



Prince Edward Island Île-du-Prince-Édouard

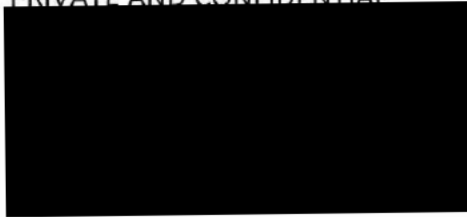
Legislative Assembly

Assemblée législative

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

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

PRIVATE AND CONFIDENTIAL



June 11, 2024

VIA EMAIL

Dear [REDACTED],

Re: Request for Review under the *Freedom of Information and Protection of Privacy Act*
Public Body: Premier's Office
PB Ref. No.: 2024-27 PO
OIPC File No.: C/24/000160 (formerly FI-24-582)

This review relates to an applicant's access to information request to the Premier's Office for:

All correspondence between the Premier's Office and the Medical Society of PEI regarding the planned UPEI Medical School.
(Date Range for Record Search: From 5/1/2019 to 1/18/2024)

The Premier's Office (the "Public Body") consulted the Medical Society of PEI ("MSPEI") as a third party whose business interests might be affected by disclosure, pursuant to sections 14 and 28 of the *Freedom of Information and Protection of Privacy Act* (the "*FOIPP Act*"). The Public Body consulted MSPEI in relation to 61 pages of records it was considering disclosing, which contained business information of MSPEI. MSPEI objected to the Public Body disclosing 19 of the pages of records it was consulted on. After consultation, the Public Body decided that the 19 pages MSPEI objected to disclosure of did not meet the legal test under section 14, so they were not authorized to withhold them under the *FOIPP Act*. You have asked us to review the decision of the Public Body to disclose some of these records.

Not all requests for review proceed to an inquiry. The first step in any request for review is for us to determine whether or not to conduct an inquiry. Under section 64.1 of the *FOIPP Act*, I have the discretion to refuse to conduct a review if, in my opinion, the circumstances do not warrant a review.

After careful consideration of all the circumstances, and for the reasons more particularly described herein, I am refusing to conduct an inquiry in this matter.

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Consultation Records vs. Disclosure Records

In your request for review, dated March 18, 2024, you asked us to review whether section 14 of the *FOIPP Act* applied to the 19 pages of the 61 MSPEI was consulted on that you had requested the Public Body not to disclose pursuant to subsection 14(1) of the *FOIPP Act*. More specifically, you claimed on behalf of MSPEI that pages 13, 15-18, 26, 27, 28, 29, 30, 50, 51, 52, 54, 56, and 58-61 of 61 should be withheld under subsection 14(1).

We note that the Public Body consulted you on 61 pages but decided to disclose 58 pages, not 61. The Public Body advises that pages 26, 27, and 28 of 61 were duplicates, which is why the final decision was for disclosure of 58 pages of records rather than 61.

As the Public Body’s decision of February 29, 2024 contained the 58-page disclosure records, and this is the decision you requested we review, we will refer to the page numbers within that document. The pages correspond as follows:

Consultation Records (61 pages)	Disclosure Records (58 pages)
13	13
15-18	15-18
26, 27,28	N/A
29	26
30	27
50	47
51	48
52	49
54	51
56	53
58-61	55-58

Records at Issue

Although the Public Body decided that subsection 14(1) did not apply to the 19 pages you objected to disclosing, when the Public Body made their decision, pages 26, 27 and 28 were not included in their final pages for disclosure, so we do not consider those pages at issue for your request for review.

With regard to the remaining 16 pages, the Public Body decided that they were not authorized to withhold any of them under subsection 14(1) of the *FOIPP Act*, but decided to withhold eight of them under subsection 22(1) [advice to officials]. Even though the Public Body decided not to disclose these eight pages under a different provision, I included them in my assessment of whether I would conduct an inquiry into the application of subsection 14(1). The reason is that subsection 14(1) is a mandatory exception to disclosure but subsection 22(1) is a discretionary

one, and the Applicant could request our office to review the Public Body's decision to withhold these eight pages under subsection 22(1). If subsection 14(1) applies, then the Public Body could not disclose them even if a review determined subsection 22(1) did not apply. For clarity, I am not reviewing whether subsection 22(1) applies to these eight pages, only explaining why I included them in my assessment of whether subsection 14(1) might apply even though the Public Body's decision was to refuse access to them.

The following 16 pages of the disclosure records are the records at issue for the application of subsection 14(1) of the *FOIPP Act*: pages 13,15-18, 26, 27, 47, 48, 49, 51, 53, and 55-58 of 58.

MSPEI Position

MSPEI's position is that subsection 14(1) of the *FOIPP Act* requires the Public Body to refuse the Applicant access to the pages at issue. We requested the Public Body provide us with a copy of their processing file, including the responsive records, which we received and reviewed.

MSPEI opposes the Public Body disclosing these pages to the Applicant, submitting that the information is labour relations information of MSPEI, that it was submitted to the Public Body in confidence, and that disclosing it will significantly interfere with MSPEI's negotiating position and competitive position. It is MSPEI's position that these factors meet the test set out in subsection 14(1) of the *FOIPP Act* and the Public Body is therefore required to withhold the information.

Burden of Proof

The Public Body has decided that subsection 14(1) of the *FOIPP Act* does not apply, and that they are not authorized to refuse access to these records. Under subsection 65(3)(b) of the *FOIPP Act*, the burden of proof rests with MSPEI to show that the Applicant has no right of access.

Legal Test

As you set out in your request for review, MSPEI has the burden to show that each of the three parts of subsection 14(1) are satisfied. The three parts of the test that must be met are:

1. The disclosure of the requested information would reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party [clause 14(1)(a)];
2. The information in question was supplied implicitly or explicitly in confidence [clause 14(1)(b)]; and

3. The disclosure of the requested information could reasonably be expected to cause one or more of the harms set out in clause 14(1)(c) of the *FOIPP Act*.

Even if I were to accept that the information was labour relations information and that it was implicitly supplied in confidence, which would meet the first two parts of the legal test, based on the information you have provided, my assessment is that MSPEI does not have a reasonable chance of success of showing that they can meet the third part of the test. As all three parts of the test must be met before subsection 14(1) applies, I find there is no reasonable possibility that MSPEI can meet the requirements for subsection 14(1) to apply.

To satisfy the test for a reasonable expectation of harm under clause 14(1)(c), MSPEI must show:

- (a) a clear cause and effect relationship between the disclosure and the alleged harm/interference;
- (b) the harm/interference caused by the disclosure must constitute damage or detriment and not simply hindrance or minimal interference; and
- (c) the likelihood of harm/interference must be genuine and conceivable.

I find that, on the face of it, MSPEI has no reasonable possibility of success in meeting its burden of proof. My reasoning is set out below.

It is foreseeable that MSPEI is negotiating with the Government of PEI because the Master Agreement from April 2019 recently expired, and we are not aware of a successor agreement. The parties to the Master Agreement are MSPEI, Health PEI and Government of PEI. Health PEI is a Crown Corporation of the provincial government. The Premier's office is part of the provincial government. MSPEI sent the information contained in the records to individuals within the Premier's Office, who are representatives of the provincial government. If you are negotiating with the provincial government, the Government of PEI already has the information you are objecting to being disclosed.

As the parties to the negotiations already have the information that is contained within the records, disclosure of the information could not be reasonably expected to impact MSPEI's competitive position or negotiating position. If there is any impact on MSPEI's competitive position or negotiation position, this impact would be felt notwithstanding any decision about this access to information request. There is no cause and effect relationship between the disclosure and the alleged significant harm or interference.

We do not agree that any content of the records at issue would cause significant harm to MSPEI's competitive position or significant interference with your negotiation position. You alleged that significant harm could result because MSPEI's position in negotiations was different than what was presented in the records. We note that the information in the records is one to

three years old. If any content from these one to three-year-old records is raised in negotiations, it can be easily addressed. It is not unusual for a party to change or modify their position prior to entering into negotiations, as more information is gained, and a party completes their analysis. If disclosure of the records at issue were to have any impact on MSPEI's negotiating position, it would be minimal at best.

MSPEI has not established a *prima facie* case that disclosure of the records could reasonably result in significant damage or detriment to MSPEI and their negotiating position.

Also, while MSPEI does not have to prove with absolute certainty that harm will occur, there must be some reasonable basis to show that the likelihood of the claimed harm is genuine and conceivable. MSPEI has alleged that the disclosure of the records at issue would harm their negotiating position or competitive position.

Although in your request for review, you made the statement that disclosure of the records would significantly harm the competitive position of MSPEI, you provided no further information about this claim. As MSPEI is the only representative for the physicians' group in the province, it is difficult to see where there is a competitive position to be harmed.

With regard to the negotiating position, as I have already described above, the information in the records is already in the knowledge of the Government of PEI because MSPEI provided it to them through the Premier's Office. As Government of PEI is a party to the negotiations with MSPEI and is already aware of MSPEI's previous position, no genuine and conceivable harm could reasonably be expected to result to MSPEI's negotiating position if the records at issue are disclosed.

MSPEI has not established a *prima facie* case that there is a clear cause and effect relationship between the disclosure of the records at issue and the alleged harm to MSPEI's competitive position or negotiating position, nor has MSPEI established a *prima facie* case that there is a genuine and conceivable likelihood of damage or detriment to MSPEI's competitive position or negotiating position if the records at issue are disclosed. For these reasons, there is no reasonable possibility of MSPEI meeting its burden of proof to show that the Applicant has no right of access to the records at issue under subsection 14(1) of the *FOIPP Act*.

Refusal to conduct an inquiry

Based on all of the above, including a careful review of your five-page request for review and the Public Body's processing file, it is apparent on the face of it that MSPEI cannot reasonably be expected to meet all three parts of the test required for subsection 14(1) to apply to any of the records at issue. As MSPEI does not have a reasonable possibility of success if a review is conducted, it is my opinion that the circumstances do not warrant conducting an inquiry.

Therefore, for the reasons set out above, and pursuant to clause 64.1(b) of the *FOIPP Act*, I am refusing to conduct a review in this matter.

Next Steps

Because I have refused to conduct a review, we will be closing our file in this matter.

We will notify the Applicant that we received, but refused, a request to review. Subsection 62(1) of the *FOIPP Act* requires us to give a copy of a request for review to anyone the Commissioner thinks would be impacted by the review. We do not intend to give the Applicant a copy of your request for review because we are not conducting a review and, as such, they will not be affected by the request for review.

We are copying the Public Body on this letter as notice to them that we have refused to conduct a review. I am not directing them to do so, but they may wait for the judicial review period to expire prior to disclosing the records to the Applicant.

As noted earlier, the Public Body's decision letter to MSPEI indicated they were withholding from disclosure eight of the 19 pages of records MSPEI had requested not be disclosed but had decided to withhold them under subsection 22(1) of the *FOIPP Act*, not subsection 14(1). Once records are disclosed to the Applicant, the Applicant will have the opportunity to request a review of the Public Body's decision. If the Applicant requests a review of the Public Body's decision to not disclose the eight pages of records that contain information about MSPEI, the Public Body bears the burden to establish to my satisfaction that section 22(1) of the *FOIPP Act* applies.

Sincerely,



Denise N. Doiron
Information and Privacy Commissioner

c. Premier's Office
APSO