

**ANNUAL REPORT
2005**

**OFFICE OF THE
INFORMATION AND PRIVACY COMMISSIONER**

PROVINCE OF PRINCE EDWARD ISLAND



May 4th, 2006

The Honourable Gregory Deighan
Speaker of the Legislative Assembly
Province of Prince Edward Island
Province House
Richmond Street
P.O. Box 2000
Charlottetown, PE
C1A 7N8

Dear Mr. Speaker:

In accordance with section 59(1) of the *Freedom of Information and Protection of Privacy Act*, S.P.E.I., 2002, I enclose the Annual Report of the Office of the Information and Privacy Commissioner for the period January 1, 2005 to December 31, 2005.

Respectfully submitted,

M. Rebecca Wellner
Information and Privacy Commissioner

/emc

TABLE OF CONTENTS

	Page
The purposes of the Freedom of Information and Protection of Privacy Act	1
Message from the Information and Privacy Commissioner	2
The Office of the Information and Privacy Commissioner	4
Duties under the <i>Act</i>	4
Public Bodies under the <i>Act</i>	5
Review Procedural Chart	7
Overview of 2005	8
Amendments to the <i>Act</i>	8
Government Re-organizes Health and Services System	9
Summary of Selected Orders	10
- Freedom of Information:	
Order No. 05-002	10
Order No. 05-003	11
Order No. 05-004	13
- Privacy:	
Order No. PP-05-001	15
Statistics	16
Appendix A - Summary of Applications for Review	17
Appendix B - Summary of Privacy Complaints	19

The Purposes of the *Freedom of Information and Protection of Privacy Act*

Section 2 of the *Act* states:

2. The purposes of this Act are

(a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act;

(b) to control the manner in which a public body may collect personal information from individuals, to control the use that a public body may make of that information and to control the disclosure by a public body of that information;

(c) to allow individuals, subject to limited and specific exceptions as set out in this Act, a right of access to personal information about themselves that is held by a public body;

(d) to allow individuals a right to request corrections to personal information about themselves that is held by a public body; and

(e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.

Message from the Information and Privacy Commissioner

This is the third annual report to the Speaker of the Prince Edward Island Legislative Assembly on the operations of the Office of the Information and Privacy Commissioner, this being my first as my appointment as Commissioner became effective June 6, 2005. As an independent Officer of the Legislative Assembly, my report serves a number of purposes: to provide accountability of this office to the Legislative Assembly; to communicate any specific challenges affecting the operations of this office; and to inform the public of the functions of this office.

The Office of the Information and Privacy Commissioner continues to be designated as a part-time office, with the Commissioner's time being limited to 22.5 hours per week and her assistant's time being limited to 25 hours per week. The time allotted is not sufficient to address the backlog of reviews that existed at the time of my appointment, as well as those begun since that time, while also attending to the normal day-to-day telephone, email, mail, and in-person inquiries received by this office. I have formally raised my concerns with the Legislative Management Committee making recommendations that the positions of Commissioner and her assistant be made full-time and that the financial resources allotted this office be increased, but I regret to report that my recommendations were not accepted or approved by the Committee.

The Office of the Information and Privacy Commissioner was created in November 2002, and since 2003 the backlog of incomplete reviews has continued to grow. The reality of the backlog, combined with the complexity of the work, the time it takes to research the issues and complete a review, have put the office in a position whereby we cannot adhere to the guidelines within the *Act* that a review be completed within 90 days. In her Annual

Report 2003-2004, the previous Commissioner reported that since the Act's inception, only 3 of the 27 files which resulted in Orders of this office to that date had been completed within 90 days.

As a point of interest, Prince Edward Island's *Freedom of Information and Protection of Privacy Act* very closely resembles that of Alberta's *Freedom of Information and Protection of Privacy Act*. However, included in the organizational structure of the Office of the Information and Privacy Commissioner of Alberta, in addition to the Commissioner, are separate positions of Inquiry Clerks, Adjudicators, Administrative Assistants, the Director of Policy and Consultation, a Research and Issues Manager, an Information Technology Team, a Legal Team, the Human Resources and Finance Team, and the FOIP Team. In this respect, I would like to thank my assistant, Ellen Connolly, for her tremendous dedication to her work as she competently performs many complex duties over and above that normally required of administrative support. Ms. Connolly is truly an asset to this office.

The Office of the Information and Privacy Commissioner

Duties under the Legislation

The Commissioner is an independent Officer of the Legislative Assembly appointed by the Legislature for a term of five years. Pursuant to the *Freedom of Information and Protection of Privacy Act*, the Commissioner has broad powers to conduct reviews and issue final and binding orders. Under the *Act*, the Commissioner is responsible for a broad range of functions, including:

- conduct reviews of any decision, act or failure to act of the head of a public body that relate to the request of an applicant for access to a record or for correction of personal information;
- conduct reviews as requested by a third party notified under section 29 of the *Act* of a decision by the head of a public body to give access to a record;
- conduct reviews of complaints that a public body has collected, used or disclosed personal information contrary to the privacy protections of the *Act*;
- make final and binding orders;
- may authorize a mediator to investigate and attempt to settle any matter that is the subject of a request for a review.

In addition, the Commissioner is generally responsible for monitoring how the *Act* is administered to ensure that its purposes are achieved, and may

- (a) conduct investigations to ensure compliance with any provision of this *Act* or compliance with rules relating to the destruction of records set out in any other enactment of Prince Edward Island;
- (b) make an order described in subsection 66(3) whether or not a review is requested;

- (c) inform the public about this *Act*;
- (d) comment on the implications for freedom of information or for protection of personal privacy of proposed legislative schemes or programs of public bodies;
- (e) comment on the implications for protection of personal privacy of using or disclosing personal information for record linkage;
- (f) authorize the collection of personal information from sources other than the individual the information is about;
- (g) bring to the attention of a public body any failure by the public body to assist applicants under section 8; and
- (h) give advice and recommendations of general application to the head of a public body on matters respecting the rights or obligations of a head under this *Act*.

Public Bodies under the *Act*

Subject to those exceptions stated in section 4, the *Act* applies to all records in the custody or under the control of a public body. A public body is defined in section 1(k) of the *Act* as:

- 1.(k)(i) a department, branch or office of the Government of Prince Edward Island,
- (ii) an agency, board, commission, corporation, office or other body designated as a public body in the regulations,
- (iii) the Executive Council Office, and
- (iv) the office of an officer of the Legislative Assembly, but does not include
 - (v) the office of the Speaker of the Legislative Assembly and the office of a Member of the Legislative Assembly, or
 - (vi) the Supreme Court of Prince Edward Island or the Provincial Court of Prince

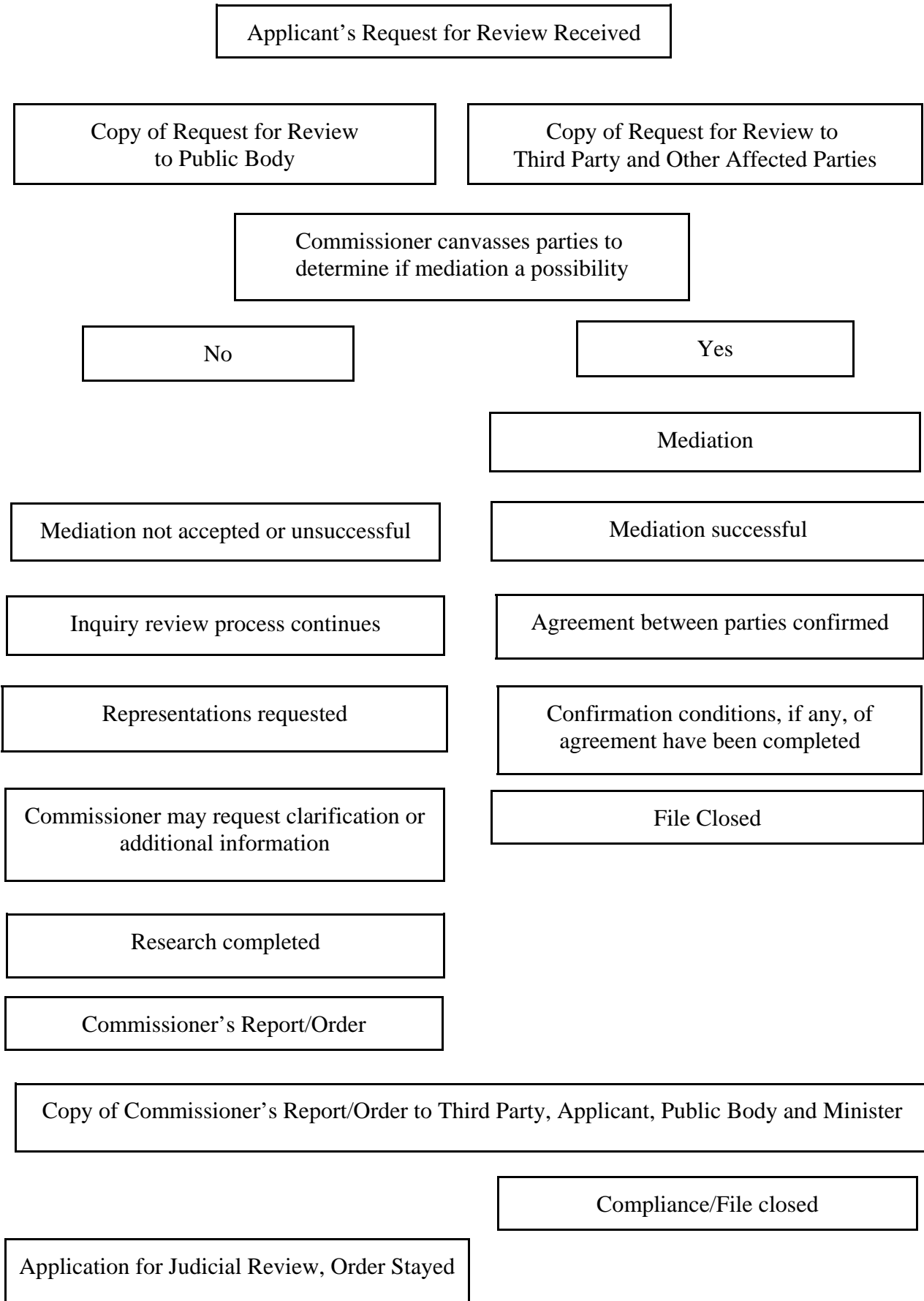
Edward Island.

Including those recently added by amendment, there are currently 123 designated public bodies subject to oversight by the Office of the Information and Privacy Commissioner.

Review Process Procedural Chart

To help better understand the review process of this office, a procedural chart is set out on the following page.

Review Procedural Chart



Overview of 2005

This is the third full year of operation of the Office of the Information and Privacy Commissioner. The former and first Commissioner resigned effective April 29, 2005. The position was empty from April 30th until my appointment effective June 6, 2005.

At the time of the resignation of the previous Commissioner, there were thirty-one (31) reviews remaining to be completed. Investigations were complete in ten (10) files but research not completed or Orders issued. After my appointment, three (3) additional requests for review and one (1) privacy complaint were received in 2005.

One (1) freedom of information review had been carried forward from 2003. At the time of writing this report, all issues in that review were resolved in 2005 with the exception of the applicant's request for a waiver of fees. An Order will be issued in 2006 with respect to this outstanding issue. Twenty (20) review files had been carried forward from 2004, eight (8) of which resulted in either Orders being issued or the matters being resolved without the necessity of an Order. The total number of new freedom of information reviews in 2005 was thirteen (13). The total number of new privacy investigations was two (2). Five (5) files resulted in Orders in 2005.

Twenty-seven (27) files have been carried over to 2006 and at the date of this report, two of those files have resulted in an Order and one other was resolved.

Amendments to the Act

During the Fall sitting of the General Assembly, amendments to the *Act* were passed. The amendments were based, in part, upon recommendations of the previous Commissioner made in consultation with the Standing Committee on Community Affairs and Economic Development in 2004.

The amendments include, among others: provision for the use of an adjudicator in

situations where the Commissioner has a conflict; administrative changes to correct titles of various offices; school boards as public bodies; clarification of the procedure to be followed in requesting a fee waiver; and, provision that requires another review of the *Act* within three years.

Unfortunately, this office was not notified in advance of the proposed amendments. However, the department responsible for administration of the *Act*, being the Office of the Attorney General, has agreed that, as a courtesy, they will endeavour to provide this office with advance notice of any anticipated amendments to the *Act* in future.

Government Re-organizes Health and Services System

On November 8, 2005, Government announced the reorganization of the health and social services systems by the amalgamation of the four regional health authorities, the Provincial Health Services Authority and the Department of Health and Social Services into two new ministries, namely, the Department of Health and the Department of Social Services and Seniors.

At the time of the reorganization, our office had seven open review files, two of which involved the former Queens Health Region, one involved the West Prince Region, one involved the Kings Health Region, one involved the Provincial Health Services Authority, and two files involved the former Department of Health.

Summary of Selected Orders

Freedom of Information Matters

(1) Order No. 05 - 002 Third Party Request for Review

Date Issued: February 25, 2005

Public Body: Workers Compensation Board

The Applicant requested the Public Body provide records relating to the fees, retainers and any other monies paid to or on behalf of a doctor for work performed on behalf of the Public Body. The Public Body notified the affected Third Party of its decision to provide the Applicant with partial access to the records, and stated that information relating to the hourly rate and total amount paid for services would be withheld as it determined that disclosure of this information would be an unreasonable invasion of the Third Party's personal privacy. The Applicant subsequently referred the Public Body to Commissioner's Order No. 04-001 and requested it reconsider its decision regarding non-disclosure of the hourly rate and total amount billed. The Public Body reconsidered its decision and decided to release the hourly rate and total amount billed by the Third Party to the Applicant. Following receipt of the Public Body's decision, the Third Party filed a request for review with this office, confirming she wished to rely on sections 14 and 15 in support of non-disclosure of the records.

Following consultation with the parties, it was decided to proceed to mediation; however, due to delays the Applicant opted not to pursue that option.

Following discussion of sections 14 and 15 and upon analyzing the submissions of the parties, the Commissioner found that the Applicant was correct in his argument that the deeming provision of subsection 15(4)(f) applied to the personal information at issue in this case, and that disclosure of the information at issue was not an unreasonable invasion of the Third Party's personal privacy. Based on an analysis of subsections 15(2) and 15(3), the

Commissioner concluded that the Public Body properly decided to disclose the records at issue in their entirety.

Following her analysis of section 14, the Commissioner concluded that the records at issue revealed financial information of the Third Party in accordance with subsection 14(1)(a) and that subsection 14(1)(b) was also satisfied by the evidence that the Third Party's hourly rate was supplied implicitly in confidence. The Commissioner further concluded that the Third Party's argument under subsection 14(1)(c) failed, stating that the evidence was entirely speculative.

The Commissioner found that the head of the Public Body properly decided to disclose to the Applicant the records at issue in their entirety, in compliance with sections 14 and 15.

(2) **Order No. 05 - 003**

Date Issued: March 29, 2005

Public Body: Department of Transportation and Public Works

The Applicant was seeking information relating to restoration of the grounds of Government House following damage as a result of hurricane Juan in September, 2003. The Applicant posed numerous questions as part of his request.

After receiving a fee estimate from the Public Body, the Applicant asked the Commissioner to review the calculation of the fee estimate. In the Order, the Commissioner discussed section 76(3) and regulation 9(4) of the *Act* relevant to this review, the burden of proof, the calculation of the fee estimate and the analysis of fee estimates.

The Commissioner requested that the Public Body provide a written representation supporting the calculation of the fee estimate provided to the Applicant. The Public Body responded that it required a number of hours to search out and prepare a response for release to the Applicant's request. The Public Body stated that numerous staff were involved in

processing this request either searching or preparing a response to the request, while others were contacted to obtain information concerning the request. Staff reviewed the questions asked by the Applicant, visited the site, counted tree stumps, measured the woodpile, and met with an employee involved with the cleanup and removal of trees. Building Maintenance and Department of Highway staff were contacted to ascertain if other trees removed from Government land may have been cleaned up by Government employees and taken home by politicians or senior members of Government. A staff member prepared a written report of the investigation which was reviewed by the FOIPP Coordinator, following which a fee estimate was sent to the Applicant.

During the investigation, the Commissioner concluded that fundamental errors in the interpretation of the *Act* were made by the Public Body and that avoidance of such misinterpretation in the future should save the Public Body time dealing with further requests for access.

The Commissioner found that the Public Body acted beyond the requirements of the *Act* in responding to the Applicant's request. Searching for records is an appropriate response to an access request. On-site visits with a view to creating a record is not. The Commissioner noted that where an Applicant has a list of questions, it is incumbent on the Public Body to explain to the Applicant that its search is limited to existing records in its custody or control. In this case, hours were spent by employees of the Public Body counting tree stumps and gathering verbal information. This type of response is not contemplated by the *Act* or its regulations.

As the Public Body had committed itself to answering the Applicant's questions, the Commissioner ordered it to provide the report which was already drafted following the Public Body's investigation into the questions asked, as well as two additional records relating to the request. The Commissioner also ordered the Public Body to reduce its fee estimate to nil, as the time required to actually search and prepare the records responsive to the request did not exceed two hours.

(3) **Order No. 05 - 004**

Date Issued: April 27, 2005

Public Body: Provincial Health Services Authority

The Applicant in this case was a union representative seeking a breakdown of overtime hours worked by a Third Party in the scheduling department of the Third Party's place of employment. This request included all paid overtime or credited as time off in lieu in accordance with the Collective Agreement.

The Public Body denied access to all information based on section 37(1)(m) of the *Act*. The Public Body stated that since there was no provision under the applicable Collective Agreement for release of the type of information requested by a representative of a collective bargaining agent, then authorization in writing by the employee granting such access must accompany the request. The Applicant filed a request for review with this office. The affected Third Party was notified of the Applicant's request for a review and given an opportunity to provide written reasons for non-disclosure.

The parties were in agreement that the information sought was "personal information" as defined by section 1(i)(vii) of the *Act*, but the Applicant argued that disclosure of this personal information would not constitute an unreasonable invasion of the Third Party's personal privacy. This was the crux of the parties' disagreement.

The Applicant argued that subsection 15(4)(e) provided an exception to non-disclosure and pointed out that the Third Party is an employee of the Public Body. The Applicant relied on the Supreme Court of Canada's decision in *Daag* wherein a private consultant made an application for sign-in logs of a government department to determine whether union members were working overtime on weekends without claiming compensation. In *Daag*, the Court ruled in favour of the Applicant by concluding that the information sought fell within the "responsibilities" of the positions held by the individuals.

The present Applicant pointed out that the Applicant in *Daag* was not the Union and submitted that the Court's ruling in *Daag* should apply equally to overtime hours under FOIPP. The Public Body argued that the release of the information would constitute an unreasonable invasion of the Third Party's personal privacy. It acknowledged that section 15(4) outlines specific instances where information would not constitute such an invasion, but submitted that the requested information in this case did not fall within any of the enumerated categories of subsection 15(4).

The Commissioner found that the Applicant successfully invoked the deeming provision of subsection 15(4) so that the disclosure of the overtime hours of the Third Party is not an unreasonable invasion of the Third Party's personal privacy. However, in the event that a higher authority determined the finding that subsection 15(4) was invoked in error, the Commissioner went on to analyze the remaining arguments of the parties and made findings relating thereto.

Having regard to all the relevant circumstances under subsection 15(3), the Commissioner found that, on balance, the evidence favoured disclosure of the records at issue, and the presumption raised by subsection 15(2) had been rebutted by the Applicant, on a balance of probabilities.

The Commissioner also considered whether section 37 could be relied upon as an exception to disclosure.

The Commissioner found that the head of the Public Body had not properly applied section 15 in his decision of non-disclosure. In addition, the Commissioner found that the Public Body had not properly applied subsections 37(1)(d) and 37(1)(m) in their decision for non-disclosure, as these sections cannot properly be raised as an exception to disclosure. The Public Body was ordered to provide the records at issue, with any information not responsive to the request to be severed from the documents.

Privacy Matters

(1) Order PP-05-001

Date Issued: March 29, 2005

Public Body: Department of Health and Social Services

The Complainant's spouse, in this case, received a T5007 Statement of Benefits in error, containing the Complainant's financial information. The identifying information in the T5 was that of the Complainant's spouse. The Complainant is the recipient of the benefits on behalf of their child who receives benefits under the Disability Support Program. The issue arising from this complaint was whether the Public Body disclosed the Complainant's personal information in contravention of Part II of the *Act*.

Following her investigation, the Commissioner concluded that the Public Body violated Part II of the *Act* by disclosing the Complainant's financial information in a T5 being issued in the Complainant spouse's name. The Public Body was ordered to make changes to its policy and/or its computer system in order to accommodate its responsibilities under the *Act* relating to privacy of T5 financial information. The Commissioner required the Public Body to report to the Office of the Information and Privacy Commissioner within six months of the date of the Order to relay the steps taken to ensure that such violations of Part II of the *Act* are eliminated or at least minimized in the future.

Statistics

Summaries of the applications for review and privacy complaints are set out in Appendix “A” and “B” respectively, and which form part of this Annual Report.

APPENDIX "A"

FREEDOM OF INFORMATION SUMMARY OF APPLICATIONS FOR REVIEW

January 1, 2005 - December 31, 2005

PUBLIC BODY	REQUESTS FOR ACCESS TO INFORMATION *	APPLICATIONS FOR REVIEW	RESOLVED OR CLOSED	ORDERS ISSUED	ONGOING
Agriculture, Fisheries & Aquaculture	1	2			2
Community and Cultural Affairs	3	1			1
Development and Technology	4	4	2		2
Education	5				
Environment, Energy & Forestry	13	1	1		
Health	31	6	1	1	4
Tourism	2	2			2
Transportation and Public Works	3	7	2	2	3**
Executive Council Office	1	1			1
Office of the Attorney General	22	2			2
Office of the Premier	2	1	1		
Provincial Treasury	4	2	1		1
Social Services & Seniors	5				
Fathers of Confederation Buildings Trust					
Island Regulatory and Appeals Commission					

PUBLIC BODY	REQUESTS FOR ACCESS TO INFORMATION *	APPLICATIONS FOR REVIEW	RESOLVED OR CLOSED	ORDER ISSUED	ONGOING
Island Waste Management Corporation					
Prince Edward Island Liquor Control Commission	3				
Prince Edward Island Public Service Commission	3				
Workers Compensation Board of Prince Edward Island	4	3		1	2
Workers Compensation Board Appeal Tribunal		2	1	1	
Commission Scolaire de langue française	1				
Western School Board	1				
Eastern School Board	4	1			1
TOTAL:	112	35	9	5	21

* As obtained from Access and Privacy Services Office.

** Orders issued in January 2006

APPENDIX "B"

SUMMARY OF PRIVACY COMPLAINTS

January 1, 2005 - December 31, 2005

PUBLIC BODY	PRIVACY COMPLAINTS	RESOLVED OR CLOSED	ORDER ISSUED	ONGOING
Agriculture, Fisheries & Aquaculture				
Community and Cultural Affairs				
Development and Technology				
Education				
Environment, Energy & Forestry				
Health	4*	1	1	2*
Tourism				
Transportation and Public Works				
Executive Council Office				
Office of the Attorney General	1*			1*
Office of the Premier				
Provincial Treasury				
Fathers of Confederation Buildings Trust	1			1**
Island Regulatory and Appeals Commission				
Island Waste Management Corporation				
Prince Edward Island Liquor Control Commission				
Social Services & Seniors	1			1

PUBLIC BODY	PRIVACY COMPLAINTS	RESOLVED OR CLOSED	ORDER ISSUED	ONGOING
Prince Edward Island Public Service Commission	1*			1*
Workers Compensation Board of Prince Edward Island	2			2
Workers Compensation Appeal Tribunal				
Commission Scolaire de langue française				
Western School Board				
Eastern School District				
TOTAL:	8	1	1	6

* One privacy complaint involves three public bodies.

** Resolved in 2006.