



Prince Edward Island
Legislative Assembly

Information and
Privacy Commissioner
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Île-du-Prince-Édouard
Assemblée législative

Commissaire à l'information et
à la protection de la vie privée
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PRIVATE AND CONFIDENTIAL

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

September 20, 2024

Via Email

Dear [REDACTED],

Re: Request for Review under the *Freedom of Information and Protection of Privacy Act*
Public Body: Department of Economic Development, Innovation and Trade
Your File No.: 2023-378 EDIT
Our File No.: C/24/00148 (formerly FI-24-568)

In your access request 2023-378 EDIT, you asked for some records of [REDACTED] an administrative assistant with the Department of Economic Development, Innovation and Trade (the "Public Body"), from a period in 2011, that mention a specific named individual. More specifically, you requested:

"All records in any format (including emails, Calendar Entries, texts, blackberry messenger and/or paper) of [REDACTED] that make mention of [REDACTED]." Date Range for Record Search: From February 1, 2011 to September 1, 2011

The Public Body provided you with 15 pages of responsive records, with limited information redacted under section 15(1) of the *Freedom of Information and Protection of Privacy Act* ("FOIPP Act"). You requested a review of the Public Body's response to this access request.

We reviewed your 14-page request for review of January 17, 2024 and appendices A-P (289 pages), the Public Body's processing file, your emails of July 31, 2024 and August 14, 2024, and the enclosed email chain between Deputy Commissioner Maria MacDonald, and Bobbi-Jo Dow Baker, solicitor for the Public Body.

Preliminary Matters

I noted the following discrepancies in your January 17, 2024 letter and the appendices. I apologize for not notifying you of them earlier:

Appendix B: You advise that page 7 of access request 2023-378 EDIT is at Appendix B, but it is not. At Appendix B to your request for review, you enclosed a 2-page trip report of [REDACTED] from May 2012. The top line that would ordinarily identify the access request number is not clear enough for me to read, but it appears this is the same record you received in access request 2020-298 EGTC (found at Appendix G to your request for review), not a copy of page 7 from access request 2023-378 EDIT. We have a copy of page 7 of access request 2023-378 EDIT, which is also labelled as a trip report, but it is from February of 2011.

Appendix J: You advise that the decision letter and responsive records for your access request 2019-008 EDIT is at Appendix "J". But Appendix J is the decision letter and responsive records to access request 2019-169.

Appendix K: You advise that this is an email from [REDACTED] to [REDACTED] and [REDACTED] dated May 16, 2011, However, the document at Appendix K is an email from [REDACTED] to [REDACTED] and 3 others (not [REDACTED]) dated May 20, 2011, with a subject of "[REDACTED]'s project list" and an attached Excel spreadsheet titled "My Projects". We do not need a copy of the document you referred to as being at Appendix K because your access request was for records of [REDACTED], not records of [REDACTED], [REDACTED] or [REDACTED].

Much of your request for review and the related information you provided in support of your request for review, does not relate to access request 2023-378 EDIT. I acknowledge that your intent may have been to show what you believe to be patterns of behaviour, or to explain why certain records are or would have been important to your various other legal actions involving government. However, a large portion of the information you have provided is not relevant to a review of the Public Body's decision in 2023-378 EDIT. Although I have reviewed and considered all the information you have provided, I will only address information that is relevant to my decision.

Request for Review

You express that you have concerns about three areas, which I summarize as follows:

- 1) Concerns about a trip report that you received in response to this access request;
- 2) The electronic copy of employee [REDACTED]'s emails from 2011 were unable to be searched; and
- 3) [REDACTED]'s records.

You also allege an offence occurred under the *Archives and Records Act*.

Not every request for review proceeds to inquiry. Section 64.1 of the *FOIPP Act* authorizes me to refuse to conduct an inquiry if, in my opinion, the circumstances warrant refusing to conduct an inquiry, or if the subject matter of the request for review has been dealt with already in an order or investigation report of the Commissioner.

For the reasons set out below, I am refusing to conduct an inquiry into the issues you have raised in your request for review of access request 2023-378 EDIT.

I will address each topic separately below.

1) Trip report

One of the records the Public Body provided to you in response to this access request is called a "trip report", which you describe in your request for review as a trip planner filed by [REDACTED]. You state you do not believe this record is responsive to this access request (2023-378 EDIT). However, you state you believe it was responsive to several access requests you made in 2019 but was not disclosed in any of those other requests. You wish me to review why this record was not disclosed in the other access requests but was disclosed in this one.

Pursuant to clause 64.1(b) of the *FOIPP Act*, I have the discretion to refuse to conduct a review if, in my opinion, the circumstances warrant refusing to conduct an inquiry. In my opinion, the circumstances warrant me refusing to conduct an inquiry into this concern, for two reasons:

1. I do not accept as accurate your description of this document as "a trip planner filed by [REDACTED]".

First, the record is titled "Trip Report", not "Trip Planner". In addition, I would expect a trip planner to be a document that would be prepared in advance of an upcoming event that has not yet taken place, and a trip report to be a document that would be prepared after an event had taken place. The trip report found at page 7 of 15 of the records disclosed to you in this access request was written in the past tense, and it seems fairly clear that it was written after the referred to trip had taken place rather than in anticipation of something that has not yet occurred. This strongly suggests that the record is, as it is titled, a "trip report", not a "trip planner" as you have described it.

Second, I am not persuaded the records is a record of [REDACTED], as you claim. This record is a similar format to a later trip report of [REDACTED], which you appended to your request for review at Appendix "B", but that is a different record than what was disclosed in response to your present access request. That record was dated May 2012, while the record at page 7 was dated February 2011, which was within the date range of access request 2023-378 EDIT.

Further, there is no indication the record at page 7 was a record of [REDACTED]. The report is unsigned, but I note that the author refers to themselves in the first person (i.e. "I"), and [REDACTED] in the third person, where it states that a file "was moved to [REDACTED]" and another person. This contradicts your belief that the report is a report from or filed by [REDACTED].

Your access request sought records of employee [REDACTED] that make mention of [REDACTED]. Your request did not mention [REDACTED] as a search parameter. Although unsigned, the fact that

this record was located and determined to be responsive to a search for records of [REDACTED] that mention [REDACTED], but was not located during searches for records of [REDACTED], supports that the record was more likely than not to have been a record of or from [REDACTED].

Therefore, on a balance of probabilities, I am satisfied that the record at page 7 of 15 of the records disclosed to you as responsive to access request 2023-378 EDIT is not a "trip planner filed by [REDACTED]" as you allege. I am persuaded, based on the information you have provided, that the record is more likely than not a trip report of [REDACTED].

2. You state that page 7 of 15 in 2023-378 EDIT was not responsive to access request 2023-378 EDIT. As set out above, I am persuaded that the record at page 7 of 15 is more likely than not a trip report of [REDACTED]. As such, it is responsive to access request 2023-378 EDIT.

You also state that this record should have been responsive to eight of your access requests from 2019 and should have been disclosed in those access requests. You appear to be asking me to review the Public Body's response in those eight access requests. I note that those access requests were from 2019, and it is well beyond the 60-day limitation period set out in the *FOIPP Act* for requesting a review. You did not ask me to extend the time for requesting a review in those eight access requests, but I considered it. I am not persuaded the circumstances warrant extending the time to request a review in the eight access requests from 2019.

If I was persuaded that the record at page 7 was responsive to one or more of your indicated 2019 access requests, I could potentially conduct a review of that other access request or requests. However, I am persuaded that the trip report found at page 7 of 15 of the Public Body's response to 2023-378 EDIT is not responsive to any of the eight access requests.

In 2023-378 EDIT, you requested records of [REDACTED] which mention [REDACTED], from February 1, 2011 to September 1, 2011. None of the eight access requests from 2019 were for records of [REDACTED]. Further, two of the access requests (2019-010 and 2019-091) were for records from 2012. Page 7 of 15 is dated February 14, 2011. A record from February 2011 is not responsive to requests for records from 2012. The other access requests were for records within the relevant time period, but were for records of individuals other than [REDACTED]. More specifically:

- three (2019-008, 2019-011, 2019-014) were for records of [REDACTED] and, as I set out above, I am not persuaded this record is a record of [REDACTED];
- two (2019-092, 2019-103) were for records of other individuals that were sent to or received from or mentioned other individuals who were not [REDACTED] or [REDACTED]; and
- the remaining access request (2019-284) was for records of [REDACTED] "sent to or received from [REDACTED]".

I am not extending the request for review period for any of these eight access requests because I do not agree that the trip report would have been responsive to the eight access requests from 2019 and should have been disclosed to you in those other access requests.

2) Unable to locate emails — Section 8 duty to assist

The Public Body searched for records responsive to your access request and located some responsive records. They advised you in their decision letter that they were not able to search the electronic copies of ██████'s email for the period of your access request.

In your request for review, you refer to Order FI-20-007, *Re: Department of Economic Growth, Tourism and Culture*, 2020 CanLII 43897 (PE IPC), in which the Department of Economic Growth Tourism and Culture (EGTC), gave you some records, but remained silent about the possibility that other records might have existed at one time, but were not retained. Former Commissioner Karen A. Rose held that EGTC did not fulfill their duty to be open, accurate, and complete when responding to you and another applicant because they knew, but did not tell you, that electronic copies of emails were not retained.

Order FI-20-007 does not apply here, as it is distinguishable on the facts. In the present matter, the Public Body stated, in their decision letter, that "the employee was unable to locate e-mails in their archive dated in 2011, during the time period of this request". In FI-20-007, the public body failed to inform you and the other applicant that they were unable to search an employee's email even though they knew the emails were not available to be searched. Here, however, the Public Body advised you that they were not able to search through the electronic copy of the employee's email account.

You ask further "how are they missing and why hasn't [the Deputy Minister] explained to me why they are missing?". You allege that this explanation is part of the Public Body's duty to respond to you openly, accurately, and completely.

Respectfully, I disagree with your interpretation of section 8 of the *FOIPP Act*. While subsection 8(1) of the *FOIPP Act* requires public bodies to make every reasonable effort to assist a person who makes a request for access to a record, it does not mean they have to answer every question asked. This is an issue that has been previously explored by our office (see: Order FI-22-005, *Re: Health PEI*, 2022 CanLII 83333 (PE IPC), at paragraph 24).

The *FOIPP Act* applies to access to records, not access to information in general. A public body may choose to answer questions asked by an applicant, but they are not required to do so under the *FOIPP Act*. The Public Body is not required by law to answer your questions, and I do not have the authority to order the Public Body to answer your questions.

The subject matter of your request for review regarding records management of the Public Body, a public body's obligation to inform an applicant of a limitation in their ability to search

records and whether a public body is required to answer an applicant's questions are all subject matters that have been dealt with in previous orders of this office. In relation to the Public Body's inability to search the electronic copy of █████'s emails in access request 2023-378 EDIT, I am of the opinion that the circumstances warrant refusing to conduct an inquiry as the Public Body advised you that they were unable to search the electronic copies of █████'s emails for the time period of your access request, and they are not required to answer your questions.

For these reasons, pursuant to clauses 64.1(a) and 64.1(b) of the *FOIPP Act*, I am refusing to conduct an inquiry into the Public Body's inability to search the electronic copies of █████'s emails.

The Public Body advised you that they were making inquiries about the emails, and we asked the Public Body about the results of their inquiries. As you will see in the enclosed exchange, the Public Body advises their employee knew when searching other access requests (2023-346 EDIT and 2023-347 EDIT) that they did not have electronic email records to search, but the Public Body did not advise you of this fact when responding to those other access requests. I understand they did advise you of this later.

The Public Body distinguishes between when the searcher knew there were missing records, and when the head of the Public Body knew. This may be an issue with the Public Body's internal communication. Although I am refusing to conduct an inquiry into this issue, my intention is to recommend that the Public Body add to their search forms a space for searchers to indicate if there are any records they were unable to search and why, and a space for searchers to explain why a record was not located, where there is a concern that potentially responsive records were not able to be searched for or located.

3) █████'s records

You describe this issue as "the mystery of █████'s destroyed emails". You also remark that the Public Body did not advise you that the email account of █████ does not exist.

In access request 2023-378, I would not expect the Public Body to search records of █████, or advise you that the electronic copies of █████'s emails no longer exist. It is immaterial to access request 2023-378 whether the email accounts of █████ exist, because you asked for records of █████ not records of █████

In your request for review, you made comments about █████ having proxy access to both █████'s and █████'s records. You remark: "█████ was granted proxy to █████'s records, so how is it possible for █████ to not have any emails that make mention of █████?" It may be that you believe █████ having proxy access to those records means they are now the records of █████ and would have been included in a search of █████'s records. If so, this is not the case. Having proxy access merely means that person is authorized to access the other person's records if access to those records is necessary and the person is not available to access them themselves.

████ having proxy access to █████'s email records did not make those records █████'s records. Because you did not ask for records of █████, the Public Body would not have been required to, and I would not have expected them to, search █████'s records to respond to your access request 2023-378. Therefore, whether █████'s records exist or not, and whether the Public Body told you they no longer exist, are moot points in this matter.

For these reasons, in my opinion the circumstances do not warrant conducting an inquiry and, pursuant to clause 64.1(b) of the *FOIPP Act*, I am refusing to conduct an inquiry into your concerns about the Public Body not advising you that they were not able to electronically search █████'s email records because you did not ask for records of this employee.

Offence under the *Archives and Records Act*

You refer to offence provisions in the *Archives and Records Act* which make it an offence to destroy, erase, remove, conceal, etc., a public record, with the intent to deprive a public body, the Public Archives and Records Office or the Provincial Archivist of the custody, control or use of, or access to, a public record. You acknowledge that this provision was not in force until 2017, but that it would be an offence if the records were destroyed after 2017. We do not know when the emails went missing.

The employee does not recall when the electronic email records went missing. As we learned from the review that resulted in Order FI-20-007, the province does not have the technical capacity to assess when an email was deleted – unless it was deleted within the previous 365 days. With the provincial system, a public body can tell if records had been deleted in the previous year and retrieve them. The Public Body advises they checked, and the electronic email records were not destroyed in the last year. Beyond this, there is no way to tell when the electronic email records were destroyed.

Clause 50(1)(a) of the *Freedom of Information and Protection of Privacy Act* (the "*FOIPP Act*") authorizes us to investigate to ensure compliance with rules relating to the destruction of records, but I must consider whether the circumstances warrant an inquiry. The most relevant circumstance is that the province's records management and destruction of some records from 2011-2012 has already been the subject of intense public scrutiny, investigations and analysis.

As I have recently explained in other reviews, although these reviews did not relate to the files of the administrative assistant, I still find that our Office could not expand on the conclusions, recommendations of the independent officers of the Legislative Assembly, nor the investigations by the Legislature, or the subsequent actions of the province. The provincial government has made genuine and focused efforts to improve recorded information management.

For these reasons, in my opinion the circumstances do not warrant an investigation into the destruction of records of the administrative assistant "to ensure compliance . . . with rules relating to the destruction of records" under clause 50(1)(a) of the *FOIPP Act*. Therefore,

pursuant to subsection 64.1(b) of the *FOI/PP Act*, I am refusing to conduct an inquiry into the destruction of these records.

Sincerely,


Denise N. Doiron
Information and Privacy Commissioner

cc: APSO

Attachment: email exchange between Maria MacDonald and Bobbi-Jo Dow Baker, March 2024 ,
with attachments (15 pages)