

Prince Edward Island

Legislative Assembly

Information and Privacy Commissioner PO Box 2000, Charlottetown PE Canada C1A 7N8

Île-du-Prince-Édouard

Assemblée législative

Commissaire à l'information et à la protection de la vie privée C.P. 2000, Charlottetown PE Canada C1A 7N8

PRIVATE AND CONFIDENTIAL	
	September 20, 2024
	Via Email
Dear de la company de la compa	
Re: Request for Review under the Freedom of Information and Public Body: Department of Economic Development, Interview 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 assistant with the Department of Economic Development, Innovat Body"), from a period in 2011, that mention a specific named indirequested:	tion and Trade (the "Public
"All records in any format (including emails, Calendar Entri messenger and/or paper) of that make mention of Record Search: From February 1, 2011 to September 1, 202	." Date Range for
The Public Body provided you with 15 pages of responsive records redacted under section 15(1) of the <i>Freedom of Information and F</i> ("FOIPP Act"). You requested a review of the Public Body's response	Protection of Privacy Act

Preliminary Matters

Baker, solicitor for the Public Body.

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

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

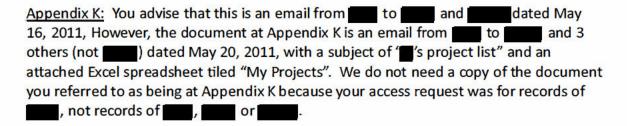
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Appendix B: You advise that page 7 of access request 2023-378 EDIT is at Appendix B, but it is not. At Appendix B to your request for review, you enclosed a 2-page trip report of from May 2012. The top line that would ordinarily identify the access 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.

<u>Appendix J:</u> 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.



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 are 's emails from 2011 were unable to be searched; and
- 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

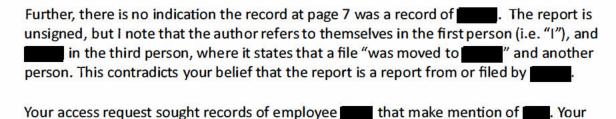
One of the records the Public Body provided to you in response to this access request is called a "trip report", which you describe in your request for review as a trip planner filed by state you do not believe this record is responsive to this access request (2023-378 EDIT). However, you state you believe 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:

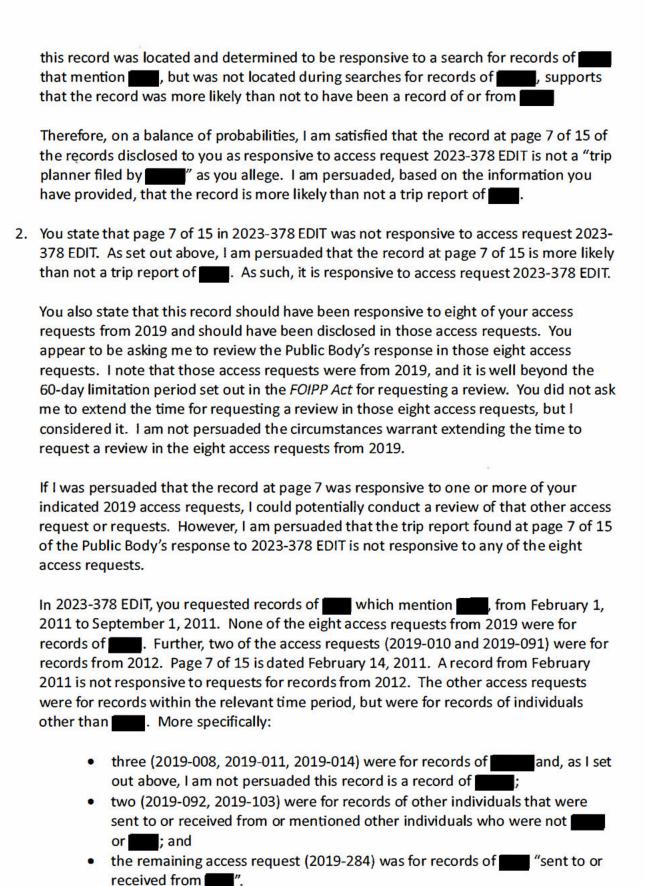
I do not accept as accurate your description of this document as "a trip planner filed by

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 _____, as you claim. This record is a similar format to a later trip report of _____, 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.



request did not mention as a search parameter. Although unsigned, the fact that



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.

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 Fl-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 Fl-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 Fl-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

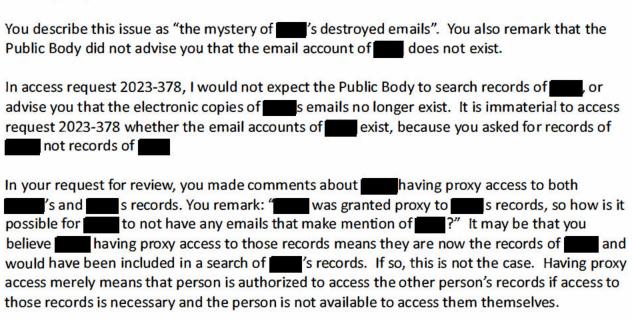
records and whether a public body is required to answer an applicant's questions are all subject matters that have been dealt with in previous orders of this office. In relation to the Public Body's inability to search the electronic copy of semails in access request 2023-378 EDIT, I am of the opinion 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 semails 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 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



having proxy access to see a s
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 search search 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 search

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 *FOIPP 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)