Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3101

Appeal PA11-79

Ministry of the Attorney General

July 25, 2012

Summary: The appellant made a request to the ministry for records relating to the tests given to court interpreters as well as the results of those tests. The ministry denied access to portions of the responsive records on the basis of the mandatory exemption in section 21(1) as well as the discretionary exemptions in sections 13(1) (advice or recommendation), 15(b) (relations with other governments), 17(1) (third party information) and 18(1)(h) (economic and other interests of Ontario). The ministry also argued that some of the records were excluded from the *Act* under section 65(6)3. The ministry's decision is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of "personal information"); 13(1), 15(b), 17(1)(c), 21(1).

Orders and Investigation Reports Considered: *Ontario (Minister of Health and Long-Term Care)* v. Ontario (Assistant Information and Privacy Commissioner), [2003] O.J. No. 4123.

OVERVIEW:

[1] The Ministry of the Attorney General (the ministry) is responsible for the administration of courts in Ontario. As part of its business, the ministry arranges interpretation services for courtroom proceedings. Due to the unpredictability of demand, the ministry relies on several hundred fee-for-service freelance interpreters to augment the core staff of approximately 25 salaried court interpreters.

[2] The ministry facilitates scheduling these interpreters by maintaining an internal Registry of Accredited Freelance Court Interpreters ("the Registry") which contains the names and contact information of individuals who provide freelance interpretation services for the ministry. The Registry functions as a pool for court staff to draw from when hiring freelance interpreters for in-court matters.

[3] For many years, accreditation was based on the successful completion of a Standard Interpreter Aptitude Test and a training seminar on courtroom procedure and ethics. However, as part of its mandate to maintain a modern and professional court service, the ministry retained a panel of expert consultants to review its court interpretation system and provide recommendations for improvement. Based on that panel's recommendations, in 2006 the ministry decided to change its accreditation process, including its testing regime.

[4] The ministry issued a Request for Qualifications followed by a Request for Proposals, in which an organization (the affected party) was the successful bidder. The affected party undertook to:

- Provide new bilingual interpreter tests in the ministry's 24 highest demand languages as well as an English court interpreting test and an English test for the First Nations courtroom;
- Develop test preparation material for prospective candidates; and
- Provide advice in the development of an accreditation model to be used to assign interpreters to matters according to their skills.

[5] The appellant made a request to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

- A copy of the previous version of the Standard Aptitude Test for court interpretation,
- A copy of the new version of accreditation test for court interpreters (i.e. the version of the test which is conducted by [the affected party]),
- The results of the accreditation test, broken down by language tested,
- Any reports, studies, etc. that are related to the change in testing regimes.

[6] The ministry located the responsive records and provided partial access to them, withholding portions and citing the discretionary exemptions at sections 13(1) (advice or recommendation), 15(b) (relations with other governments), 17(1)(b) (third party information), 18(1)(h) (economic and other interests of Ontario), 20 (danger to safety or health) and the mandatory personal privacy exemption at section 21(1). The ministry also submits that the records (and portions of the records) are excluded from the *Act* under section 65(6).

[7] The appellant appealed the ministry's decision. During mediation, the ministry removed its claim of section 20. Accordingly, that exemption is no longer at issue.

[8] During my inquiry into this appeal I sought and received representations from the ministry, the affected party and the appellant. Representations were shared in accordance with Section 7 of IPC's *Code of Procedure* and *Practice Direction* 7. I received representations from the ministry and affected party only. I did not receive representations from the appellant, and staff from this office were unable to contact him.

[9] In this order, I uphold the ministry's decision.

RECORDS:

[10] The following table sets out the pages of record remaining at issue as set out in the Revised Index prepared by the ministry and provided with its representations during the inquiry into this appeal:

Page number	Exemption or Exclusion claimed	Partial or Full Severance	Description
442 – 444	13(1), 21(1)	Partial	Briefing note
445 – 447	13(1), 21(1), 65(6)	Partial	Briefing note
448***	Index says no exemption claimed	Partial	Test Results (Index says released)
449 – 453	13(1), 21(1)	Partial	Briefing note
454 – 459	13(1), 21(1)	Partial	Briefing note
460 – 465	21(1), 65(6)	Partial	Briefing note
466 – 483	21(1), 65(6)	Partial	Briefing note
484 – 488	13(1), 17(1)	Partial	Training for Court Interpreting Test Candidates
489 – 498	65(6)	Partial	Preliminary Discussion Paper
499	21(1)	Partial	Candidate Results – Chart
500 – 503	17(1)	Partial	Study Highlights
504 – 509	15(b), NR	Full	Emails
510 – 513	NR	Full	Emails
529 – 538	NR	Full	Test Specifications
539 – 547	17(1)	Full	Emails and Attachments
548 – 549	17(1), NR	Full	Scoring of Bilingual Test
571 – 572	17(1)	Full	Requirements for Non-English Speaking Translators, Voices, Markers
573 – 577	65(6)	Full	Proficiency Levels

578 – 587	15(b), 17(1)	Full	Report
588 – 589	15(b)	Full	Comments on Pass Rates (Duplicate of pages 606 – 607)
590 – 601	17(1)	Full	Consultation Document
602 – 605	17(1)	Full	Data Analysis Summary
606 – 607	15(b)	Full	Comments on pass rates
608 – 610	17(1)	Full	Validity Report
611 – 613	17(1)	Full	First Nations Report
614 – 638**	13(1), 17(1), 21(1), 65(6)	Full	Confidential Report
676 – 705	17(1)	Full	Research Report
706 – 714	15(b)	Full	Memorandum and Guidelines
715 – 720	15(b)	Full	Summary Document
740 – 744	15(b)	Full	Summary of Cross-Jurisdictional Research
747 – 750	15(b)	Full	Overview of Tests
757 – 761	15(b)	Full	Criteria Document – Research
762 – 769	15(b)	Full	Recommendation of Working Group – Research
770 – 787	15(b)	Full	Cross-Jurisdictional Review Document
788 – 814	15(b)	Full	Confidential Report
815 – 823	15(b)	Full	Research Report
824 – 825	15(b)	Full	Cross-Jurisdictional Review Document
826 – 978	15(b)	Full	Survey Responses
*Binder 1 and 2	18(1)(h), 17(1), 65(6)	Full	VCC (new) Court Interpreting Tests
*Binder 3 and 4	65(6)	Full	Standard Interpreter Aptitude Tests

*Records added with the ministry's representations.
**The ministry issued a revised decision following the submission of its representations. In this decision, the ministry noted that Appendix A "Report on the Initial Round of Court Interpreter Testing (pages 614 – 632 and 635 – 638) which was previously withheld, is now being partially released.
***Will order the withheld information disclosed as ministry no longer claiming section 21(1).

ISSUES:

A. What records are responsive to the request?
B. Does section 65(6) exclude records from the application of the *Act*?

C. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
D. Does the mandatory exemption at section 21(1) apply to the information at issue?
E. Does the discretionary exemption at section 15(b) apply to the records?
F. Does the mandatory exemption at section 17(1) apply to the records?
G. Does the discretionary exemption at section 13(1) apply to the records?
H. Was the ministry's exercise of discretion proper?

DISCUSSION:

A. What records are responsive to the request?

[11] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[12] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134 and P-880].

[13] To be considered responsive to the request, records must "reasonably relate" to the request [Orders P-880 and PO-2661].

[14] The ministry determined that some of the identified records were not responsive to the appellant's request. The appellant did not remove the issue of whether these records were responsive to his request during mediation so I will consider whether these records are in the scope of the appellant's request.

[15] In particular, the ministry has identified pages 510 – 513 and 529 – 549 as not responsive. The ministry submits that it attempted to adopt a liberal interpretation of the appellant's request and it resolved the ambiguities over the meaning of "reports, studies **etc**." in the appellant's favour. The ministry submits that it included briefing notes, tables and even detailed emails in the responsive records "under the auspices of the 'etcetera', because of the formality of the documents and the careful research that informed them."

[16] The ministry submits that the email chain (pages 510 – 513) and the emails and the track changes document on test specifications (pages 529 – 549) are not responsive because of the informal tone used in these documents. The ministry submits that these records formed part of an ongoing conversation and do not "rise to the level of report, study or something in that class."

[17] As stated above, the appellant did not make representations. Based on my review of the appellant's request and the records claimed not responsive by the ministry, I find that the information identified by the ministry does not reasonably relate to the appellant's request. The records identified by the ministry are emails and draft documents with comments relating to the interpreter testing. I find these records, and particularly the nature of the comments on these records, does not reasonably relate to the "change in testing regimes."

[18] Accordingly, I find that pages 510 – 513 and 529 – 549 are not responsive to the appellant's request and I uphold the ministry's decision on these records.

B. Does section 65(6) exclude records from the application of the *Act*?

[19] The ministry submits that the exclusion in section 65(6)3 applies to seven of the responsive records, including:

- Portions of the briefing notes titled *Contingency Planning to Ensure Court Interpreter Supply following test results* at pp. 462 and 464 and *Court Interpreter Testing Project Update and Next Steps* at pp. 467, 468 and 469;
- The portions of a preliminary discussion paper at pp. 492, 497, 498;
- Description of oral proficiency levels at pp. 573 – 577;
- Portions of a Confidential Report on the initial round of court interpreter testing at pp. 633 – 634, 636;
- The Standard Interpreter Aptitude Test (Binders 3 and 4); and
- The new versions of the court interpreter accreditation test (Binders 1 and 2).

[20] While the ministry has argued that only portions of the briefing notes and the confidential report are excluded from the application of the *Act* under section 65(6)3, I find it appropriate to consider the applicability of the exclusion to the whole of these records. The records for which the ministry has claimed the exclusion do not contain

distinct subject matters which can be separated easily from the rest of the information. Further, section 10(2) of the *Act* applies to exemptions and not the exclusions. I note that the ministry has already disclosed portions of these records to the appellant, however, if I find these records excluded from the *Act*, I cannot proceed to consider the exemptions claimed by the ministry for these records.

[21] Section 65(6)3 states, in part:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[22] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

[23] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them [Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).].

[24] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.].

[25] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

[26] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

[27] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

Section 65(6)3: matters in which the institution has an interest

Introduction

[28] For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Part One: Record collected, prepared, maintained or used by or on behalf of an institution

[29] The ministry submits that each of the records for which it has claimed the exclusion was collected, prepared, maintained or used by the ministry. In particular, the ministry submits the following:

- The briefing notes and the confidential report were prepared by the Court Interpretation Unit in the ministry's Court Services Division and were used to brief senior management in the ministry.

- The discussion paper was prepared by staff in the Court Interpretation Unit and used by others in the unit as part of the process for developing a future court interpreter model.

- The proficiency levels document was supplied by the Ministry of Government Services for use by the ministry. The affected party prepared the draft requirements for use by the Court Interpretation Unit.

- The Standard Interpreter Aptitude Test was prepared by ministry employees for use in assessing whether to add an applicant to its Registry of Freelance Interpreters.

- The new test was prepared by the affected party for use by the Court Services Division. The ministry uses the test to:

    - Determine whether individuals will be added to the Registry of Freelance Interpreters;
    - Assist in assigning appropriate work to staff interpreters and scheduling freelance interpreters; and
    - In future, it will use it as a component of competitions for staff interpreter positions.

[30] Based on my review of the records at issue, I find that the records were collected, prepared, maintained or used by or on behalf of the ministry. Accordingly, the ministry has met part one of the requirements for the application of the exclusion.

Part two: Records collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications

[31] The ministry submits that the briefing notes, discussion paper, proficiency level document and confidential report were prepared, used or maintained in relation to discussions about the new accreditation process, which would affect staff and freelance interpreters. One of the briefing notes was also prepared in relation to communications to interested parties, including freelance and staff interpreters.

[32] With regard to the Standard Interpreter Aptitude and new tests, the ministry submits that they have been administered to freelance interpreters, as a condition of their inclusion on the Registry. Further, the ministry notes that the new test will be administered to all future applicants for staff interpreter positions.

[33] Finally, the ministry argues that previous orders (notably Order P-1242) have found that employment-related interviews are "meetings, discussions or communication" and records generated with respect to interviews are therefore properly characterized as being "in relation to" them. The ministry submits that the interpretation test, like a job interview, is administered to the candidate to assess his or her ability to perform a paid function. Accordingly, the interpretation tests were prepared and used in relation to a meeting.

[34] Additionally, the ministry submits that in Order PO-2123, this office found that records used in deliberations about the results of a job competition among interview panel members are used in relation to "meetings, discussions and communications". As

such, the ministry submits that the new tests are used by the test markers (there are always two) in discussions about test scores.

[35] Based on my review of the records, I find that the briefing notes, discussion paper, proficiency level document and the confidential report were prepared, used or maintained in relation to meetings and discussions about the new accreditation process. It is evident that these records were meant to be the subject of discussion between ministry staff and/or staff and freelance interpreters.

[36] Further, I find that both the Standard Interpreter Aptitude Test and the new test were prepared and used in relation to meetings and discussions between the ministry and either a freelance or staff interpreter.

[37] Accordingly, I find the ministry has met part two of the requirements for the application of section 65(6)3.

Part three: Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest

[38] The ministry submits that its interest in remuneration and recruitment of staff interpreters is clear. However, it also argues that it has a labour relations interest in the remuneration and hiring of freelance interpreters. The ministry submits that in *Ontario* v. *Mitchinson* [2001] O.J. No. 3223 the Court of Appeal took a relatively expansive view of this part of the test, holding that the term "labour relations" extends to:

- Relationships with individuals who do work for the government but are not employees; and
- "relations and conditions of work beyond those related to collective bargaining."

[39] Accordingly, the ministry argues that its relationship with the freelance interpreters on its registry should be characterized as a labour relations one. Similarly, the ministry argues that the hiring of the freelance interpreters as fee-for-service contractors is akin to the remuneration of doctors by the Ministry of Health and Long-Term Care which was at issue in *MOHLTC* v. *OIPC*, [2003] O.J. No. 4123 (OCA) and the government and deputy judges (PO-2501).

[40] The ministry submits that while freelance interpreters are not competing in a job competition or technically being hired, the accreditation process is analogous because both are used to determine eligibility to perform certain paid tasks for the Government of Ontario.

[41] Finally, the ministry makes the following specific submissions relating to the records:

- The Briefing Note, the Discussion Paper and the Confidential Report refer to remuneration, workload and staffing levels for either staff or freelance interpreters[1].
- The Tests relate to the addition of freelance interpreters to the Registry and the new test will also be used as part of the competition process for new staff interpreters.
- The Proficiency Levels describe the levels of proficiency in French that are used by the Ontario government when evaluating candidates' French language skills for designated bilingual positions[2].

[42] The ministry submits that the information in the Proficiency Levels, because it describes the way in which recruits are assessed, is employment-related. The ministry's interest in the records derives from the fact that it was reassessing its own accreditation process at the time that it was provided.

[43] Based on my review of the records and the ministry's representations, I accept that the ministry's relationship with the freelance interpreters can be characterized as labour relations. The Court of Appeal's judgment in *Minister of Health and Long Term Care* indicates that finding a group of professionals not to be involved in "labour relations" with the government, because they are not its employees, is reading section 65(6)3 too narrowly. The Court also indicates that "labour relations" has a meaning that goes beyond the confines of collective bargaining. The Court holds:

> …the Assistant Information and Privacy Commissioner and the Divisional Court read the phrase "labour relations" in s. 65(6)3 of the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F. 31 ("the Act"), too narrowly. The phrase is not defined in the Act, and its ordinary meaning can extend to relations and conditions of work beyond those relating to collective bargaining. Nor is there any reason to restrict the meaning of "labour relations" to employer/employee relations; to do so would render the phrase "employment-related matters" redundant.

[44] I also find that the ministry's relationship with its staff reporters should be characterized as labour related for the purposes of section 65(6)3.

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[1] The ministry submits that prior orders of this office have found that briefing notes related to staffing levels (P-1516) and records discussing workload (PO-2057) relate to labour relations matters in which the institution had an interest.

[2] The ministry submits that earlier IPC orders have concluded that the complete hiring process, including records concerning recruitment, screening and interviewing, are considered "employment-related" for the purposes of section 65(6)3. (P-1627, PO-1760)

[45] Based on my review of the records and the representations of the ministry, I find that the remuneration, accreditation and hiring of new staff and freelance interpreters are labour relations matters in which the ministry has an interest. Further, I find that the records at issue were collected, prepared, maintained or used by the ministry in relation to meetings, discussions or communications about these labour relations matters. Accordingly, I find that requirement 3 is met. As all three requirements for the application of section 65(6)3 are met, and the exceptions in section 65(7) do not apply, the records are excluded from the scope of the *Act*.

C. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[46] The ministry notes in its representations that pages 448 and 611 do not contain "personal information". As this information was withheld under section 21(1) of the *Act* and no further discretionary exemptions are claimed and no mandatory exemptions apply, I will order the ministry to disclose the information on page 448. I note from the index that the ministry has also claimed that page 611 is exempt under the mandatory exemption in section 17(1) and I will consider the application of this exemption to that record in my discussion below.

[47] The ministry submits that some of the records contain information about a named individual's potential conflict of interest in respect of a particular subject matter. Specifically, this information is on pages 442 and 449 of the records. The ministry calls these records the "Conflict Records".

[48] In order to determine which section of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. Under section 2(1), "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or whether disclosure of the name would reveal other personal information about the individual [paragraph (h)].

[49] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual[3].

[50] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual[4].

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[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225
[4] Orders P-1409, R-980015, PO-2225 and MO-2344

[51] The ministry submits that the Conflict Records contain an individual's name, official position and the nature of the possible conflict of interest. The ministry submits that the possibility of a conflict is a personal circumstance that is not related to this individual's position and thus disclosure would reveal something of a personal nature about this individual.

[52] I agree. The individual's name combined with the information relating to the possible conflict of interest is personal information about that individual within the meaning of section 2(1) of the *Act*. Accordingly, I find that the records contain personal information and I will proceed to consider whether this information is exempt under section 21(1).

D. Does the mandatory exemption at section 21(1) apply to the information at issue?

[53] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[54] If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21(1). In the circumstances, it appears that the only exception that could apply is paragraph (f), which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

[55] The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). In the present appeal, none of the presumptions in section 21(3) apply.

[56] If no section 21(3) presumption applies and the exception in section 21(4) does not apply, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239]. In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies [Orders PO-2267 and PO-2733].

[57] In the present appeal, the appellant did not provide representations. Based on my review of the records for which the ministry has claimed the exemption in section 21(1), I can find no factors favouring disclosure, listed or otherwise. Accordingly, I find the exemption in section 21(1) applies to exempt the information on pages 442 and 449 of the records at issue.

E. Does the discretionary exemption at section 15(b) apply to the records?

[58] Section 15 states, in part:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > reveal information received in confidence from another government or its agencies by an institution;
>
> and shall not disclose any such record without the prior approval of the Executive Council.

[59] Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. The purpose of section 15(b) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern[5].

[60] For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient[6].

[61] If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received [Order P-1552].

[62] For a record to qualify for exemption under subsection 15(b), the institution must establish that:

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[5] Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.); see also Orders PO-1927-I, PO-2569, PO-2647, and PO-2666

[6] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.); see also Order PO-2439

1. the records must reveal information received from another government or its agencies;
2. the information must have been received by an institution; and
3. the information must have been received in confidence. [Order P-210]

[63] The ministry submits that the following records were received in confidence from other governments:

- Email from government of U.S. state to Ontario (pages 504 – 509)
- Requirements for non-English speaking translators, voice, markers (pages 571 – 572)
- Report on credentialing interpreters in a named language (pages 578 – 587)
- Memorandum and Guidelines on managing a specified tier of interpreters in another jurisdiction (pages 706 – 714)
- Summary on exam procedures in another jurisdiction (pages 715 – 720)
- Summary of cross-jurisdictional research (pages 740 – 744)
- Overview of tests in other jurisdictions (pages 747 – 750)
- Criteria document – Research on Recruiting interpreters in another jurisdiction (pages 757 – 761)
- Recommendation of Working Group on interpreter recruitment in another jurisdiction (pages 762 – 769)
- Cross-jurisdictional review document (pages 770 – 787)
- Confidential report on accrediting interpreters in another jurisdiction (pages 788 – 814)
- Research report on overseeing interpreter services in another jurisdiction (pages 815 – 823)
- Cross-jurisdictional review document (pages 824 – 825); and
- Survey responses on interpreter-related practices in other jurisdictions (pages 826 – 978)

[64] The ministry submits that these pages of records were supplied by the governments in other Canadian provinces and territories and from a US state government and makes the following specific representations on the pages claimed exempt:

> Pages 504 – 509, 706 - 714
>
> These records were sent by email as part of communications about court interpretation programs between Ontario and the government of a US state.
>
> Pages 578 -587

This article was distributed by a speaker from a state government to participants at an Annual Business Meeting of the Consortium for State Court Interpreter Certification in 2008. Participants were asked not to distribute the paper publicly.

Pages 740 – 744, 747 – 750, 770 – 787, 826 - 978

The records at pages 740 – 744, 770 – 787 and 826 – 978 were created by ministry staff using information obtained in conversations with officials in other jurisdictions.

Previous IPC orders establish that information can be "received" from another government even where the record itself was authored by a person in the institution. That is, the exemption applies where another government is the source of the content of the record. [PO-1350]

In this instance, ministry staff interviewed individuals from other provinces and states as part of its policy research on court interpretation policies. The ministry then transcribed the content of the responses into word documents (740 – 744) and tables (747 – 750, 770 – 787, 826 – 978).

The ministry submits that this information was "received" from the other governments, in the same way as the briefing note outlining information received from another country and the notes of a telephone call between a ministry employee and a foreign official in Order PO-1350.

Pages 757 – 769, 788 – 814, 815 – 823, 824 - 825

Due to staff turnover in the division, the ministry does not have a clear record of the circumstances under which these records were provided. However, the information within the records:

- Relates to the internal practices of other governments;
- Is not otherwise publicly available; and
- Dates to the same period as other documents acquired from other governments.

[65] Based on these submissions, the ministry submits that the records were received by it from another government. Regarding the "confidentiality" component, the ministry notes that in order to satisfy this component, both the other government and the institution must have an expectation of confidentiality that is reasonable and has an objective basis[7].

[7] Orders P-278, MO-1896, PO-2647

[66] Specifically, the ministry provided the following representations on the confidentiality component:

- The state of New Jersey included the memorandum and guidelines (706-714) as an attachment to an email, in which staff expressly state that the record was not public and not be shared. It was provided to the ministry as a courtesy to assist the ministry in development of Ontario's accreditation model.

- Regarding pages 715 – 720 (Summary and Guidelines), this New York document is clearly labeled "not for publication without permission". The ministry made contact upon receiving the appellant's request but did not receive permission for release.

- The Confidential report (788 – 814) was expressly communicated in confidence: the word "CONFIDENTIAL" is stamped on the cover of the report, and the first page of the report contains a confidentiality notice.

- A staff person at the ministry contacted the New Jersey office when the request was received but the New Jersey contact confirmed that the test portions in the report were still in use and asked that the report remain confidential.

- Regarding the remaining pages, the ministry submits that these records were received on the understanding that they would be treated confidentially. The ministry states that when approaching their counterparts in other jurisdictions, ministry staff routinely issued assurances that the information would be for internal use only.

[67] Lastly, the ministry submits that it did not seek Cabinet approval to disclose some or all of the records. The ministry explains:

> Inter-jurisdictional research is an important part of policy-making. Decision-makers – and through them, the public – benefit from knowing about the successes and failures that others have experienced in tackling similar issues.
>
> In making this decision not to seek Cabinet approval, the ministry considered its long term relationships with the other jurisdictions. The other governments volunteered this information on the understanding that it would be for Ontario's internal use only. Disclosing records would erode the relationship of trust it had with other jurisdictions, making it harder to conduct effective jurisdictional research in the future.

[68] Based on my review of the records and the ministry's representations, I find that all of the records, with the exception of pages 571- 572 are exempt under section 15(b). The records for which the ministry has claimed this exemption are clearly marked or identified as information received from another jurisdiction. Specifically, I find the following:

- Pages 504 – 509 is an email chain between an individual in the ministry to individuals in New Jersey with respect to the court interpreter program. The emails contain questions and discussion about the program and policies behind the program.

- Pages 578 – 587 and 706 – 714 are documents provided by state of New Jersey to ministry regarding court interpreter services.

- Pages 715 – 720 is a document provided by state of New York to ministry regarding examination procedures for court interpreters.

- Pages 740 – 744 is a summary of cross-jurisdictional research into court interpreter programs. I find that the information contained in the summary is information received by the ministry from other jurisdictions.

- Pages 747 – 750 is a comparison chart of testing in other jurisdictions. I accept that the information in the chart was received by the ministry from other jurisdictions.

- Pages 757 – 761 contain the criteria for testing of interpreters received by the ministry from another jurisdiction.

- Pages 762 – 769 contain recommendations on recruitment received by the ministry from the state of New Jersey.

- Pages 770 – 787 is a cross-jurisdictional review document which I find contains information received by the ministry from other jurisdictions.

- Pages 788 – 814 is a report sent by the state of New Jersey to the ministry and is referred to in the earlier email chain.

- Pages 815 – 823 are information received by the ministry from the state of New York relation to oversight of the court interpreting services.

- Pages 824 – 825 contains another cross-jurisdictional review which I find contains information received by the ministry from other jurisdictions.

- Pages 826 – 978 contains survey responses on interpreter related practices in other jurisdictions. I find the survey answers contain information received by the ministry from other jurisdictions.

[69] I find that these records were received in confidence by the ministry from other governments or agencies and as such are exempt under section 15(b). The ministry correctly notes that previous orders of this office have established that the head need not seek Cabinet approval to release in every case, although it ought to consider doing so[8]. Based on the ministry's representations, I accept that the ministry considered requesting Cabinet approval to disclose these records but determined that it would not do so in order to preserve its relationship with the jurisdictions from which it received information.

[70] The ministry did not make representations on the application of section 15(b) to pages 588 – 589 and 606 – 607, however, I note that this exemption is claimed for these pages on the index of records. These pages are duplicate records of an appendix containing comments on pass rates. These records contain a summary of comments made by various individuals from other jurisdictions. Based on my review, I find that this information contains information received in confidence from other jurisdictions and, as such, is exempt under section 15(b).

[71] In regard to pages 571 – 572, the ministry did not submit representations on where this information arose and whether it received this information in confidence. Further, I cannot determine this information based on my review of the records. Based on my review, I find that section 15(b) does not apply[9] and I will proceed to consider whether section 17(1) applies to exempt the information from disclosure.

F. Does the mandatory exemption at section 17(1) apply to the records?

[72] Section 17(1) states, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

[8] Orders PO-2122, PO-2344

[9] The index for the ministry states that section 17(1) is being claimed for these pages but the ministry's representations refer to these pages in its section 15(b) discussion.

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[73] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions[10]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace[11].

[74] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

[75] The ministry and/or the affected party submits that the following records are exempt from disclosure under section 17(1):

- Pages 484 – 488 (Training for Court Interpreting Test Candidates)
- Pages 500 – 503 (Validation Study and Study highlights)
- Pages 571 – 572 (Requirements for Non-English speaking Translators, Voices, Markers)
- Pages 590 – 601 (Consultation Document)
- Pages 602 – 605 (Data Analysis Summary)
- Pages 608 – 610 (Validity Reports)
- Pages 611 – 613 (First Nations Report)
- Pages 676 – 705 (Research Report)

[10] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.)
[11] Orders PO-1805, PO-2018, PO-2184, MO-1706

Part 1: type of information

[76] The ministry submits that disclosure of the records would reveal trade secret, technical and commercial information. Previous orders have defined these types of information as follows:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
> (ii) is not generally known in that trade or business,
> (iii) has economic value from not being generally known, and
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

[77] The ministry submits that the technical records about the development of the evaluative process are the affected party's trade secret and commercial information. The ministry states that the affected party developed the test which is unique in Canada and further argues that the affected party owns the intellectual property in the test and "is free to license it to other jurisdictions for profit."

[78] The affected party describes the information as its "intellectual property" which is used to generate revenue.

[79] The ministry's submission that the records at issue contain trade secret information relate to the actual test contained in Binders 1 and 2 of the responsive records. I have found this information to be excluded from the *Act* under section 65(6) set out above. The remaining information, namely the records relating to development, I find, is not trade secret information. Neither the ministry nor the affected party has established that the information is not generally known and is subject to efforts to maintain its secrecy.

[80] However, I find that the information at issue contains technical information relating to the establishment of the court interpreter test and the accreditation model. The records contain detailed analysis and the results of study and testing relevant to the establishment of the new test and the accreditation model and as such are technical information. While this information was provided to the ministry for a fee as a service, I find the records do not contain commercial information for the purposes of the *Act*.

[81] Accordingly, the ministry and the affected party have met part 1 of the requirements for section 17(1).

Part 2: supplied in confidence

Supplied

[82] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

[83] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

In confidence

[84] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

[85] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;

- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure [Orders PO-2043, PO-2371, PO-2497].

[86] The ministry submits that all of the information "originated" from the affected party.

[87] The ministry submits that the Consultation Document (pages 590 – 601) was supplied with an explicit expectation of confidence as it was labeled by the affected party as "confidential" and was expressly supplied to the ministry in confidence. It contains the affected party's expert technical analysis on the accreditation process.

[88] The ministry submits that the rest of the records were supplied with an implicit expectation of confidence and states that the affected party has consistently expressed to the ministry its desire to keep records relating to the test confidential. Lastly, the ministry submits that it has consistently protected the records from disclosure and has not made them available from sources to which the public has access. The ministry submits that the documents were prepared for the purposes of developing the test, where disclosure would not normally occur.

[89] I find that the records at issue were supplied by the affected party to the ministry. The records clearly identify that the records were prepared by the affected party for the ministry. I also find that the affected party had both an explicit and implicit expectation of confidentiality when it supplied the records to the ministry. I accept the ministry's submission that it consistently treated the records in a confidential manner. Further, I accept that the nature of these documents is such that the affected party would expect that these records would be kept confidential by the ministry. Accordingly, the requirements for part 2 of the test for section 17(1) has been met.

Part 3: harms

General principles

[90] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient[12].

[12] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)

[91] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

[92] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1) [Order PO-2435].

[93] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order PO-2435].

[94] The parties argue that disclosure would prejudice the competitive position and result in undue loss for the affected party.

[95] The ministry's submissions focus on the ensuing harm should the test be disclosed. The ministry submits that the affected party owns the intellectual property in the court interpretation test framework and the terms of its agreement, including compensation, were based on the affected party's understanding that it would be able to use the test in the future for its own profit. The ministry states the following:

> Were the contents of the test to become public, it would be worthless to [the affected party]. This is apparent from the nature of the test.
>
> The bilingual test consists of:
>
> - Sight translation of a written text from English into the interpreter's language and from the other language into English;
> - Consecutive interpretation of a witness's testimony, with counsel's questions interpreted into the other language and the witness's answers interpreted into English; and,
> - Simultaneous interpretation from English into the other language of one dialogue and one monologue.
>
> The English test consists of:
>
> - Oral recall of a short passage in English;
> - Consecutive dialogue with pauses for the interpreter to repeat in English;
> - Shadowing which is listening to a continuous text in English and repeating it in English while the original speaker continues speaking and,

- Sight and consecutive where the interpreter does a sight translation of a written text from English into the other language and later an interpretation of that sight translation back into English.

The First Nation Courtroom test consists of:

- Oral recall of a passage in English;
- Consecutive dialogue with pauses for the interpreter to repeat in English; and,
- Consecutive interpreting of a text which can be read and heard in English and its translation into the First Nation language. The text is divided into several segments which are later interpreted back into English.

[96] Regarding the records at issue, the ministry states:

> The harms from disclosing … remaining records that deal with the development of the test are less direct, but equally significant. Were these to become public, competitors could benefit unfairly by piggybacking on [the affected party's] two years of consultation, research, development and the trial-and-error process that went into the creation of the test.

[97] The affected party did not make representations on the harm that could arise should the records regarding the development of the test be disclosed.

[98] While the parties did not make detailed representations on the possible harm in disclosing the records which deal with the development of the test and the accreditation model, I note that the ministry's representations on possible harm of disclosure of the test are relevant. The test development records and accreditation model development discuss the reasons behind the components of the test set out above. Based on my review of the records and the ministry's representations, I find that disclosure of the records at issue could reasonably be expected to result in undue loss to the affected party within the meaning of section 17(1)(c) of the *Act*. I find that disclosure of the records would reveal the test methodology which the affected party developed for the ministry. Accordingly, I find that section 17(1)(c) applies to exempt the records from disclosure and I uphold the ministry's decision for these records.

G. Does the discretionary exemption at section 13(1) apply to the records?

[99] The ministry submits that section 13(1) applies to exempt information on:

- Pages 442 – 444 (Interpreter Testing Cut Score Recommendation)
- Pages 449 – 453 (Recording Court Interpreter Tests)
- Pages 454 – 459 (Court Interpretation Test Preparation Material)

[100] Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[101] The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure[13].

[102] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information [see Order PO-2681].

[103] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised[14].

[104] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations,
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given[15].

[105] Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

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[13]Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)

[14]Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563

[15]Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above)

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation[16]

[106] The ministry made the following specific submissions regarding the records:

- Pages 442 – 444 is a briefing note with the subject "Interpreter Testing Cut Score Recommendation" and reveals advice and contains recommendations about:

    - The test cut score (i.e. the minimum score a candidate can receive on the test to be accredited as a MAG court interpreter); and
    - Communications to candidates related to the test cut scores.

- Pages 449 – 453 is a briefing note containing advice about a policy related to the recording of the court interpreter test. The section entitled "Status" sets out the argument for the recommendation. The ministry submits that this section constitutes advice because the reader could accurately infer the recommendation from reading it. The recommendation itself is evidence that the suggested course of action of the briefing note could be accepted or rejected by the Assistant Deputy Attorney General.

- Pages 454 – 459 is a briefing note with the subject line Court Interpretation Test Preparation Material reveals advice and contains recommendations about word per minute speed of the test and test preparation materials.

[107] The ministry submits that the advice and/or recommendations was given by the Court Interpretation Unit of the Court Services Division to the Assistant Deputy General of the Court Services Division. Further the briefing note on the cut scores and recording the tests would reveal advice that was provided by the affected party to the ministry.

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[16]Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above)

[108] Lastly, the ministry submits that the advice and recommendations contained in the briefing notes relate to the development and rollout of an important change. The ministry states that although the changes will affect operations, the change is fundamentally one of justice policy.

[109] Based on my review of the ministry's representations and the withheld portions of the pages described above, I find that disclosure of this information would reveal advice or recommendations of a public servant or the affected party given to the ministry. I also find that the information in the records suggest a course of action that will be ultimately be accepted or rejected by the person be advised. Further, I find that the exceptions in section 13(2) do not apply to the information at issue. Accordingly, I find that section 13(1) applies to exempt the information at issue and I uphold the ministry's decision with respect to these records.

H. Was the ministry's exercise of discretion with respect to section 13(1) and 15(b) proper in the circumstances?

[110] The sections 13(1) and 15(b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[111] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose,
- it takes into account irrelevant considerations,
- it fails to take into account relevant considerations.

[112] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[113] The ministry submits that it properly exercised its discretion taking into account all relevant considerations. The ministry notes that it is unaware of any compelling reason for the appellant's request and notes that the records do not contain the appellant's personal information.

[114] Based on my review of the records and the ministry's representations, I am satisfied that the ministry properly exercised its discretion in withholding the information under sections 13(1) and 15(b). The ministry properly considered the exemptions and the interests sought to be protected. Further, in disclosing some of the information to the appellant, I find that the ministry considered that the exemptions

from the right of access should be limited and specific. In summary, I uphold the ministry's exercise of discretion.

ORDER:

1. I order the ministry to disclose page 448 of the record by providing the appellant with a copy of the record by August 24, 2012.

2. I uphold the ministry's decision that pages 510 – 513 and 529 – 549 are not responsive to the appellant's request.

3. I uphold the ministry's decision that the following records are excluded from the *Act*:

    - Pages 445 – 447
    - Pages 460 – 465
    - Pages 466 – 483
    - Pages 489 – 499
    - Pages 573 – 577
    - Pages 614 – 638
    - Binders 1 – 4

3. I uphold the ministry's decision to withhold the information on the remaining records.

4. In order to verify compliance with order provision 1, I reserve the right to require the ministry to provide me with a copy of the record provided to the appellant.

Original signed by: July 25, 2012
Stephanie Haly
Adjudicator