act were tabled in the PEI legislature. The competency of the individual applicant, and his/her qualification for the applied position, do form a significant part of the timeline leading up to the resignation of the entire Health Board. The details surrounding this event warrant public scrutiny and are certainly in the public interest. Without these details, the public cannot be certain whether a qualified candidate was passed up for a position of a permanent CEO of Health P.E.I.

[34] All members of the board of directors of the Public Body resigned. In media reports from that time, a former member of the board of directors states their reason for resignation, which includes a comment related to the process of selection of a CEO.

[35] The resignation of an entire board of directors is a strong indicator of an issue that may warrant public scrutiny. In addition, the Public Body agrees that there may be public interest in the CEO recruitment process. However, they also point out that it is not clear if the third party to whom pages B12-B13 relates, applied for the position. The Public Body had retained a recruitment agency to manage the search for a CEO. The Public Body states:

> . . . We do not disagree with the Applicant's position that there would be public interest in the CEO recruitment process, however we argue that there is no certainty that this particular individual was ultimately considered as a candidate for the position. There are other possible outcomes that could have reasonably resulted from the forwarding of this email to the recruitment firm, including the individual deciding not to participate in the competition or the recruitment process already having closed to new applications. It is our position that public scrutiny does not outweigh impact to personal privacy in this case, particularly in the absence of confirmation that the individual was a candidate considered in the CEO recruitment process.

[36] With respect to the opinion information the Public Body withheld from page A27, I find that it would not assist in any public scrutiny related to the resignation of the members of the board of directors, the recruitment of a CEO, or any other issue deserving of public scrutiny.

[37] With respect to pages D12-D13, I am not persuaded that the personal information the Public Body withheld, most of which is educational or employment history of a third party individual, would assist meaningfully in public scrutiny of the process of selecting a CEO. Pages D12-D13 are an introductory email and, as the Public Body points out, it is uncertain whether the third party individual actually applied for the position of CEO.

[38] Clause 15(5)(c) of the *FOIPP Act* applies if the personal information is relevant to a fair determination of the Applicant's rights. The Applicant has not identified any right for which they seek this personal information. I find that this clause does not apply.

[39] It is apparent from a review of pages A27, D12 and D13 that the withheld personal information was provided implicitly in confidence by the third parties to whom the personal information relates. It is reasonable to expect that the opinion information on page A27 was provided in confidence between board members. Further, it is also reasonable to expect that the personal information on pages D12 and D13, expressing interest in the CEO position, was provided in confidence to the chair of the board. This factor favours withholding the personal information.

[40] The relevant circumstances to be considered under subsection 15(5) of the *FOIPP Act* are not exhaustive. Other relevant circumstances may be considered by a public body. Several potential factors are listed in Order No. FI-11-001, *Re: Department of Agriculture*, 2011 CanLII 91839 (PE IPC), at paragraph 89. I have considered the following relevant factors:

- the fact that an applicant is not required to maintain the confidentiality of personal information once it has been released to them; and
- the third party refused to consent to disclosure of their personal information.

[41] The opinions of the author at page A27, and the work history and other personal information of the third party at pages D12 and D13, were implicitly provided in confidence. However, the Applicant, if they are provided access to this information, is not bound by confidentiality. This is a relevant factor which favours withholding the personal information. In addition, the Public Body inquired with the third party who forwarded the email at pages D12-D13, and the third party refused to consent to disclosure of their personal information which was ultimately withheld by the Public Body. This factor also favours withholding the personal information.

Findings re Issue 1

[42] As noted above, pursuant to subsection 65(2) of the *FOIPP Act*, the Applicant bears the burden of proof to show that disclosure of personal information would not be an unreasonable invasion of a third party's personal privacy.

[43] The Public Body provided the Applicant with access to some information on pages A27 and D12-D13, but severed personal information. I am persuaded that they conducted a thorough analysis of the information. I find that the severed information on page A27 is personal information the disclosure of which would be an unreasonable invasion of a third party's personal privacy, pursuant to section 15 of the *FOIPP Act*. I further find that the presumption of unreasonable invasion of personal privacy raised by disclosure of the employment and educational information on pages D12-D13 has not been rebutted by other relevant circumstances. I find that the severed information on pages D12-D13 is personal information the disclosure of which would be an unreasonable invasion of a third party's personal privacy, pursuant to section 15 of the *FOIPP Act*.

Issue 2: Did the head of the Public Body properly apply section 22 of the *FOIPP Act* to information withheld from responsive records?

[44] The Public Body submits that information in the records at issue falls under subsection 22(1) of the *FOIPP Act*, specifically clauses (a), (e), or (g) which state:

> 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
>
> (a)consultations or deliberations involving
> (i) officers or employees of a public body,
> (ii) a member of the Executive Council, or
> (iii) the staff of a member of the Executive Council;
> . . .
> (e) the contents of agendas or minutes of meetings of
> (i) the governing body of an agency, board, commission, corporation, office or other body that is designated as a public body in the regulations made under this Act; or

(ii) a committee of a governing body referred to in subclause (i);

. . .

(g) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council;

. . .

[45] Subsection 22(2) of the *FOIPP Act* limits the scope of this discretionary exception to disclosure. Thus, the analysis of section 22 involves assessing:

- whether a clause of subsection 22(1) applies; and, if so,
- whether a clause of subsection 22(2) applies; and, if not,
- whether the head of the Public Body properly exercised their discretion to withhold the information.

Clause 22(1)(a) consultations or deliberations

[46] The Public Body submits there is a reasonable expectation that disclosure of information in the following records could reveal consultations or deliberations involving officers or employees of the Public Body: A1 – A2, A9 - A11, A26, A28 - A30, A32, A33, B10, B11, B24, B28, B172-B173, and E9.

[47] The terms "consultations" and "deliberations" are not defined in the *FOIPP Act*. However, in previous orders, the Commissioner has accepted definitions as provided in the Prince Edward Island *Freedom of Information and Protection of Privacy Guidelines and Practices Manual* (May 2006), at page 105, as follows:

> A *consultation* is a very similar activity where the views of one or more individuals are sought about the appropriateness of particular proposals or suggested actions.
>
> A *deliberation* is a discussion or consideration by a group of individuals of the reasons for and against a measure.

[48] Previous decisions of the Commissioner have held that the views expressed must be sought from the view-holder, or be part of the responsibility of the view-holder to

provide such input. In addition, the views must be for the purpose of doing something, such as taking an action, or making a decision or a choice [see Order FI-18-013, 2018 CanLII 130518 (PE IPC) at paragraph 24].

[49] The records to which the Public Body claims clause 22(1)(a) applies, are between members of the board of directors of the Public Body. The Public Body provides further information relating to the responsibilities of the members of the board of directors, as follows:

> The Health PEI Board has a responsibility to "control and manage the affairs" of Health PEI, pursuant to a mandate established by the *Health Services Act.* As such, members of the Board, as a whole and as part of various Board committees, are routinely required to respond to issues and concerns impacting Health PEI and the achievement of the Board's mandate. We feel that it is clear that the exchange of information and perspectives in these email records for the purpose of determining what actions the Board should take to best respond to such matters falls within the manual's definition of "deliberations".

[50] I have reviewed the information that the Public Body withheld on the basis of clause 22(1)(a) of the *FOIPP Act*. The Public Body severed some information, but disclosed some lines and words that are indicative of consultations or deliberations such as:

- These are a few thoughts. . . . look forward to your reflections;
- See my comments in red below. You have hit on many key points;
- Only a suggestion to consider; and
- I have skimmed thru some documents and will express some of my views.

[51] In each instance, I am persuaded that the information that the Public Body withheld is a view that was part of the responsibility of the person from whom it was sought, and was for the purpose of taking an action, or making a decision or a choice. I find that the withheld information satisfies the definition of either consultation or deliberation.

[52] I find that clause 22(1)(a) of the *FOIPP Act* applies to information on pages A1 – A2, A9 - A11, A26, A28 - A30, A32, A33, B10, B11, B24, B28, B172-B173, and E9.

Clause 22(1)(e), agendas or minutes of meetings

[53] With respect to page A28, the Public Body additionally relies on clause 22(1)(e) of the *FOIPP Act* to withhold the same information. As I have already determined that clause 22(1)(a) of the *FOIPP Act* applies to this information, it is not necessary to consider the application of clause 22(1)(e).

Clause 22(1)(g) - Advice to Officials

[54] The Public Body submits that there is a reasonable expectation that disclosure of information in the following records could reveal advice, proposals, recommendations, analyses, or policy options developed by or for a public body: pages A9, A13, B24 - B26, B28 - B30, C7, D1, D5, D11, and D17.

[55] The following definitions of the terms in clause 22(1)(g) have been accepted in previous orders of the Commissioner:

> 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.
>
> *Advice*, 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.
>
> [see Order FI-18-001, *Re: Public Schools Branch*, 2018 CanLII 3930 (PE IPC), at paragraph 24]

[56] To be subject to clause 22(1)(g), the information at issue must 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.
> [Order FI-18-001, *supra*, at paragraph 23]

[57] With respect to the first criteria, related to the responsibilities of the person's position, the Public Body advises that some of the withheld information is advice from the CEO of the Public Body, and providing such advice was part of their role. The Public Body states:

> This provision was employed to protect advice directly provided to the Board by the CEO via email and Board deliberation on advice received from the CEO through another forum.
> . . .
> The CEO role, like the Board, is mandated under the *Health Services Act* and has responsibility for "general management and conduct of the affairs of Health PEI". The CEO reports directly to the Board as per the legislation and Board policies. In all cases where information relating to CEO advice to the Board was protected, the CEO identified particular issues requiring Board action or response, provided advice on potential actions or responses and/or provided analysis of or insight into matters related to the business affairs of Health PEI. It is our position that all three criteria above are met in this case.

[58] Some information that the Public Body withheld is from the recruitment agency that the Public Body retained to assist in the search for a new CEO. The Public Body states:

> This same provision of the Act was also used to protect correspondence sent by a representative from the firm contracted to recruit a new CEO for Health PEI. The severed information, including portions of the records held by several of the Board members, consists of advice to the Board on matters relating to that recruitment process and options for response, with the objective of seeking a decision from the Board on how to address the issue. By virtue of that contract agreement for this service, advice from the recruitment firm is sought and expected, and

> made to the Board for the purpose of action, and therefore meets the first and second criteria described above. Regarding the third criteria, at the time that these records were created and the CEO recruitment was in progress, the version of the *Health Services Act* in force established that the Board shall appoint a CEO for Health PEI. In our view, this legislated power given to the Board satisfies item 3 above.

[59] Based on my review of the records, I confirm the assessment of the Public Body that the information they withheld in reliance of clause 22(1)(g) of the *FOIPP Act* satisfies the three requirements of this provision. The information is advice, recommendations, or analysis that was part of the responsibility of the author. I also confirm that the views were expressed for the purpose of taking an action, and were made to the members of the board of directors who could take or implement the action.

[60] I find that clause 22(1)(g) of the *FOIPP Act* applies to information on pages A9, A13, B24 - B26, B28 - B30, C7, D1, D5, D11, and D17.

Subsection 22(2) – exceptions to subsection 22(1)

[61] One of the concerns raised by the Applicant is that the Public Body interpreted the exceptions to disclosure under section 22 too broadly. They state:

> I noted roughly 48 redactions of information in my request based on Sections 22(1)(a) and 22(1)(g), many of which I believe should not be applicable based on Section 22(2)(b).

[62] Subsection 22(2) of the *FOIPP Act* lists several types of information that may not be withheld under section 22, even if a provision of subsection 22(1) is satisfied. The Public Body provided submissions illustrating that they considered each clause of subsection 22(2), and found that none apply.

[63] The Applicant has raised the possibility that clause 22(2)(b) of the *FOIPP Act* applies. Clause 22(2)(b) states:

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

. . .

(b) is a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function;

[64] The Applicant submits:

> I would suggest that it is in the spirit of public interest for knowledge of the reasoning behind the resignation of the members of the Health P.E.I. board to be publicly known. I believe many of the redactions involved exchanges of opinion of Board Members related to changes to the Health Act, which were inappropriately redacted under sections 22(1)(a) or 22(1)(g). The resignation of members of this body was an exercise in discretionary power and reasoning for such a decision should be public based on Section 22(2)(b).
>
> I believe certain passages related to discussion around the selection of a CEO for Health P.E.I. would also qualify as "reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function" and so should not be redacted under Sections 22(1)(a) or 22(1)(g).

[65] I do not find that the resignation of the members of the board of directors was an exercise in discretionary power or adjudicative function of the board. Although the members of the board all resigned at the same time, a decision to resign remains a personal decision of any individual, not a decision of the board of directors as a body.

[66] The Applicant submits that discussion around the selection of a CEO for the Public Body would also qualify as reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function. I am not aware of whether any decision was made relating to the selection of a CEO. In any event, the records at issue do not contain the reasons for such a decision.

[67] I have reviewed the withheld information, and find that it does not include a statement of the reasons for a decision that was made in the exercise of a discretionary power or

an adjudicative function. I therefore confirm the assessment of the Public Body that clause 22(2)(b) of the *FOIPP Act* does not apply. I have also reviewed the other clauses of subsection 22(2), and find that none apply.

Exercise of Discretion

[68] Under section 22, the head of the Public Body has discretion to provide access to an applicant, or withhold the information. I must now assess whether the head of the Public Body exercised their discretion reasonably. A decision is not reasonable if, for example, the head of a public body made a decision in bad faith or for an improper purpose, or took into account irrelevant considerations, or failed to take into account relevant considerations. The head of a public body must show that all relevant factors for and against access were considered in a balanced and judicious manner when making their determination [see Order No. FI-18-001, *supra*, at paragraph 30, and Order No. FI-18-004, *Re: Charlottetown Area Development Corporation*, 2018 CanLII 9505 (PE IPC) at paragraph 29, and Order FI-18-005, *Re: Office of the Premier*, 2018 CanLII 54181 (PE IPC), at paragraph 37].

[69] Order FI-18-005, *supra*, at paragraph 38, sets out a non-exhaustive list of potentially relevant factors for a public body to consider when exercising their discretion:

a. the general purposes of the *FOIPP Act*, including that public bodies should make information available to the public, and individuals should have access to personal information about themselves;
b. the wording of the discretionary exception and the interests which the exception attempts to balance;
c. whether the applicant's request may be satisfied by severing the record and providing the applicant with as much information as is reasonably practicable;
d. the historical practice of the public body with respect to the release of similar types of records;
e. the nature of the record and the extent to which the record is significant or sensitive to the public body;
f. whether the disclosure of the information will increase public confidence in the operation of the public body;

g. the age of the record;
h. whether there is a definite and compelling need to release the record; and
i. whether Commissioners' orders have ruled that similar types of records or information should or should not be disclosed.

[70] Order FI-16-003, *Re: English Language School Board*, 2016 CanLII 48834 (PE IPC), at paragraph 47, sets out the purpose of section 22, to allow persons having the responsibility to make decisions to freely discuss the issues before them. This freedom allows decision makers to arrive at well-reasoned decisions, without fear of being wrong, looking bad or appearing foolish if their frank deliberations were made public. The Public Body states that they considered item (b) above, relating to the purpose of the provision:

> As the Manual establishes, the intent of these provisions in section 22 is to provide a confidential forum for officers and employees with authority to make decisions and oversee the business of a public body:
>
> > "The need for confidentiality in relation to various aspects of decision-making is not restricted to decisions by the Executive Council or the governing authorities of public bodies. An absolute rule permitting public access to all records relating to policy formulation and decision-making processes in public bodies would impair the ability of such bodies to discharge their responsibilities in a manner consistent with the public interest.
> >
> > The exception is intended to provide a "deliberative space" for those involved in providing advice, carrying on consultations and making recommendations, so that records may be written with candour and cover all options."
> >
> > FOIPP Manual, page 105
>
> It is our position that the portions of Board email correspondence that have been withheld from disclosure would reveal the substance of discussions between members, held for the purpose of analyzing issues that faced the Board and weighing various options for action and/or response. In applying discretion to protect this information, a primary consideration was the impact that the disclosure of such records would have on future deliberations by Board members. If the decision-making process were not treated as confidential in this instance, it would be

> reasonable to expect that future Board members would lose confidence in their ability to have frank discussions amongst themselves to thoroughly consider issues facing the Board and requiring response or action. The importance of the responsibility for managing the health system for the Province cannot be understated. Health care affects every single resident of Prince Edward Island and decisions affecting health care programs and services must be made using the most effective decision-making processes.

[71] It is apparent that the Public Body also considered the third factor described in the above paragraph, whether the Applicant's request may be satisfied by severing the record and providing the Applicant with as much information as is reasonably practicable. It is clear from a review of the records at issue that the Public Body applied exceptions with the goal of providing the Applicant with as much information as they reasonably could.

[72] As further evidence of the Public Body's careful exercise of discretion, in the course of the review, the Public Body identified two pages of withheld information, and decided to exercise their discretion to disclose the pages. The Public Body states:

> . . . Although the information meets the established criteria for defining "advice", we have re-considered the potential impact of disclosing this information. We find that disclosure of this advice would not reasonably impact the provision of advice in the future, nor the decision making processes of the Board. . . .

[73] Based on all the circumstances, I am satisfied that the Public Body considered relevant factors when exercising their discretion under section 22 of the *FOIPP Act*, and they did not take into account any irrelevant considerations. The Public Body reasonably exercised their discretion under section 22 of the *FOIPP Act*.

Findings re Issue 2

[74] I find that the head of the Public Body exercised their discretion reasonably, in deciding

to withhold information in the following pages of the records at issue:

- pursuant to clause 22(1)(a): pages A1 – A2, A9 - A11, A26, A28 - A30, A32, A33, B10, B11, B24, B28, B172-173, and E9; and
- pursuant to clause 22(1)(g): pages A9, A13, B24 - B26, B28 - B30, C7, D1, D5, D11, and D17.

Issue 3: Did the head of the Public Body properly apply clause 25(1)(a) of the *FOIPP Act* to information withheld from responsive records?

[75] The Public Body relies on clause 25(1)(a) of the *FOIPP Act* for their refusal to provide the Applicant with access to information on pages A14-A16 and D20-D23. Subsection 25(1)(a) of the *FOIPP Act* states:

> 25. (1) The head of a public body may refuse to disclose to an applicant
> (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege;
> . . .

[76] The Public Body claims that the records are subject to solicitor-client privilege. *Solosky v. The Queen,* [1980] 1 SCR 821 (CanLII) is one of the leading Canadian decisions on solicitor-client privilege. At page 837, Justice Dickson outlines the three essential components of a claim of solicitor-client privilege, known as the *Solosky* test:

> As Mr. Justice Addy notes, privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege—(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[77] In accordance with *Alberta (OIPC) v. University of Calgary*, [2016] 2 SCR 555 (CanLII), the Public Body chose not to provide the Commissioner with a copy of the records for which they claim solicitor-client privilege. Instead, the Public Body provided an affidavit sworn by the manager in charge of *FOIPP Act* requests. The affidavit states that the records relate to correspondence between the Public Body/Public Body board and legal counsel,

containing legal opinion and advice. They further advise that the advice does not relate to either of the expressed areas of interest of the Applicant, the recruitment of a new CEO, or proposed statutory amendments to the *Health Services Act.*

[78] The Public Body must provide clear, convincing, and cogent evidence of each element of the *Solosky* test. The adjudicator in AB Order F2018-26, *supra*, considering the equivalent of subsection 25(1) of the *FOIPP Act*, described the quality of evidence necessary to satisfy the balance of probabilities:

> [para 14] In an inquiry under the FOIP Act, a public body must provide sufficiently clear, convincing, and cogent evidence to discharge its burden of proving that a discretionary exception to disclosure applies to information it has withheld from an applicant. As the Public Body decided to apply sections 27(1)(a) to withhold information from the Applicant, it has the burden of proof under section 71(1) to prove that section 27(1)(a) applies to this information with evidence that is sufficiently clear, convincing, and cogent to meet this purpose.

[79] Without the records to review, the Commissioner's job is more challenging than for the review of other *FOIPP Act* exceptions to disclosure. The Commissioner must consider the exception and the context, and must rely upon the submissions and evidence offered by the Public Body. I will review the Public Body's evidence and submissions, and all of the circumstances, with a view to assessing whether it is more likely than not that the *Solosky* test has been satisfied.

[80] Taking into consideration the role of the board of directors, it is reasonable to expect that they would be seeking or receiving legal advice from a lawyer. It is also a matter of public record that the Public Body was a party to legal proceedings at the time the records were created.

[81] With respect to the requirement of confidentiality, it may be implied by the circumstances of the communication. In AB Order F2018-01, *Re University Of Alberta*,

2018 CanLII 1820 (AB OIPC), the adjudicator held that confidentiality was implied in the circumstances, because the communications were between a lawyer and a client during a time when there were either grievances looming or activity being arbitrated. As there were legal proceedings ongoing at the time the responsive records were created, I accept that confidentiality was implied.

Findings re Issue 3

[82] As I have confirmed the component parts of solicitor-client privilege, I find that the information on pages A14-A16 and D20-D23 is subject to solicitor-client privilege, pursuant to clause 25(1)(c) of the *FOIPP Act*.

Issue 4: Did the head of the Public Body properly apply clause 30(1)(b) of the *FOIPP Act* to information in the records at issue?

[83] The Applicant relies on clause 30(1)(b) of the *FOIPP Act*, which compels a public body to disclose information if disclosure is clearly in the public interest. Section 30 is occasionally referred to as the public interest override, as it overrides all discretionary and mandatory exceptions to disclosure. Section 30 states:

> 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.

[84] In Order No. FI-10-005, *Re: Department of Education and Early Childhood Development*, 2010 CanLII 97256 (PE IPC), the Commissioner explained the application of section 30 of the *FOIPP Act*, at pages 16-17:

> Section 30 deals with releasing information related to issues which have an element of urgency to them, or have an element of overriding public interest. The urgent issues are public health and safety issues, where delay might have significant and serious consequences.
> . . .
> The salient features of subsection 30(1) of the FOIPP Act are urgency and, under clause (a) significant harm, or clause (b) the public interest. Subsection 30(1) must be read as a whole to determine the tenor and intent of the subsection. Subsection 30(1) is an exception to the usual process of disclosure of information. It allows a public body to disclose information that would not normally be disclosed, in situations where such disclosure might be an urgent matter of health or safety, or a matter of great importance to the people of the province, which should be released sooner rather than later. When invoking an exception section like section 30 of the Act, it is important to note that the situation that falls within that section must be urgent in nature ("without delay"). 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.

[85] Based on the foregoing analysis, there is a high threshold to invoke clause 30(1)(b) of the *FOIPP Act*. The information must relate to an urgent matter, and should be released sooner rather than later. As noted in the discussion of burden of proof above, the Applicant must show that disclosure of the information is clearly in the public interest, and if so, the Public Body must show that the decision not to disclose the information is rationally defensible.

[86] It may be that the resignation of the board of directors of the Public Body is a matter of interest to the public. However, clause 30(1)(b) of the *FOIPP Act* requires me to examine the records at issue themselves to determine whether there is a clear or compelling public interest in their disclosure. Based on my review of all of the withheld information in the records at issue, and based on all relevant factors, I am not persuaded that disclosure of the withheld information within them is "clearly in the public interest".

Findings re Issue 4

[87] I find that the head of the Public Body properly applied clause 30(1)(b) of the *FOIPP Act,* in deciding that it does not apply to the information that they decided to withhold from the Applicant.

VI. SUMMARY OF FINDINGS

[88] I find that the head of the Public Body properly applied subsection 15(1) of the *FOIPP Act* to the personal information withheld from pages D12-D13 and A27 of the records at issue.

[89] I find that the head of the Public Body properly applied clause 22(1)(a) of the *FOIPP Act* to the information withheld from pages A1 – A2, A9 - A11, A26, A28 - A30, A32, A33, B10, B11, B24, B28, B172-173, and E9 of the records at issue.

[90] I find that the head of the Public Body properly applied clause 22(1)(g) of the *FOIPP Act* to the information withheld from pages A9, A13, B24 - B26, B28 - B30, C7, D1, D5, D11, and D17 of the records at issue.

[91] I find that the head of the Public Body properly applied clause 25(1)(a) of the *FOIPP Act* to information withheld from pages A14-A16 and D20-D23 of the records at issue.

[92] I find that the head of the Public Body properly determined that clause 30(1)(b) of the *FOIPP Act* does not apply to the information withheld from the records at issue.

VII. ORDER

[93] Based on the above findings, I confirm the decision of the Public Body. As such, I make no order in this matter.

[94] I thank both parties for their submissions. In accordance with section 67 of the *FOIPP Act*, the Commissioner's order is final. However, I note that an application for judicial review of the order may be made pursuant to section 3 of the *Judicial Review Act.*

_____

Karen A. Rose
Information and Privacy Commissioner