Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3326-I

Appeal PA12-28

Ministry of the Attorney General

March 26, 2014

Summary: The appellant made a request to the Ministry of the Attorney General (the ministry) for records relating to its court interpreter accreditation program. The ministry issued a decision letter granting access to the responsive records in part, claiming that portions of these records were non-responsive to the request. The ministry also claimed the application of the discretionary exemptions in sections 13(1) (advice or recommendations), 15 (relations with other governments), and 19 (solicitor-client privilege), the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy), and the exclusion in section 65(6)3 (labour relations and employment records) of the *Act* to deny access to the remaining information.

During the mediation of the appeal, the appellant advised that it continued to seek access to the information identified as non-responsive to the request, and confirmed that the disclosure of the information withheld under sections 13(1), 15, 17(1) and 21(1) is in the public interest. Accordingly, section 23 was added as an issue in this appeal. The appellant further stated that additional records responsive to the request should exist; accordingly, reasonable search was also added as an issue.

During the inquiry, the ministry withdrew its claim for the application of the mandatory exemption in section 21(1).

In this interim order, the adjudicator finds that portions of the records which the ministry claimed are non-responsive are responsive to the request and that other portions of the records are not excluded under section 65(6)3 of the *Act*. With respect to the exemptions claimed, she upholds the application of the exemptions in sections 13(1) and 19 to all of the records for

which they were claimed and the exemptions in sections 15 and 17(1) to most of the records for which they were claimed. The adjudicator also upholds the ministry's exercise of discretion and finds that the public interest override does not apply. Lastly, she does not uphold the ministry's search. In this interim order, the adjudicator orders the ministry to disclose some records to the appellant, to issue a new decision letter regarding certain records, and to conduct another search for responsive records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1), 15(a), 15(b), 17(1), 19, 23, 24 and 65(6)3.

Orders Considered: PO-3101.

OVERVIEW:

[1] The Ministry of the Attorney General (the ministry) provided extensive background information concerning the subject matter of the access request. The ministry is responsible for the administration of courts in the province, including arranging for interpretation services for over 155,000 hours of courtroom proceedings yearly. Due to the unpredictability of demand, it relies on several hundred fee-for-service freelance interpreters to augment its core staff of 26 salaried court interpreters.

[2] For many years, an interpreter's accreditation was based on successful completion of a Standard Interpreter Aptitude Test and a training seminar on courtroom procedures and ethics. In 2006, the ministry retained an international panel of expert consultants to review its court interpretation system and provide recommendations for improvement. Based on the panel's recommendation, the ministry changed the accreditation process, including its testing regime. After issuing a Request for Proposal (the RFP), the ministry entered into a contract with the affected party to develop a new interpretation accreditation model, including a test that better matched a realistic interpreter experience and the kind of specialized terminology that would typically be used in the courtroom. The affected party also provides marking services for the tests.

[3] At the time of the request, the ministry had launched this new testing model and had re-tested most of its rostered freelance interpreters. It had also implemented a new accreditation model which provides two levels of accreditation known as "accredited" and "conditionally accredited."

[4] The ministry uses the accreditation system as a tool to assist in identifying, scheduling and training employees and freelance interpreters. Freelance interpreters apply to be added to the internal Registry of Accredited Freelance Interpreters (the registry). This registry functions as a pool for court staff to draw from when using freelance interpreters for in-court matters. To be included in the registry, the candidate must complete the affected party's interpretation test.

[5] Interpreters are scheduled according to the Court Interpreter Scheduling Protocol as follows:

- Accredited interpreters are scheduled for all types of court matters, particularly complex ones;

- Conditionally accredited interpreters are scheduled for less complex matters and provided with support on working towards full accreditation; and

- Unaccredited interpreters can be scheduled where there is no accredited or conditionally accredited interpreter available. Court staff members are required to notify the parties and the presiding judicial officer of the interpreter's status, who has the discretion to inquire into the interpreter's skill and decide whether to accept him/her for the matter.

[6] This interim order disposes most of the issues raised as a result of a request to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following information:

(1) Test score results, for all interpreters in Ontario who have completed the testing prepared by [the affected party], showing the individual's score on each area of the [affected party's] test (sight, consecutive and simultaneous) and the language(s) tested. The names of the individuals may be severed from the records and not disclosed.

(2) Any reports, instructions, methodology or other materials provided to the persons who were responsible for scoring the [affected party's] tests that have been conducted.

(3) Any reports, statistical analyses, studies or impact assessments prepared or conducted by or on behalf of [the ministry] concerning the interpretation of the testing results on the [affected party's] test, the appropriate cut-offs for full and conditional accreditation, the implications of the results of the testing conducted in 2009-2010, and/or the development of [the ministry] Court Interpreter Scheduling Protocol.

(4) Any reports, statistical analyses, studies or impact assessments prepared or conducted by or on behalf of [the ministry] concerning the impact of the availability of accredited interpreters on criminal cases in Ontario, including data or analyses concerning adjournments, voir

dires and other consequences arising from the lack of qualified court interpreters in Ontario.

(5) All records or documents relating to the qualification of court interpreters subpoenaed or ordered to be produced by [the ministry] in any criminal case in Ontario since January 2009, along with the name and particulars of the case in which the records were ordered produced.

(6) Any documents or records providing statistics as to the number of fully accredited and conditionally accredited interpreters available for each language in each geographic area in Ontario.

(7) A copy of the Registry of Accredited Freelance Court Interpreters maintained by or available to [the ministry].

[7] The ministry conducted a search for responsive records, and issued a decision letter, granting access in part, claiming the application of the discretionary exemptions in sections 13 (advice or recommendations), 15 (relations with other governments), and 19 (solicitor-client privilege), the mandatory exemptions in sections 17 (third party information) and 21 (personal privacy), and the exclusion in section 65(6) (labour relations and employment records) of the *Act* to deny access to the remaining information.

[8] The requester (now the appellant) appealed the ministry's decision to this office.

[9] During mediation of the appeal, the ministry advised that it did not disclose the information in the records it identified as not responsive to the request, and also claimed for the first time the application of the exclusion in section 65(5.2) (records relating to a prosecution) of the *Act* with respect to certain other records.

[10] The appellant confirmed with the mediator that it was seeking access to the information withheld by the ministry under sections 13(1), 15, 17(1), 19, 21(1), 65(5.2) and 65(6) of the *Act*, as well as the information that was identified as non-responsive to the request. The appellant then received a copy of the ministry's index of records and subsequently confirmed it was not seeking access to some of the information identified as personal information in the records. Accordingly, pages 365, 645, 734, 758, 790 and 839 are no longer at issue in this appeal.

[11] The mediator sought consent from the affected party with regards to the records that were withheld under section 17(1) of the *Act*, but the affected party did not provide consent.

[12] The ministry also clarified that the information on page 409 of the records should be withheld under section 15(b) and not section 13(1) of the *Act*.

[13] The ministry then issued a revised decision to the appellant, disclosing information that was previously severed under section 65(5.2) of the *Act*. Consequently, pages 668 to 675 are no longer at issue in this appeal. The ministry also advised the appellant that pages 600-601 were denied pursuant to section 22(a) of the *Act*. The ministry provided the appellant with a link to a webpage where those pages are available. The ministry also included an index of non-responsive records where a more detailed description of the non-responsive information was provided. Subsequently, the appellant advised the mediator that pages 600-601 were no longer at issue in the appeal, but confirmed that it continued to seek access to the information identified as non-responsive to the request.

[14] The appellant also confirmed that it believes the disclosure of the information withheld under sections 13(1), 15, 17(1) and 21(1) are in the public interest. Accordingly, section 23 was added as an issue in this appeal.

[15] The appellant further stated that it believes additional records responsive to the request should exist; specifically that there should be additional information on testing that occurred in 2010 and that more records responsive to part 5 of the request should exist. The ministry confirmed there were no further records responsive to the request. Accordingly, reasonable search was added as an issue in this appeal.

[16] Following mediation, the appeal moved to the adjudication state of the appeals process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to the appeal sought and received representations from the ministry, the appellant and one affected party. Representations were shared in accordance with this office's *Practice Direction 7*.

[17] During the inquiry, the ministry issued a revised decision, granting access to pages 270 – 273, 290, 355, 536-538, 541 and 675. Accordingly, these pages are no longer at issue. In addition, the ministry withdrew its claim of the application of the mandatory exemption in section 21(1) and the exclusion in section 65(5.2). Consequently, that exemption and the exclusion are no longer at issue. In addition, the ministry advised that during the course of preparing the appeal, the ministry revised its position on a number of records, to the extent that some records would be withheld under a different exemption or exception than originally claimed. The ministry advised that these changes were reflected in its representations and in a revised index of records that was included with its representations.

[18] The appeal was then transferred to me for final disposition. For the reasons that follow, I uphold the ministry's decision, in part. I find that portions of the records the ministry claimed are non-responsive are, in fact, responsive to the request and that

other portions of the records are not excluded under section 65(6)3 of the *Act*. With respect to the exemptions claimed, I uphold the application of the exemptions in sections 13(1) and 19 to all of the records for which they were claimed and the exemptions in sections 15 and 17(1) to most of the records for which they were claimed. I uphold the ministry's exercise of discretion and find that the public interest override does not apply. Lastly, I do not uphold the ministry's search. In this interim order, I order the ministry to disclose some records to the appellant, to issue a new decision letter regarding certain other records, and to conduct another search for responsive records.

RECORDS:

[19] The records consist of reports, manuals, briefing notes and correspondence as described in the index of records.

ISSUES:

A: What records are responsive to the request?

B: Does the discretionary exemption at section 13(1) apply to the records?

C: Does the discretionary exemption at section 15 apply to the records?

D: Does the discretionary exemption at section 19 apply to the records?

E: Did the institution exercise its discretion under sections 13(1), 15 and 19? If so, should this office uphold the exercise of discretion?

F: Does section 65(6) exclude the records from the *Act*?

G: Does the mandatory exemption at section 17(1) apply to the records?

H: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the sections 13(1), 15 and 17(1) exemptions?

I: Did the institution conduct a reasonable search for records?

DISCUSSION:

Issue A: What records are responsive to the request?

[20] 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;
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> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
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> . . .
>
> (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).

[21] 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.[1]

[22] To be considered responsive to the request, records must "reasonably relate" to the request.[2]

[23] The ministry submits that it made "great efforts" to adopt a liberal interpretation of the request in accordance with case law. The ministry argues that the request is for records concerning the results of the new interpreter testing and the effects of the new testing regime on the criminal justice system. The ministry advises that it withheld these portions of the records that refer to the genesis, development and administration of the test. The ministry argues that the non-responsive portions relate to the aspects of the test that occurred prior to the marking, that is, prior to the marker receiving the test package.

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[1] Orders P-134 and P-880.
[2] Orders P-880 and PO-2661.

[24] In particular, the ministry submits that the following pages or portions thereof, are non-responsive to the request:

- The discussion about the timing of the RFP for the development and roll-out of the new test (pages 287-288 and 745);
- Recommendations and analysis on test-administration best practices by proctors (pages 330-331);
- The structure or format of the test (pages 353-364);
- Information on the development of the Court Interpreter Coordinators' Manual (pages 378-379);
- Information on the development of test preparation materials for candidates and on retesting policies (pages 602-603, 612 and 745);
- Development of test content (pages 606-607); and
- Recruitment of pilot test takers (page 610).

[25] The appellant advises that the ministry did not contact it to seek clarification regarding the intended scope of the request, and instead chose to unilaterally define the scope of the request. The appellant also states that it was first informed of the restricted nature of the ministry's understanding of the request when it received a copy of the ministry's representations.

[26] The appellant states:

> The [appellant] respectfully submits that the Ministry's interpretation of the scope of the request is unduly and unreasonably restrictive. The [appellant's] request is not restricted to records concerning the effects of the new testing regime on the criminal justice system; to the contrary, the request also seeks information and records relating to the development and administration of the test. This is particularly evident in part 3 of the request, which seeks reports, statistical analysis, studies or impact assessments relating to the appropriate cut-offs for full and conditional accreditation, the implications of the results of the testing conducted in 2009-2010, and/or the development of the Court Interpreter Scheduling Protocol. The aspect of the [appellant's] request clearly embraces the genesis, development, administration *and* effects of these elements of the new interpreter testing regime.

[27] I have carefully reviewed the appellant's request, the representations of both parties and the records. At the outset, I note that the ministry did not provide representations regarding pages 360-364, 445-448, 611 and 613 yet on the face of these records they are marked as being non-responsive either in whole, or in part. As I have no evidence before me that these records are non-responsive to the request, I order the ministry to issue a decision letter to the appellant regarding these pages.

[28] Turning to the remaining records for which I have received representations from the ministry, I find that the majority of the records are non-responsive to the request, with the exception of pages 378-379 and 602, which I will describe below. The remaining records are non-responsive to the request, as they relate to:

- The development of the RFP;
- Describe what the proctors should do during testing;
- Set out comments regarding the pilot test material;
- Describe the development of the test content;
- Discuss the recruitment of pilot test takers.

[29] In my view, the appellant's request is clear on its face, and the subjects described above do not reasonably relate to the appellant's request. In essence, the appellant's request is for records relating to test score results, materials provided to the test scorers, information about the impact of the availability of court interpreters on criminal cases, records relating to court ordered qualifications of interpreters, statistics regarding the number of interpreters available for each language, and a copy of the registry as described in the request. In addition, the request relates to records concerning the interpretation of the testing results on the test itself, the cut-offs for full and conditional accreditation, the implications of the results of the testing conducted in 2009-2010, and the development of the Court Interpreter Scheduling Protocol. On my careful review of the records, I find that none of these portions of the records, with the exceptions below, relate to the subject matter clearly described in the appellant's request and they are, therefore, non-responsive to the request.

[30] Conversely, I find that pages 378-379 and 602 are responsive to the appellant's request. Pages 378-379 discuss policy requirements for managing and scheduling interpreters. In my view, the withheld portions of this record reasonably relate to the appellant's request for records concerning to the development of the Court Interpreter Scheduling Protocol, as they form part of a document dealing with managing and scheduling interpreters. Similarly, I find that page 602 is reasonably related to the appellant's request, as it discusses the re-testing of interpreters, which is an activity that would post-date the original testing. The appellant's request includes records

relating to the implications of the results of the testing conducted in 2009-2010, the interpretation of the testing results and the cut-off scores. I find that information relating to re-testing of candidates reasonably relates to this aspect of the appellant's request. Consequently, I find that pages 378-379 and 602 are responsive to the request and I order the ministry to issue a decision to the appellant regarding access to them.

Issue B: Does the discretionary exemption in section 13(1) apply to the records?

[31] The ministry is claiming the application of the exemption in section 13(1) to records or portions thereof of pages 280, 282, 284, 332-333, 356-358, 534-535, 539-544, 700-701 and 716.

[32] 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.

[33] 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.[3]

[34] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.[4]

[35] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must reveal a course of action that will ultimately be accepted or rejected by its recipient.[5]

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

- the information itself consists of advice or recommendations; or

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[3] Orders 24 and 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.).
[4] Order PO-2681.
[5] 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.

- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[6]

[37] It is implicit in the various meanings of "advice" or "recommendations" considered in *Ministry of Transportation* and *Ministry of Northern Development and Mines* that section 13(1) seeks to protect a decision-making process. If the document actually suggests the preferred course of action it may be accurately described as a recommendation. However, advice is also protected, and advice may be no more than material that permits the drawing of inferences with respect to a suggested course of action but does not recommend a specific course of action.[7]

[38] There is no requirement under section 13(1) that the ministry be able to demonstrate that the document went to the ultimate decision maker. What section 13(1) protects is the deliberative process.[8]

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

- factual or background information;
- analytical information;
- evaluative information;
- notifications or cautions;
- views; or
- a supervisor's direction to staff on how to conduct an investigation.[9]

[40] The ministry submits that the records contain specific advice or a recommended course of action. In particular, the ministry describes the records as follows:

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[6] 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).
[7] *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (C.A.).
[8] *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, (cited above).
[9] 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).

- advice given by the Court Interpreter Advisory Group about models of accreditation under the province's new testing regime and content for inclusion in the RFP. The group consisted of expert professional consultants who were paid for their services;[10]

- advice and recommendations given by the consultants on designing the scoring system, interpreting test scores, methods of grading and improving data integrity;[11]

- advice on re-structuring the panel of ministry staff who advise the Court interpretation program;[12]

- advice and recommendations given by staff in the ministry's Court Interpreter Unit regarding the way in which tests are administered and scores are evaluated;[13]

- advice and recommendations given by ministry staff about the test cut score. This record also reveals advice that was provided by the affected party to the ministry; and[14]

- a recommendation from the affected party to the ministry about how to interpret scores for the purposes of classification and retesting.[15]

[41] The ministry argues that the advice was communicated in writing and related to the development and "rollout" of an important change to its processes for recruiting, training and accrediting court interpreters. The ministry goes on to state that the manner in which this change was implemented had important implications for justice policy, and argues that the disclosure of the advice and recommendations would put a chill on future advice in relating to interpreter-testing and diminish the ministry's efforts to improve the quality of court interpretation services in the province.

[42] The appellant submits that the records may contain analytical and evaluative material, rather than advice and recommendations, but even if the records do contain advice and recommendations, the ministry must still disclose the entire record if it falls within a section 13(2) exception. In particular, the appellant argues that two of the exceptions in section 13(2) apply, namely s. 13(2)(f) and 13(2)(i). Those sections state:

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[10] The briefing note at pages 280, 282 and 284.
[11] Consultant comments at pages 332-333 and 356-358.
[12] Ministry advisory panel at pages 534-535.
[13] Pages 539-540.
[14] Page 701.
[15] Page 716.

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

> (f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;
>
> (i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;

[43] The appellant submits that the application of section 13(2)(f) is not restricted to reports or studies concerning institutions as a whole, but may also apply to reports or studies concerning one or more discrete program areas within an institution. In particular, the appellant argues that the following records were created in order to report on or study the performance of the court interpreter services offered by the ministry:

- the record at pages 330-334 relates to "The Testing and Evaluation of Court Interpreters" and is, therefore, a study of the performance of the court interpretation services;
- the record at pages 353-359 indicates that it is an analysis of the validity and reliability of the test to be provided to the interpreters. In order to effectively evaluate performance, a valid and reliable testing method must be established. As such, this record was created for the purpose of studying and reporting on the program's effectiveness;
- the title of the record at pages 539-540 suggests that it relates to the marking of the tests used to evaluate the performance of the ministry's interpreters, and, therefore, relate to the study of the program's efficiency;
- the ministry did not provide representations regarding the application of the exemption in section 13(1) to the record at pages 541-544. It also points out that this record may be an analysis of the effectiveness of the test used to gauge the performance of court interpreters, which is a necessary aspect of the study of the performance of the court interpreter program.

[44] With respect to section 13(2)(i), the appellant submits that this section provides for an exception with respect to a final plan or proposal to change a program of an institution, unless the plan or proposal is to be submitted to the Executive Council or its committees. The appellant submits that the court interpreters' accreditation test qualifies as a program of the ministry and that none of the records withheld under section 13(1) have been submitted to the Executive Council or its committees.

[45] In particular, the appellant believes that the following records meet the exception in section 13(2)(i):

- the record at pages 534-535 appears to be a proposal regarding the structure of the Ministry Advisory Panel and its members' duties. The appellant argues that there is no evidence that another version of this proposal was prepared, and the record therefore appears to qualify as a final proposal regarding a change to one aspect of the court interpreters services;

- the record at pages 700-701 appears to be a proposal regarding the appropriate cut scores for court interpreters in the province. The appellant argues that there is no evidence that another version of this proposal was prepared, and the record therefore appears to qualify as a final proposal regarding a change to another aspect of the court interpreters services; and

- the record at pages 714-723 appears to be a final proposal regarding the appropriate classification system for court interpreters in the province, given that section 3 of the records is entitled as a final proposal.

[46] In reply, the ministry reiterates that the records at issue contain advice and recommendations to the government and do not qualify as exceptions to the exemption in section 13(1). The ministry also advises that it re-exercised its discretion and has decided to disclose the record at pages 534-535 to the appellant. As no other exemptions were claimed with respect to this record, it is no longer at issue in this appeal and the ministry should disclose it to the appellant, if it has not done so already.

[47] With respect to the appellant's claim that certain records fall within the exception in section 13(2)(f), the ministry submits that the records at pages 330-334 and 353-359 are not reports about the performance or efficiency of a program, as they do not bear the indicia of a formal statement or account.[16] The content of these two records suggests that they form part of a dialogue with the ministry, rather than a report to the ministry, and contain the observations, suggestions and advice of consultants who reviewed the affected party's report. These comments, the ministry argues, are not themselves a report and do not relate to performance and/or efficiency of the

[16] Orders MO-2204 and PO-1709, upheld in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct).

interpretations modernization program. The ministry also advises that the record at pages 541-544 is duplicated on pages 354-359.

[48] Concerning the appellant's claim that the records at pages 700-701 and 714-723 fall within the exception in section 13(2)(i), the ministry submits that in order for the exception to apply, the plan or proposal must be final.[17] The ministry argues that these two records represent an intermediate step in the process of developing the final plan, which was followed by additional consultation and study. The ministry also provided further reply representations which I relied on, but cannot reproduce, as they met this office's confidentiality criteria.

[49] I have reviewed the records and confirm that the withheld information at pages 541-544 is duplicated on pages 354-359.

[50] After considering the representations of the ministry and the appellant and upon my review of the records, I find that the records, or portions thereof that were withheld, are exempt under section 13(1) of the *Act*, subject to my findings in regard to the ministry's exercise of discretion and to my consideration of the possible application of the public interest override in section 23. I am satisfied that the withheld portions contain recommendations and advice given to the ministry by either the external consultants or internal staff on a variety of topics relating to the court interpreter program. The advice and recommendations in the records describe a suggested course of action which can be accepted or rejected by the ministry. I am also satisfied that the withheld information does not fall within either of the exceptions relied upon by the appellant, as it is neither a report or study on the performance or efficiency of an institution or a particular program, nor a final plan or proposal to change a program of an institution.

Issue C: Does the discretionary exemption at section 15 apply to the records?

[51] The ministry is claiming the application of the discretionary exemption in section 15(a) and/or (b) either in whole or in part, to the records at pages 344-352, 409-444, 454-457 and 503-529. Initially, the ministry also claimed this exemption with respect to pages 626-643, which is a portion of a cross jurisdictional review. However, in its reply representations, the ministry advised that it is no longer claiming the application of section 15 to pages 626-643. As no other exemptions have been claimed for these pages, they are no longer at issue in this appeal and the ministry should disclose them to the appellant, if it has not done so already.

[52] Section 15 states, in part:

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[17] Order PO-2400.

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

[53] Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships.[18] Similarly, 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.[19]

[54] 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.[20]

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

1. the records must reveal information received from another government or its agencies; and

2. the information must have been received by an institution; and

3. the information must have been received in confidence.[21]

[56] The ministry submits that the records at issue were received in confidence from

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[18] Orders PO-2247, PO-2369-F, PO-2715 and PO-2734.
[19] 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.
[20] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.); see also Order PO-2439.
[21] Order P-210.

other governments or bodies of international organizations of states, and that disclosure of these records could reasonably be expected to prejudice the relationship between Ontario and the other governments. The ministry describes the manner in which the information was received from another government or organization of states as follows:

- Memorandum and Guidelines: the record at pages 344-352 is an attachment to an email sent by the state of New Jersey to Ontario as part of communications about court interpretation programs. The email from New Jersey expressly stated that the record was not public and was not to be shared;

- Survey Responses: the records at pages 409-444 were created by ministry staff using information obtained in conversations with officials in other jurisdictions. In this instance, the ministry staff interviewed individuals from other provinces and states as part of its policy research on court interpretation policies. The content of the interviews was then transcribed into the records;

- Confidential Report (pages 503-529) and Cross Jurisdictional Review Document (pages 454-457) contain information about the internal practices of other governments, are not otherwise publicly available and date to the same period as other documents acquired from other governments. The ministry infers that the information in these records was received from the state of New Jersey, New York, California, the federal American government and the National Centre for State Courts, which is a body of an international organization of states for the purposes of section 15(c). The ministry concedes that due to staff turnover in the Court Services Division, it does not have a clear record of the circumstances under which the records were provided.

[57] The ministry further submits that the information was received with a reasonable and objective basis for believing it was supplied in confidence. For example, the memorandum and guidelines explicitly states that the information in the record was not public and should not be shared. The information that was received by ministry staff in the survey results and cross jurisdictional review documents was obtained with the understanding that it would be treated confidentially. With respect to the survey results, 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. The ministry also advised that the cross jurisdictional review documents have a header that states "[c]ontains confidential information," and the confidential report is stamped as being confidential with a further notice to the reader restricting its circulation. The ministry further submits that the State of New Jersey actively uses the content of the confidential report and has asked that the report remain confidential.

[58] The ministry goes on to state that the records were stored on a secure floor or server and were not publicly distributed. These actions, the ministry argues, reflect its concern for the confidentiality of the records.

[59] The ministry's position is that disclosure of the records would prejudice intergovernmental relations. The ministry states:

> 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 this case, the Ministry approached other governments for advice on how to best to improve its court interpreting program. Through the goodwill of those governments, it obtained, at no cost, useful, practical, and otherwise unobtainable resources.
>
> The Ministry believes that disclosure of these records would jeopardize its ability to seek such help from other governments in the future. 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.

[60] In addition, the ministry submits that although it ought to consider seeking Cabinet approval to disclose the records, it did not seek such approval. The ministry advises that it made this decision in light of the need to maintain working relationships with other governments to whom it had made assurances of confidentiality. The ministry argues that if it cannot guarantee the confidentiality of sensitive information it receives from other provinces and states, then other governments will not share it and Ontario will lose an important, cost-effective resource.

[61] Lastly, the ministry argues that some of the records at issue were considered by Adjudicator Stephanie Haly in Order PO-3101, in which she upheld the ministry's decision to withhold the records under section 15(b).

[62] The appellant submits that the ministry has not provided sufficient evidence to support its assertion that the survey responses and cross jurisdictional review were received in confidence from another government or its agencies, as there is no evidence that each piece of information or conversation was the subject of an assurance of confidentiality or was received in confidence, given that the ministry has stated in its representations that it does not have a clear record of the circumstances under which

the records were provided. The appellant further submits that the ministry's statement that staff "routinely" issued such assurances does not establish that they were given in relation to each piece of information or each conversation between staff and survey respondents; nor has the ministry provided evidence that the information in the records relates to the internal practices of other governments, which is not otherwise publicly available. The appellant argues that the ministry's evidence with respect to the survey responses and cross jurisdictional review falls short of the "detailed and convincing" evidence required to meet the exemption in 15(b).

[63] Similarly, the appellant argues that the ministry has not provided sufficient evidence to support its section 15(a) claim with respect to the cross jurisdictional review. The appellant submits that the ministry's argument with respect to prejudice to the conduct of its intergovernmental relations hinges on the assertion that the information was obtained on the basis of a promise or expectation of confidentiality. The appellant argues that there is no evidence that an expectation of confidentiality existed in the first place and the ministry's claim of an expectation of prejudice is speculative. Accordingly, the appellant submits, the ministry has failed to satisfy its onus to establish the applicability of the exemption in section 15(a).

[64] Lastly, the appellant submits that the conclusion reached by Adjudicator Haly in Order PO-3101 is not determinative in the current appeal, as the requesting party in that appeal did not participate, to the extent that the ministry's arguments were not subjected to any adversarial testing.

[65] In reply, the ministry submits that it has been forthright about the staff turnover it has experienced since the research was conducted in 2009 and the resultant lack of institutional memory related to the survey responses and the cross-jurisdictional review, and argues that in order to maintain positive relationships with other governments, institutions must be able to guarantee that confidentiality will continue even though staff members change. To ensure this, the ministry states, it relies on institutional practice, which is that jurisdictional research is implicitly understood to be confidential unless the information being discussed is publicly available.

[66] At the outset, I note while previous orders of this office can provide guidance on particular issues and exemptions, I am not bound by them, as each request, appeal and inquiry has its own unique set of circumstances. My position on this issue applies to all of the exemptions and/or exclusions relied upon by the ministry in this appeal.

[67] As previously stated, for a record to qualify for exemption under subsection 15(b), the institution must establish that:

1. the records must reveal information received from another government or its agencies; and
2. the information must have been received by an institution; and

3. the information must have been received in confidence.

[68] Based on the ministry's representations and my review of the records, I am satisfied that the ministry has established the requirements of section 15(b) with respect to pages 344-352, 454-457 and 503-529. I am persuaded that disclosure these records would reveal information received in confidence from another government or it agencies by the ministry.

[69] In particular, the record at pages 344-352 is a memorandum and guidelines prepared by the State of New Jersey, Administrative Office of the Courts. It was sent as an attachment to an email, in which the staff member from the State of New Jersey sending the email expressly stated that the record was not public and was not to be shared. Similarly, the record at pages 505-529 also originates from the State of New Jersey, Administrative Office of the Courts. This record is a report that includes excerpts from tests given to interpreters. The ministry has advised that the State of New Jersey actively uses the content of the confidential report and has asked that the report remain confidential. It is clear that the information in these records was provided by another government or its agencies to the ministry and that it was done so in confidence, as evidenced by the State of New Jersey's stated position regarding the confidentiality of the records.

[70] Similarly, I am satisfied that the portions of the record at pages 454-457 that were withheld[22] from the appellant contain information that was provided by other states or their agencies in the United States, notably California and New York, to the ministry. I am further satisfied that this information was provided in confidence, because each page of the record is clearly marked "contains confidential information." I do not agree with the appellant that the fact that the record is marked as confidential is insufficient to satisfy the confidentiality requirement in section 15(b). In my view, the confidentiality marking corroborates the understanding between the ministry and the other governments that the information was being provided on a confidential basis.

[71] Consequently, 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), subject to my findings regarding the ministry's exercise of discretion and the possible application of the public interest override in section 23. 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.[23] 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.

[22] Specifically on pages 454 and 456.
[23] Orders PO-2122 and PO-2344

[72] The remaining record at issue is at pages 409-444, and comprises a table, setting out survey responses from other provinces and territories in Canada regarding court interpreter programs. I am not persuaded that this record is exempt from disclosure under either section 15(a) or 15(b).

[73] With respect to section 15(a), the ministry has not provided the requisite "detailed and convincing" evidence that disclosure of this record could reasonably be expected to prejudice the conduct of intergovernmental relations between the ministry and other provinces. In particular, I am not satisfied that the ministry has provided sufficient evidence that disclosure of this record would erode the relationship of trust it has with other jurisdictions, making it harder to conduct cost-effective jurisdictional research in the future. I am not persuaded that in the future other jurisdictions would refuse to share information with the ministry for cross-jurisdictional research purposes.

[74] In addition, the ministry's basis for its belief that disclosure of this record could reasonably be expected to prejudice the conduct on intergovernmental relations is that it assured the other jurisdictions that confidentiality of the information would be preserved. I agree with the appellant's argument that, with respect to this record, the ministry has not provided sufficiently detailed and convincing evidence regarding assurances of confidentiality in the case of the information obtained that is reflected in pages 409-444. In its representations, 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. I find that this statement falls short of the "detailed and convincing evidence" threshold required of section 15(a) with respect to this record. I also note that if the confidentiality of the information contained in this record was of such importance, there would be an indication on its face that the information was confidential which, in this case, is lacking.

[75] Turning to section 15(b), while I accept that the information in the record was provided to the ministry by other provinces and territories in Canada, for the reasons detailed above, I find that there is insufficient evidence to support a finding that the information was received in confidence by the ministry.

[76] Consequently, I find that the record at pages 409-444 is not exempt from disclosure under either section 15(a) or 15(b). As no other exemptions were claimed, I order the ministry to disclose this record to the appellant.

Issue D: Does the discretionary exemption at section 19 apply to the records?

[77] The ministry is claiming the application of the discretionary exemption in section 19 to the records at pages 32-33, 264-267 and 286-287. Section 19 of the *Act* states, in part:

> A head may refuse to disclose a record,

> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

[78] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b). The institution must establish that at least one branch applies.

Branch 1: common law privilege

[79] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[24]

[80] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[25]

[81] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[26]

[82] The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[27]

[83] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[28]

[84] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[29]

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[24] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[25] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[26] Orders PO-2441, MO-2166 and MO-1925.
[27] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[28] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

Branch 2: statutory privileges

[85] Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

[86] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution, "for use in giving legal advice."

[87] The ministry is claiming the application of both section 19(a) and (b) to the following records:

- Disclosure of Test Documents at pages 32-33 – due to staff turnover within the division, it is not clear who prepared this record, but even if prepared by non-legal staff, the record reveals the subject matter for which legal counsel was consulted, summarizes the advice and refers to ongoing legal work on related matters;

- Court Interpreters Triage System Protocol at pages 264-267 – this record contains a practical protocol for minimizing disruption to cases during the transition from the old to new interpreter testing regime. Crown Counsel in the Ministry's Criminal Law Division prepared pages 266-267 for ministry staff on an issue of shared concern, and contain step-by-step instructions for ensuring cases are handled appropriately, efficiently and consistently. These pages are expressly labelled "confidential" and "solicitor-client privileged." Pages 264-265 reveal the advice given on pages 266-267;[30] and

- Briefing Note at pages 286-287 – this note was prepared by Crown Counsel at the ministry's Court Services Division for use by senior bureaucrats within the ministry. The withheld portions of the note contain confidential legal advice and describe the nature of ongoing legal work being conducted by Crown Counsel in other parts of the ministry.

[88] The appellant submits that its ability to make meaningful representations is limited and that it must rely on this office to verify that the ministry's arguments regarding the applicability of section 19 are confirmed by the content of the records.

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[29] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

[30] The ministry relies on Order PO-2719 in which this office applied solicitor-client privilege to practical advice on procedures surrounding legal cases.

[89] I have reviewed the records at issue. The withheld portions of pages 32-33, 264-267 and 286-287 reveal several issues about which the ministry sought legal advice and also reveal the content of the advice that was given to it by internal legal counsel. This information falls clearly within the ambit of privileged solicitor-client communications between a solicitor and client, as it reveals the seeking and giving of legal advice on a variety of subjects. Consequently, I find that the withheld information qualifies for exemption under branch 1 of section 19(a), subject to my finding regarding the ministry's exercise of discretion and my consideration of the possible application of the public interest override in section 23.

Issue E: Did the institution exercise its discretion under sections 13, 15, and 19? If so, should this office uphold the exercise of discretion?

[90] The sections 13(1), 15 and 19 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.

[91] 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; or
- it fails to take into account relevant considerations.

[92] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[31] This office may not, however, substitute its own discretion for that of the institution.[32]

[93] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[33]

- the purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right of access to their own personal information, exemptions from the right of

[31] Order MO-1573.
[32] Section 54(2).
[33] Orders P-344 and MO-1573.

access should be limited and specific and the privacy of individuals should be protected;

- the wording of the exemption and the interests it seeks to protect;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

[94] The ministry submits that it properly exercised its discretion in good faith and for a proper purpose, taking into account all reasonably relevant considerations and without reference to irrelevant considerations. The ministry also states that it could not take into account the purpose of the request, as it does not know why the purpose for which the information is being sought.

[95] The appellant submits that the Supreme Court of Canada's decision in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* provides guidance regarding the manner in which a head is to exercise his/her discretion and the scope of this office's review of the exercise of discretion, and that the ministry bears the burden of proving that its exercise of discretion was reasonable. In this appeal, the appellant argues, the ministry has merely asserted that it properly exercised its discretion, and has not provided an explanation as to what relevant considerations it took into account in exercising its discretion. The appellant goes on to state that the ministry is aware of the identity of the appellant, and appears not to have taken into consideration the interests and purposes of the appellant, which are well known to the ministry.

[96] Lastly, the appellant submits that the ministry appears not to have taken the public interest into account in exercising its discretion. In this case, the appellant states, the public interest is in protecting and upholding accused persons' fundamental rights under sections 11(b) and 14 of the Charter, by ensuring appropriate public accountability and scrutiny of the quality of the state's provision of interpretation

services in the context of criminal trials. The appellant argues that the quality of the state's interpretation services is closely linked to the integrity of the criminal justice system.

[97] In reply, the ministry states that the head originally considered the following factors in exercising her discretion:

- the purposes of the *Act* and of each exemption applied;
- whether exempt portions could be severed to allow as much disclosure as possible;
- the content of the exempt portions of records and the facts and circumstances of the interpreter accreditation initiative;
- the risk of undercutting the ability of public servants and consultants to provide free and frank advice;
- the ability of policy makers to make decisions and take action without unfair pressure;
- the need to maintain working relationships with other governments, to whom it had made assurances of confidentiality in order to conduct future inter-jurisdictional research;
- the affected party's economic interests; and
- the risk of discouraging future bidding for government contracts.

[98] Further, the ministry advises that based on the appellant's representations, it has now also considered the purpose of the request. While the ministry agrees that the public has an interest in accessing information about interpretation services, the ministry has fulfilled that public interest by making extensive material on interpreter services available on its website.

[99] Although it is the appellant's position that the ministry's representations regarding its exercise of discretion are not sufficiently detailed, I find that the ministry took into account relevant factors in weighing the relevant factors both for and against the disclosure of the information at issue and did not take into account irrelevant considerations. In my view, the ministry's representations reveal that it considered the appellant's position and circumstances, balanced against the free flow of advice and recommendations, relations with other governments and their agencies and the importance of confidentiality in the solicitor-client relationship, in exercising its discretion not to disclose the information at issue. I also note that the ministry

disclosed additional records to the appellant during the inquiry, and that most of the records for which this exemption was claimed were severed to the extent that partial access was granted to the records.

[100] Under all the circumstances, therefore, I am satisfied that the ministry has appropriately exercised its discretion under sections 13(1), 15 and 19.

[101] Consequently, I uphold the ministry's exercise of discretion to apply the exemptions in section 13(1), 15 and 19 to the withheld information that I did not order disclosed.

Issue F: Does section 65(6)3 exclude the records from the *Act*?

[102] The ministry is claiming that section 65(6)3 applies to exclude numerous records[34] or portions thereof from the *Act* and, consequently, disclosure. Section 65(6)3 states:

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

[103] If section 65(6)3 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*.

[104] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned, it must be reasonable to conclude that there is "some connection" between them.[35]

[105] 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.[36]

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[34] Set out in the ministry's revised index of records.
[35] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[36] *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.

[106] 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.[37]

[107] 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.[38]

[108] 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.

[109] 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.

[110] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition;[39]
- an employee's dismissal;
[40]
- a grievance under a collective agreement;[41]
- disciplinary proceedings under the *Police Services Act*;[42]
- a "voluntary exit program;"[43]

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[37] Order PO-2157.
[38] *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.
[39] Orders M-830 and PO-2123.
[40] Order MO-1654-I.
[41] Orders M-832 and PO-1769.
[42] Order MO-1433-F.
[43] Order M-1074.

- a review of "workload and working relationships;"[44] and

- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.[45]

[111] The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review;[46] and

- litigation in which the institution may be found vicariously liable for the actions of its employee.[47]

[112] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[48]

[113] The records collected, prepared maintained or used by the ministry … are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest.

[114] The ministry submits that part one of the test is met, as each of the records was collected, prepared, maintained or used by the ministry. All of the records, the ministry states, with three exceptions, were prepared, maintained and used by ministry staff.

[115] The ministry advised that these exceptions are:

- the markers' materials at pages 94-264 and the test results at pages 40-93 were prepared by the affected party; and
- the application file of a named interpreter at pages 676-699 was maintained and used by ministry staff, but was prepared by the interpreter.

[116] The ministry further submits that parts two and three of the test have been met, as the records were collected, prepared, maintained or used in relation to meetings,

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[44] Order PO-2057.
[45] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).
[46] Orders M-941 and P-1369.
[47] Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.
[48] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.

consultations, discussions or communications about a labour relations or employment-related matters in which it has an interest.

[117] The ministry argues that previous orders of this office have found that it has an employment-related interest in freelance interpreters,[49] similar to the labour relations interest the government has in physicians[50] and Deputy Judges,[51] despite the fact that they are not considered to be government employees. The ministry submits that freelance interpreters, like physicians and Deputy Judges, are fee-for-service contractors who are paid by a ministry to provide services to the public.

[118] The ministry goes on to describe the records at issue and how, in its view, they meet the criteria of parts two and three of the test in section 65(6)3.

Test results (pp. 1-25), Test result pass rates (pp. 26-30) and Markers' materials (pp. 96-264)

[119] The ministry states that in Order PO-3101, Adjudicator Haly of this office found the interpreter test to be an employment-related record. The ministry states that the Court Interpreter Test is a required component of any application to provide interpretation services in Ontario courts, either as a staff interpreter or a freelance contractor. The ministry also argues that in Order PO-2123, Adjudicator Haly found that the complete hiring process, including recruitment, screening and interviewing constitutes an "employment-related matter" for the purposes of section 65(6) and that records produced in the context of a competition are communications and records used in deliberations about the results of a job competition are used in relation to "meetings, discussions and communications."

[120] The ministry argues that, similar to the test itself, the test results and the markers' materials are part of the overarching hiring process as they are used in meetings, discussions and communications about the results of a job competition and are, therefore, employment-related. The ministry goes on to explain that markers use the grading book to check the original test that was provided for interpretation and then use the manual for guidance on how to score the tests according to the official marking scheme. Two markers are assigned to each test and, in essence, function as an interview panel, because they use the markers' materials to evaluate the results of the test and produce the test scores. The ministry submits that the test scores are similar to the officers' training records and certificates considered in Order PO-2643.

[121] Further, the ministry states that although there are unaccredited interpreters on the registry at this time, the likelihood of being scheduled is significantly lowered for

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[49] Order PO-3101.
[50] *Ministry of Health and Long-Term Care v. Office of the Information and Privacy Commissioner/Ontario* [2003] O.J. No 4213 (Ont. C.A.).
[51] Order PO-2501.

unaccredited interpreters. The test scores, the ministry advises, determine a hierarchy of individuals who may provide paid services for the ministry.

[122] Moreover, the ministry advises that the test results also directly inform communications about training because individuals who achieve a score of less than 70 percent, but are objectively proficient and who require further skill development are provided with free test preparation classes and a list of training resources.

The application file (pp. 676-699)

[123] This ministry states that this file contains communications regarding the application of a particular interpreter to be added to the registry, including the individual's old test, resume and correspondence between the individual and the ministry regarding the test results. The ministry submits that these records are employment-related, as they relate to an individual's eligibility and suitability to perform a paid function for the ministry.

The registry (pp. 854-910)

[124] The ministry states that the registry is used in meetings and communications about interpreter scheduling and workload. It also informs training and recruitment, as the ministry makes efforts to recruit and train accredited interpreters who are underrepresented on the registry. In addition, an update is sent to court managers twice a month, including information about interpreters added to or removed from the registry. This information, the ministry argues, is used in scheduling interpreters for future court dates.

Briefing notes (pp. 274-279, 445-453, 614-620, 790-801), Discussion paper (pp. 724-733), Options paper (pp. 772-789) and Confidential report (pp. 802-830)

[125] The ministry states all of the above records discuss compensation rates for staff and/or freelance interpreters. In addition, some of the records refer to workload and staffing levels. Previous orders of this office have found that briefing notes related to staffing levels[52] and records discussing workload[53] relate to labour relations matters in which the institution had an interest. Lastly, the ministry provided further representations that met this office's confidentiality criteria. Although I am unable to describe them in this order, I did take them into consideration in making my findings.

[52] Order P-1516.
[53] Order PO-2057.

Update notes (pp. 754-757, 831-853)

[126] The ministry provided representations with respect to these records that met this office's confidentiality criteria. Although I am unable to describe them in this order, I did take them into consideration in making my findings.

Report on testing/training (pp. 34-39), 2009 test result report (pp. 40-93), Briefing notes (pp. 365-370, 644-667 and 758-771), Testing statistics (p. 408) and Court interpreter data (pp. 752-753)

[127] The ministry submits that the reports concerning testing/training are used to inform discussions, communications and meetings about recruitment, workload, scheduling and staffing levels. The records describe the results of the new interpreter testing, broken down by language and/or court location, and were prepared initially for use in tracking the rollout of the test, which is the "vehicle" by which interpreters apply for contract and staff employment with the ministry.

External advisory panel (pp. 530-533)

[128] The ministry advises that this record was used in discussions and meetings about the ministry's hiring of paid consultants to form its external advisory panel. The ministry submits that it is employment-related because it contains information about the composition of and compensation for the panel.

Background paper on interpreter scheduling (pp. 590-594)

[129] The ministry states that this record was used in relation to discussions or communications about managing workloads for interpreters across the province and also used in communications about adherence to an employment-related ministry policy.

Slides (pp. 614-620)

[130] The ministry advises that these slides were used in discussions or communication about staff training.

House book note (p. 746)

[131] The ministry submits that, broadly speaking, this record was used in meetings or discussions about the impact of implications of the test on the administrative business of managing the Court Services Division.

Peel interpreter services impact report (pp. 911-916), Court schedule (pp. 917-925) and Accreditation model transition tracking sheets (pp. 926-1126)

[132] The ministry states that these records were prepared in relation to discussions, communications and meetings about ensuring that adequate staffing in court was maintained during the transition, including issues of workload, staffing and best-practices. The tracking sheets, the ministry advises, record instances where adjournments occurred due to either interpreter unavailability or refusal by the court to accept the assigned interpreter, and also set out the local response to ensure that interpreters were available at the next date.

[133] Finally, the ministry states that the Court schedule and the Peel report are earlier location-specific iterations of the tracking sheet and were prepared for the same purpose. In addition, the Peel report contains additional employment-related discussion of the impact of the transition on workplace morale.

[134] In response, the appellant submits that given that exclusions effectively limit the bounds of the public's right of access to information, they must be strictly construed, so as to impact upon the right of access as little as possible. The appellant's position is that the ministry has failed to prove that the records meet the third part of the test in section 65(6)3, and are therefore subject to the *Act*.

[135] The appellant has presented a three-part argument to support its position, which I will describe in turn. I will also set out the ministry's reply representations in regard to each of the three arguments in turn.

Many of the records are "generic training materials"

[136] The appellant submits that prior decisions of this office have held that "generic training materials" are not captured by the exclusion, and are, therefore, subject to the *Act*.[54] These orders have distinguished generic training materials from records that are specific to a particular individual and are, or would likely be, contained in an employee's personnel file. These materials, the appellant argues, serve to communicate operational procedures that are to be followed by an institution's employees generally, and do not relate to a specific employee, a specific incident, a specific job competition or specific workforce issues. In particular, the appellant submits that the marking manuals appear to be generic records that prescribe standards for scoring the tests according to the official marking scheme, serve to communicate operational standards that are to be followed by the markers and do not relate to the qualifications or test results of a particular or prospective court interpreter. Similarly, the appellant states, the slides at pages 614-620 appear to relate to staff training in a generic sense. The appellant cites Adjudicator Laurel Cropley's findings in Order PO-2913 in support of its position and states that "generic training and standards-establishing records that serve as tools to ensure that the ministry meets its obligations to supply competent court interpreters" are not excluded from the *Act*.

[54] Orders MO-1954, PO-2913 and PO-2928.

[137] In reply, the ministry submits that the grading books serve as a question and answer key for markers and contain the actual text of the court interpreting test. The ministry argues that disclosing the grading books would be tantamount to disclosing the test. In addition, the ministry submits that the slides at pp. 614-620 were used by the Ministry Employee Relations Committee (MERC), which is the forum for ministry management to negotiate "matters of mutual interest" with union representatives. The ministry advises that the slides were not used for training or as a reference for employees. The slides were prepared, maintained and used to facilitate discussion between ministry management and the staff interepreters' union about the new accreditation model, which triggered a negotiation provision under the collective agreement between management and the union. The ministry also states that it relies on its original representations in regard to the markers' manuals.

The records constitute operational reviews and/or policy documents

[138] The appellant also submits that many of the records consist of organizational or operational reviews, which this office has consistently held are not excluded from the *Act*,[55] as these types of records relate not to labour relations or employment-related matters, but to the efficiency and effectiveness of the operation. This office has concluded that the following type of information does not fall within the exclusion:

- summaries of management's areas of concerns, employees' concerns, department goals and a summary of a survey;
- a review whose purpose was to set policy and direction for the future management of an organization;
- operational reviews that do not contain matters that are integral to the employment relationships between a municipality and its own workforce; and
- quality assurance or operational efficiency records, even if they touch peripherally upon matters relating to an institution's employees.[56]

[139] In particular, the appellant cites Order MO-2226 in which former Senior Adjudicator John Higgins concluded that records concerning the proposed transfer of duties from a municipality's Freedom of Information Office to the Integrity Commissioner were not excluded under the municipal equivalent of the *Act*. In reaching this conclusion, former Senior Adjudicator Higgins stated:

> I acknowledge that the discussion in the records before me is not about a general review, focusing rather on the possibility of assigning the City's

[55] Orders M-941, MO-1654-I, MO-2226, MO-2660, P-1369 and PO-3029-I.
[56] *Ibid.*

> access to information functions to the incumbent occupying the position of Integrity Commissioner for the City. Nevertheless, absent a labour relations component, or one relating specifically to the terms upon which an individual may be employed, the assignment of roles to a particular City official is organizational, and not employment-related within the meaning of section 52(3)3. If a broad interpretation of this term is applied, virtually all records within the custody or control of an institution could be considered employment-related.

[140] Turning to the records at issue in this appeal, the appellant submits that many of them should be properly characterized as organizational reviews of the ministry's court interpretation services. The appellant states that the ministry has advised in its representations that the withheld records were borne of its efforts to "review its court interpretation services."[57] The appellant submits that the records were generated as part of the ministry's efforts to change its accreditation process, with the purpose of improving the efficiency, effectiveness and quality of the interpretation services provided by the ministry. In addition, the appellant submits that the records set out or report upon the policy and direction of the ministry's efforts to review and overhaul its interpretation service, and record the results of these efforts along with the ministry's responses. This process of review, overhaul, appraisal and response, the appellant argues, relates to operational efficiency and systemic policy, and only incidentally touches upon labour relations and employment-related matters.

[141] Further, the appellant submits that the records do not relate to the qualifications or test results of particular interpreters and do not appear to focus upon employment-related matters such as compensation, workload and staffing levels. Moreover, the appellant submits that to the extent that the records contain information about compensation rates, workload and staffing, unless such employment-related matters formed the focus of the record, their incidental mention does not trigger the exclusion in section 65(6).

[142] In addition, the appellant notes that the ministry states that certain records were used to "inform discussions, communication and meetings about recruitment, workload and staffing levels," yet does not provide any information as to how these records "informed" employment-related discussions and communications. The appellant argues that the fact they the records may have later been used, in an unspecified manner, to "inform" discussions on employment-related matters is insufficient to bring the records within the exclusion.

[143] In reply, the ministry submits that the records are not operational reviews. In particular, the ministry states that the focus of the test result pass rates, contingency planning, accreditation suggests and options paper is the maintenance of staffing levels

[57] Paragraph 6 of the ministry's representations.

in the courts during the transition between models, and that previous orders of this office have recognized workload and staffing as labour relations/employment-related matters.[58] In addition, the pass rates specifically refer to the qualifications of particular interpreters, while the contingency planning and accreditation suggestions contain information about identifiable (though unnamed) interpreters.

[144] The ministry also submits that the focus of the MERC slides was labour relations, as they were prepared as part of a preliminary negotiation under the collective agreement. Further, the ministry argues that the discussion paper, updates on court interpreter testing, and the confidential report were used by decision-makers within the ministry in discussions and meetings about the labour relations impact of the new model. Although the labour relations content in the record does not make up the bulk of the record, it is an essential part of the discussion and is more than incidental. The ministry goes on to say that these three records do not review an existing global operation. Instead, they discuss the impact of the program at the different stages of its rollout, including the potential or actual labour relations impact of that program.

[145] The ministry also relies on its original representations with respect to the report on testing, 2009 test results, testing statistics, MAG court interpreter scheduling background, summary/go forward strategy, house book note and court interpreter data.

The records are not "about" labour relations or employment-related matters

[146] The appellant does not dispute that the relationship between the ministry and freelance interpreters satisfies the "employment-related" requirement in section 65(6). However, the appellant states, unless the meetings, consultations, discussions or communications to which the records relate are "about" labour relations or employment-related matters, the exclusion does not apply. The appellant submits that prior decisions of this office have recognized that the use of the word "about" in the exclusion implies a requirement of a substantial connection between the subject matter and/or purpose of the record and labour relations or employment-related matters.

[147] The appellant goes on to state:

> The review and overhaul of the Ministry's interpreter accreditation program, which gave rise to the records at issue in the current appeal, was triggered by judicial findings about the inadequacies of the previous accreditation test and the "reckless indifference" of the Court Services Division to the section 14 *Charter* rights of accused persons.[59] Like most government institutions, the Ministry's court interpretation service operates through individual interpreters, who have an employment or employment-like relationship with the Ministry, and display individual

[58] Orders P-1516 and PO-2057.
[59] *R. v. Sidhu* (2005), 203 C.C.C. (3d) 17 (S.C.J.).

> variation in their qualifications and competence. An overhaul of the Ministry's interpretation service and accreditation test will necessarily have an incidental impact on employment-related matters. The [appellant] submits that this peripheral association with employment-related matters is, however, insufficient to exclude these records from the operation of the *Act*, which the records were created for the primary purpose of ensuring and/or improving the operation, efficiency and quality of the Ministry's court interpretation service.

[148] In particular, the appellant's position is that the following records are not sufficiently connected to employment-related matters or labour relations, in that they do not refer to the terms and conditions of employment, or other human resource related issues:

- records relating to testing, as accreditation is not a necessary condition of employment within the court interpretation services. The ministry has not established that the testing should be equated to a job interview;

- records relating to the external advisory panel and the house book note relate to the review of the program and the impact of the test on the administrative business of managing the Court Services Division;

- the registry is simply a record of the status of freelance interpreters with regard to their accreditation; and

- records relating to tracking the impacts of the new testing regime during the transition and afterwards were created for the purpose of tracking adjournments, *voir dires* and other potential problems. Any information relating to scheduling or triaging particular court interpreters is an incidental connection.

[149] In reply, with respect to the test scores, the ministry submits that they are about employment-related matters, because they create the hierarchy upon which employment offers will be made, similar to scores in a job interview. In fact, the ministry argues, the test literally is part of the job interview for all new staff interpreters. In addition, the ministry advises that it has re-tested over 99 percent of its rostered freelance interpreters and 100 percent of its staff interpreters. Those interpreters who refused to re-take the test have been removed from the registry. The test is an integral part of competitions for new staff interpreters. While unaccredited interpreters are occasionally scheduled in court, the ministry states, poor test scores significantly lower the likelihood of receiving work and management must approve the scheduling of unaccredited interpreters and only in situations of "extreme urgency."

[150] The ministry further submits that the registry is not simply a record of the status of freelance interpreters with regard to their accreditation. The ministry states that the accreditation status is an indicator of the interpreter's score range and that, as of August 2013, includes accreditation levels on individual testing components, such as consecutive translation. The registry also includes the interpreter's accredited language, home address, phone numbers, email address, geographic availability and other comments about availability. In addition, the ministry advises that in order to be added to the registry interpreters must also:

- undergo a security check;
- attend a training course and pass an exam on ethics and court procedure;
- if conditionally accredited, complete a skills development plan; and
- agree to adhere to a code of conduct, to accept a particular fee schedule and to a system of remuneration for travel expenses.

[151] Therefore, the ministry argues, the employment-related terms and conditions are inherent in inclusion on the registry. The registry is used to communicate to interpreter co-ordinators the list of candidates for court interpreting ranked according to accreditation level on a qualifying test, who have accepted the accompanying fee-for-contract conditions. With the registry, the ministry states, the co-ordinators can then schedule interpreters appropriately, based on their skills.[60]

[152] The ministry also reiterates that the MERC slides were used for the purpose of assisting negotiating with union representatives, which is substantially connected to its labour relations interests.

[153] The ministry also relies on its original representations with respect to the rolling up pass rates, external advisory panel, and the Toronto court schedule.

If the Act does apply

[154] The appellant argues that if I find that the exclusion does not apply, I should not permit the ministry to then claim discretionary exemptions in regard to the records or in the alternative, not permit it to claim new exemptions that were not originally claimed in its decision letter. In reply, the ministry submits that should the *Act* apply to the records at issue, the head should be permitted to review whether exemptions may or should apply and should therefore be permitted to issue a decision to the appellant.

[60] The ministry cites as an example an interpreter with a high score in consecutive interpretation would more likely be assigned to interpret in a trial with a witness.

Findings

[155] I have carefully reviewed the records at issue and have taken into consideration the detailed representations of both parties. I find that some of the records, or portions thereof are excluded from the *Act* by virtue of section 65(6)3. Other records, however, are not excluded from the *Act* and I will order the ministry to issue a new decision letter with respect to them.

[156] In making my decision with regard to section 65(6)3, I considered Adjudicator Haly's Order PO-3101, but note once again that I am not bound by her decision.

[157] I find that the test results at pages 1-25 are excluded from the *Act*. While not prepared by the ministry,[61] the test results were collected and used by the ministry. I accept that the test scores determine the accreditation status of the interpreter, which is then used by the ministry for scheduling purposes. Therefore, I am persuaded that the test scores are an integral part of the competition among interpreters for work. In addition, the test scores may reveal whether an interpreter requires further testing and test preparation classes. As these scores are used and communicated by the ministry as part of the hiring and scheduling of interpreters, I find that they are employment related matters in which the ministry has an interest and therefore, excluded from the *Act*.

[158] Similarly, I find that the registry is also excluded from the *Act*. I accept the ministry's statement that the registry is used for scheduling and training purposes. Moreover, the registry also contains information about individual interpreters' availability and scheduling preferences. I am persuaded that the registry is a communication tool that is used by the ministry to assist in scheduling interpreters, which is an employment related matter in which the ministry has an interest.

[159] In addition, I find that many of the remaining records are excluded from the *Act* because they were used in discussions and communications by the ministry in relation to employment related matters or labour relations matters in which it has an interest. In particular, these records contain information concerning:

- specific test results;
- scheduling issues;
- interpreters' status;
- an identifiable individual's application file;

[61] The test results were prepared by the affected party.

- discussions about the nature of the employment relationship between the ministry and interpreters;
- workload;
- compensation paid to external consultants;
- staffing levels;
- follow-up actions with staff regarding testing and training;
- grievance information;
- detailed information about individual interpreters' accreditation status;
- recruitment; and
- the schedules of identified interpreters.

[160] In sum, I find that all of the records above are excluded from the *Act* because they are documents related to matters in which the ministry has an interest and was acting as an employer, and terms and conditions of employment or human resource questions were at issue. In addition, I find that none of the exceptions to section 65(6) in section 65(7) apply.

[161] Conversely, I find that other records, or portions thereof that the ministry withheld, are not excluded from the *Act.* In particular, pages 49-50, 64, 66-69, 72, 83 and 91-93 contain general information about the court interpreter testing process and test administration. I find that this type of information is not about employment related issues and is, in fact, merely incidental to employment-related issues. Therefore, I find that these records are not excluded from the *Act*.

[162] Pages 94-264 consist of three markers' manuals and a grading book and are, essentially a "how to" guide to marking the court interpreter test. These records were prepared by the affected party and are used by the affected party because it provided marking services for the ministry. While the ministry may have an interest in the test results, I am not persuaded that it has an interest in how the tests are scored. Further, I do not accept the ministry's argument that these records would inform discussions about workload, staffing, scheduling and other employment-related issues. Therefore, I find that these records are not excluded under the *Act*.

[163] Pages 445, the top of pages 446 and 447, 451-453, 744-745 and 748 (except the first paragraph) and 749-50 contain stakeholder comments, an excerpt from an article in a publication and historical information. In my view, this type of information forms

part of an operational or organizational review and are not employment-related. Therefore, I find that these records are not excluded under the *Act*.

[164] The withheld portions pages 756 and 799 contain risk management information and are not about employment-related issues and only tangentially related to employment-related issues. Therefore, I find that these records are not excluded under the *Act*.

[165] Pages 768-771, 809-817, 824, 829-830, 848 and 850-853 contain general information regarding the test results and the proposed accreditation model. In my view, these records contain information relating to the operational review of the court interpreter accreditation system, rather than to employment-related issues. Therefore, I find that these records are not excluded under the *Act*.

[166] Pages 911-916 contain tracking information for program delivery review purposes. Portions of these pages relate to employment-related issues, as they discuss workload, morale, scheduling and working relationships. However, other portions relate not to the employment of interpreters, but to the effect of the interpretation system on the criminal justice system. These portions are not about employment-related issues and are, therefore, not excluded under the *Act*.

[167] Lastly, pages 926-1126 consist of a tracking sheet for program delivery review purposes. While the record may touch on some staffing issues, the purpose of the record is to determine if there are systemic issues with the court interpreter accreditation system. In my view, the record is not about employment-related issues and is, therefore, not excluded under the *Act*.

[168] The appellant takes the position that I should not permit the ministry to claim discretionary exemptions or in the alternative, not permit it to claim new exemptions that were not originally claimed in its decision letter. The ministry's position is that the head should be able to review records found covered under the *Act* and issue a decision. When an institution claims that a record is excluded from the *Act* and this office finds that it is subject to the *Act*, the remedy is to order the institution to issue a new decision letter with respect to the records at issue. In the circumstances of this appeal, there is no reason to deviate from this approach.

[169] In sum, I order the ministry to issue a new decision letter regarding pages 49-50, 64, 66-69, 72, 83, 91-93, 445, the top of pages 446 and 447, 451-453, 744-745, 748 (except the first paragraph), 749-750, 756, 768-771, 799, 809-817, 824, 829-830, 848, 850-853, 911-916 and 926-1126.

[170] The affected party is claiming the application of the mandatory third party information exemption in section 17(1) with respect to pages 94-264 which I have

found are subject to the *Act*. As section 17(1) is a mandatory exemption, I will consider its application to these records, below.

Issue G: Does the mandatory exemption at section 17 apply to the records?

[171] The ministry and the affected party are claiming the application of the mandatory exemption in section 17(1)(a) and (c) to a consultation document at pages 486-498, a validation study at pages 587-589 and MAG responses to bilingual and English pilot test data at pages 1127 to 1134.

[172] The affected party is also claiming that section 17(1) applies to:

- the marking materials, which consists of three marker's manuals and the exam grading book;
- comments on pass rates in other jurisdictions at pages 272-273;
- the record at pages 353-359;
- MAG test pilot data analysis at pages 541-544; and
- a portion of page 809, which is a record entitled "Report on the Initial Round of Court Interpreter Testing."

[173] In reply, the ministry advises that the affected party has claimed the application of section 17(1) to records it submits are not subject to the *Act*.

[174] I have already found the withheld portions of pages 353-359 and 541-544 to be either non-responsive to the request or exempt under section 13(1). The ministry has already disclosed the portions for which it did not claim the exemption in section 13(1) or non-responsiveness. With respect to the record at pages 272-273, the ministry had not claimed section 17(1) for this record, and disclosed it to the appellant during the inquiry, prior to the affected party's claim that is was subject to the exemption in section 17(1). Accordingly, I will not be considering these three records under section 17(1).

[175] Section 17(1) of the *Act* states:

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

[176] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[62] 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.[63]

[177] 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.

Part 1: type of information

[178] The types of information listed in section 17(1) have been discussed in prior orders:

> *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;

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[62] *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.).
[63] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

(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.[64]

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.[65]

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.[66] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[67]

[179] The ministry submits that the records contain technical information because they consist of detailed analysis and the results of study and testing relevant to establishing the new test and accreditation model. The validation study contains professional and technical analysis on how to ensure statistical validity of the test. The pilot test analysis[68] reveals lessons learned from the pilot test. The ministry submits that it is possible to glean valuable technical information about the test's development protocol and processes from the records.

[180] The affected party submits that the records at issue contain trade secrets, and technical and commercial information. With respect to its position that the records contain trade secrets, the affected party submits that the records reveal its methods, techniques and processes developed under its framework. The affected party states that it owns the intellectual property rights in the framework and has the right under contracts with the ministry to license it to other jurisdictions. This framework, the affected party submits, is unique in Canada, is not publicly available or generally known in the business of court interpreting.

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[64] Order PO-2010.
[65] *Ibid*.
[66] *Ibid*.
[67] P-1621.
[68] Pages 1127-1134.

[181] The affected party also submits that the records contain technical information because they reveal the specific methods and processes developed by its court interpreting professionals as part of the framework to evaluate the performance of individuals wished to be accredited. The records expressly set out, describe or permit accurate inferences to be drawn about the actual contents of the processes and methods markers use in evaluating candidates' performance on these tests.

[182] In addition, the affected party argues that the records contain commercial information as they relate to the buying and selling of court interpreting products and services for profit, and that its framework, the details of which are contained in the records, is itself a revenue generating product.

[183] The appellant submits that the general comments provided on the evaluation of candidate performance, and the MAG responses to bilingual and English pilot test data do not meet the first part of the section 17(1) test, as they do not qualify as trade secrets, technical information or commercial information. In particular, the appellant argues that the information is not:

- a trade secret as it does not gain its economic value from not being generally known; rather, it gains its economic value from the expertise, experience and authority of its authors;

- commercial information as it does not relate to the exchange or merchandise or services; and

- technical information as information associated with the development of training courses and accreditation tests for interpreters does not fall within the generally accepted fields associated with technical knowledge. In addition, the use of statistical analyses to confirm the validity of the test is insufficient to bring the records within the category of technical information.[69]

[184] In reply, the affected party states that Adjudicator Haly's conclusion in Order PO-3101 is relevant and persuasive in this appeal because she considered records containing the same information or the same type of information that is presently at issue, and found them to qualify as technical information.

[185] Based on my review of the records, I am satisfied that the three marking manuals, the exam grading book, the consultation document, the validation study, and the MAG responses to bilingual and English pilot test data contain detailed technical information and analysis, and the results of study and testing relevant to establishing

[69] The appellant also submits that Adjudicator Haly's conclusion in Order PO-3101 that the information at issue in that appeal was technical information for purposes of section 17(1) ought to be "scrutinized anew."

the new test and accreditation model. I am also persuaded that the records contain information prepared by a professional in the court interpretation testing field, namely the affected party, which describes the design and operation or maintenance of the court interpretation accreditation process. Consequently, I find that they contain "technical information" for purposes of the first part of the test in section 17(1).

[186] Conversely, I find that the withheld portion of page 809 does not contain technical information, nor does it contain trade secrets or commercial information. Instead, the information at issue simply sets out some statistical information of a very general, non-technical nature. Therefore, I find that this page does not meet the first part of the three-part test in section 17(1). As no other exemptions have been claimed with respect to this page, I order the ministry to disclose it to the appellant.

Part 2: supplied in confidence

[187] 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.[70]

[188] 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.[71]

[189] 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.[72]

[190] 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; or

[70] Order MO-1706.
[71] Orders PO-2020 and PO-2043.
[72] Order PO-2020.

- prepared for a purpose that would not entail disclosure.[73]

[191] The ministry submits that the consultation document was expressly supplied to it by the affected party in confidence, as the record is clearly marked as confidential. The remaining two records were supplied to the ministry by the affected party with the implicit expectation of confidence. The ministry states that the affected party has consistently expressed its desire to keep records relating to the test confidential, that it has consistently protected the records from disclosure and has not made them publicly available. The records, the ministry argues, were prepared for the purpose of developing the test, which is not a purpose that would entail disclosure.[74]

[192] The affected party submits that it prepared the marking materials and the consultation record, and supplied them to the ministry under the expectation that the ministry would maintain their confidentiality. The affected party also submits that the records expressly set out, describe or permit accurate inferences to be drawn about the actual contents of its framework, which it has a strong interest in remaining confidential, as it continues to be a revenue generating product for the affected party. The value of the framework, the affected party goes on to say, is highly dependent on its ability to maintain exclusive knowledge and use of the methods, techniques and processes it developed. Therefore, the affected party concludes, it has placed great importance on maintaining the confidentiality and secrecy of these methods, techniques and processes, which are not generally known to the public. Lastly, the affected party submits that while only some of the records are marked as being "confidential" all of them were supplied in confidence to the ministry within the meaning of section 17(1).

[193] The appellant submits that the bilingual test results and the MAG responses to the pilot test data do not meet the second part of the test in section 17(1), as they were not supplied to the ministry by the affected party. These records, the appellant submits, were either generated by the ministry or created jointly by the ministry and the affected party. In the case of the latter, the appellant argues, past orders of this office have held that when information is mutually generated, rather than "supplied" by a third party it does not qualify for exemption. The appellant goes on to argue that given these records were not created by the affected party, it follows that they were not created with an expectation of confidentiality.

[194] In reply, the affected party submits that the bilingual test results were supplied to the ministry as part of the deliverables under the original contract with the ministry and that the information contained in the two MAG responses to the pilot tests originated with the affected party. As such, the affected party submits, the MAG responses reveal or permit the drawing of accurate inferences with respect to confidential information supplied by the affected party to the ministry. Further, even though a particular record was not created by the affected party, it states, the record

[73] Orders PO-2043, PO-2371 and PO-2497.
[74] Order PO-2043.

can still reveal information that was supplied by it under the expectation that it would be kept confidential.

[195] I find that the marking manuals, exam grading book, consultation document and validation study were directly 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 am also persuaded by both the ministry's and the affected party's arguments that the affected party had both an explicit and implicit expectation of confidentiality when it supplied the records to the ministry. In addition, with respect to the two MAG responses to pilot test data, I find that these records contain the same information that was directly supplied to the ministry by the affected party. Consequently, the disclosure of these two records would reveal or permit the drawing of accurate inferences with respect to information that had been supplied by the affected party. 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.

[196] Accordingly, I find that the requirements for part two of the three-part test in section 17(1) have been met.

Part 3: harms

[197] 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.[75]

[198] 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.[76]

[199] 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).[77]

[200] 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.*[78]

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[75] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[76] Order PO-2020.
[77] Order PO-2435.
[78] Order PO-2435.

[201] In support of its position that disclosure of the records would prejudice the competitive position of and result in undue loss for the affected party, the ministry states:

> Although the Ministry has a licence to use the test, [the affected party] owns the intellectual property in the court interpretation test framework. The terms, including compensation, were based on the [affected party's] understanding that it would be able to use the test in future for its own profit.
>
> The harms from disclosing the discussions surrounding the records at issue are significant. Were these to become public, competitors could benefit unfairly by piggybacking on [the affected party's] two years of consultations, research, development and the trial-and-error process that went into the creation of the test.

[202] The affected party submits that disclosure of the records at issue clearly gives rise to a reasonable expectation of harm under section 17(1)(a) (prejudice to its competitive position) and (c) (undue loss for it and undue gain for a third party). The affected party also states that it developed and maintains ownership of the intellectual property in the test preparation materials and marker manuals. The affected party states:

> This intellectual capital is the backbone of the only comprehensive multilingual Court Interpreting accreditation program in Canada.
>
> Under the Contracts with the Ministry, the [affected party] has the right to license the [framework] and materials to other entities for profit. The terms of the Contracts with the Ministry, including compensation, were based on the [affected party's] understanding that it would be able to use the Framework in the future for its own profit. It continues to be the [affected party's] intent to do so and remain in the court interpreting training and accreditation market.

[203] The affected party goes on to state that the disclosure of the records would provide other entities, including other post-secondary institutions, with an opportunity to use the affected party's intellectual property for their own interests and compete directly with it. These other entities, the affected party submits, would unduly benefit from the extensive work it has invested into developing this testing system and, as a result, there would be a real risk that its status as an industry leader would be compromised. In addition, the affected party advises that its contract with the ministry is about to expire and the ministry has issued an RFP in this regard, supporting the inference that there is a real interest on the part of other institutions in obtaining the details of the framework in order to unfairly compete against it.

[204] The affected party also submits that in addition to financial loss, the disclosure of the records would pose a real risk to its reputation and credibility in the national court interpreting community and the perceived quality of the framework. The affected party advises that each of the components of the framework were designed to be used by qualified, experienced and properly trained court interpreter professionals as part of a larger system, and that the integrity of the framework depends on the use of these components in conjunction with one another. The affected party also submits that if an entity providing evaluation services to a court interpreter accreditation agency misuses the framework, there would be a real risk that incompetent and/or poorly trained court interpreters would be improperly accredited, significantly harming the reputation and credibility of the affected party, as the developer of the framework.

[205] The appellant submits that neither the ministry nor the affected party has established that disclosure of the records gives rise to a reasonable expectation of harm to the affected party. At most, the appellant argues, there is a speculation of harm, as the affected party's expertise and experience in the area of court interpretation is the result of decades of work and research, which cannot be appropriated by others merely by reading the records. Further, the appellant states, the affected party's ownership over the intellectual property it has generated is amply protected by other means, such as its contract with the ministry and its intellectual property rights.

[206] The appellant further submits that disclosure of the records will not cause the affected party to lose its competitive position, as the affected party acknowledges that the records at issue are "part of a larger system" and that the "integrity of the framework depends on the use of these components in conjunction with one another." The appellant's position is that these statements made by the affected party confirm that not all the information necessary to effectively use its program is included in the records. As a result, the appellant argues, competitors would be unable to use the program as the affected party alleges.

[207] Lastly, the appellant states that there is limited risk that the information will no longer be supplied to the ministry, as neither the ministry nor the affected party made representations on this point.

[208] In reply, the ministry reiterates that the records at issue document the way in which the affected party deployed its expertise and accumulated experience in developing its model, and that reading these records does allow competitors to stand on the affected party's shoulders in creating similar systems. In addition, the ministry argues that the affected party's contract with it cannot prevent competitors from developing competing products and marketing them to other governments, ministries or private firms, as there is a much larger market for interpreter testing and training tools than the ministry alone. Disclosing these records, the ministry states, would give the affected party's competitors an unfair advantage in the market and would prevent the

affected party from capitalizing on its efforts and experiences developing the first test of this kind.

[209] Also in reply, the affected party reiterates that disclosure of the records would give its competitors an unfair opportunity to use its intellectual property to compete against it both in the context of providing services and products to provincial Ministries of the Attorney General, and in the context of offering court interpretation training programs. The affected party further submits that the records contain specialized methodologies and techniques unique to its greater interpreting program curriculum and do not relate solely to the contracts with the ministry, but also to other full-time programming. The affected party advises that the interpreting program is unsubsidized and exists solely through revenue generating, and argues that without this revenue, the program would cease to exist. The information in the records, if disclosed, could be appropriated by a competitor and used as a partial template to develop a competitive program to gain an unfair advantage by benefitting from the value of the affected party's work and research without investing any resources itself.

[210] With respect to the appellant's assertion that the affected party's ownership over its intellectual property is amply protected by other means, the affected party submits that it would be difficult for it to succeed in an action against the ministry for breach of contract if the ministry was ordered by this office to disclose the records.

[211] In support of its position, the affected party states:

> Further, if the records were disclosed, enforcing the [affected party's] intellectual property rights through the courts would be difficult and costly. If the confidential information in the records was released to the public, the [affected party] would no longer have control over or knowledge of who is able to access the information. As a result, it would be very difficult for the [affected party] to identify or prove any misappropriation of its intellectual property. Moreover, an attempt to recover the resulting damages would involve years of legal proceedings in anticipation of an outcome that is uncertain. Even if the [affected party] was successful in this type of action, the damages suffered by the [affected party] would be irreparable.

[212] Both the ministry and, in particular, the affected party made detailed representations on the possible harm in disclosing the records which deal with the development of the test and the accreditation model. The consultation document, the validation study and the MAG responses discuss the reasons behind the components of the test, suggestions for improvements and modifications to the accreditation process, as well as follow-up questions from the ministry to the affected party. Based on my review of these records and the affected party's representations, which contain detailed and convincing evidence, I find that disclosure of the records listed above 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.

[213] In addition, I am persuaded by the affected party's detailed and convincing evidence that disclosure of the three marker's manuals and the exam grading book would disclose the actual contents of the processes and methods markers use in evaluating candidates' performance on the tests. I find that if disclosed, this information could be used by a competitor to undermine and prejudice the affected party's competitive position, as the competitor could simply adopt the methods and processes that the affected party developed. For the same reasons, I find that the disclosure of this type of information could reasonably be expected to cause undue loss to the affected party. Consequently, I find that sections 17(1)(a) and (c) of the *Act* apply to exempt these records from disclosure.

Issue H: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the sections 13(1), 15 and 17(1) exemptions?

[214] Section 23 states:

> An exemption from disclosure of a record under sections **13, 15, 17**, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[215] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[216] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[79]

[217] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[80] Previous orders have stated that in order to find a compelling public interest in disclosure, the

[79] Order P-244.
[80] Orders P-984 and PO-2607.

information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[81]

[218] A public interest does not exist where the interests being advanced are essentially private in nature.[82] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[83]

[219] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[84]

[220] Any public interest in *non*-disclosure that may exist also must be considered.[85] If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply.[86]

[221] A compelling public interest has been found to exist where, for example the integrity of the criminal justice system has been called into question.[87]

[222] A compelling public interest has been found *not* to exist where, for example, another public process or forum has been established to address public interest considerations,[88] or a significant amount of information has already been disclosed and this is adequate to address any public interest considerations.[89]

[223] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[224] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[90]

[225] The ministry submits that it has disclosed a number of records about the new interpretation system, both in relation to this request and on its publicly available

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[81] Orders P-984 and PO-2556.
[82] Orders P-12, P-347 and P-1439.
[83] Order MO-1564.
[84] Order P-984.
[85] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[86] Orders PO-2072-F and PO-2098-R.
[87] Order P-1779.
[88] Orders P-123/124, P-391 and M-539.
[89] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[90] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

website. In addition, the ministry argues that the disclosure of the records at issue will not meaningfully add to the information the public has to make effective use of the means of expressing public opinion or making political choices.

[226] The ministry goes on to make representations with respect to each of the relevant exemptions to which the public interest may apply as follows:

- Section 13(1) – this exemption has been historically overridden when the decision is related to public health or safety, which is not the case here. The ministry concedes that these records could contribute to public debate, but the need for public debate, in and of itself, is not sufficient to outweigh the purpose of the exemption in section 13(1);

- Section 15 – these records relate to other jurisdictions' accreditation practices. There is no relationship between the records and the activities of the provincial government and it is not reasonable to expect that Ontarians' political choices will be impacted by the records; and

- Section 17(1) – previous orders have overridden this exemption where the records involved public health and safety. In addition, the ministry has released extensive information about the way in which the test is structured and marked through its website and the test preparation classes it provides to interpreters.

[227] Further, the ministry submits that there is a public interest in the non-disclosure of the records. In particular, the ministry states:

> The public interest in non-disclosure is related to the purposes of the exemption. Disclosing advice to the government undercuts the public service's ability to give advice freely. Disclosing information received in confidence from other jurisdictions interferes with staff ability to conduct valuable inter-jurisdictional research. Disclosing the technical records of a Ministry contractor could cause economic harm to that contractor and discourage future bidding for government contracts.

[228] The appellant submits that there is a compelling public interest in protecting and upholding accused persons' fundamental rights under sections 11(b) (the right to be tried within a reasonable time) and 14 (the right to the assistance of an interpreter) of the *Charter* by ensuring appropriate public accountability and scrutiny of the quality of the "state's" provision of interpretation services in the context of criminal trials. The appellant argues that the quality of the state's provision of interpretation services is closely linked to the integrity of the criminal justice system. This public interest, the

appellant submits, clearly outweighs the purpose of the exemptions in sections 13(1), 15 and 17(1).

[229] The appellant further submits that maintaining the integrity of the criminal justice system has been recognized as a compelling public interest.[91] The appellant states that because many accused persons in Ontario do not speak English or French, the interpretation services supplied by the province in criminal trials are an essential aspect of a properly functioning and fair criminal justice system. Systemic inadequacies in the interpretation services, the appellant argues, whether in terms of the quality of interpretation or the supply of qualified interpreters or both, present a fundamental challenge to the integrity of the criminal justice system.

[230] The appellant also advises that section 14 of the *Charter* confers a constitutional norm and fundamental right to an accused to have the assistance of an interpreter where the accused does not understand or speak the language of the court. This right is linked to notions of justice, including the appearance of fairness and the ability to make full answer and defence, touching on the very integrity of the administration of justice.[92]

[231] The appellant states that in *R. v. Tran*, the Supreme Court of Canada explained that the denial of interpreter assistance constructively denies the defendant's constitutional, statutory and common-law right to be present in every respect at his or her trial and to understand and answer the case to meet, and comprehend all proceedings which affect his or her vital interests. The Court concluded that the denial of competent assistance of an interpreter affects the integrity of the fact-finding process, and referred to five criteria for assessing the adequacy of interpretation: continuity, precision, impartiality, competency and contemporaneity. The appellant argues that if interpretation does not meet this standard, it is inadequate and in violation of section 14 of the *Charter*.

[232] With respect to section 11(b) of the *Charter*, the appellant submits that systemic inadequacies in the availability of interpretation services give rise to delays in the progress of criminal cases, engaging the right to be tried in a reasonable time. Section 11(b), the appellant states "protects the individual from impairment of the right to liberty, security of the person, and the ability to make full answer and defence resulting from unreasonable delay in bringing criminal trials to a conclusion."[93] The appellant submits that courts have not hesitated to find that the Crown's failure to provide competent interpreters is a contributing factor to finding that an accused person was not tried within a reasonable time,[94] which can result in a stay of proceedings.

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[91] Order PO-1779.
[92] *R. v. Tran*, [1994] 21 S.C.R. 951.
[93] *R. v. Morin*, [1992] 1 S.C.R. 771, cited in *R. v. Satkunananthan*, 2001 CanLii 24061 (ON CA).
[94] *R. v. Satkunananthan, supra.*

[233] The appellant argues that there is a persistent problem of inadequate interpretation services in the province's criminal courts and that disclosure of the record is necessary for public accountability and scrutiny. The appellant refers to two rulings in 2005[95] and 2011[96] of Justice Hill of the Ontario Superior Court of Justice. In those rulings, Justice Hill provided a "scathing review" of the quality of the court interpreter services offered by the ministry and found that not all interpreters have been tested under the affected party's regime, an interpreter's accreditation may be based on inadequate testing, and there continues to be a lack of supply of competent court interpreter services able to provide simultaneous interpretation.

[234] Moreover, the appellant submits that systemic problems in the ministry's interpretation services have been identified through *voir dires* and section 11(b) Charter applications, in which the ministry has been compelled to reveal information about its interpretation program and the qualifications of its interpreters. While *voir dires* can serve to identify gaps in individual cases, the criminal courts depend on the ministry's assessment of the competency of interpreters, as judges do not have the ability to assess language or interpretation skills on a routine basis in every trial.[97]

[235] The appellant also submits that a number of recent judgments have confirmed that despite the ministry's efforts to improve court interpreter services since 2005, its partnership with the affected party, and its new testing policies, the lack of properly qualified court interpreters remains a serious problem. Given these systemic problems, the public has a compelling interest in reviewing the measures taken by the ministry in relation to the inadequacies of the court interpreter service.

[236] The appellant, who is a non-profit organization comprised of approximately 1,000 criminal defence lawyers practicing in Canada, advises that it is interested in obtaining the records, in order to:

- Educate its' membership on issues relating to criminal and constitutional law;

- Consult with the Attorney General of Ontario and both Houses of Parliament and their Committees on matters concerning provincial legislation, courts management and other concerns involving the administration of justice in Ontario;

- Intervene in high profile Supreme Court of Canada and Court of Appeal cases that have implications for the administration of the criminal justice system; and

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[95] *R. v. Sidhu*, see note 59.
[96] *R. v. Dutt*, 2011 ONSC 3329.
[97] *Ibid*. See also *R. v. Baquiano*, 2013 ONSC 1917.

- Use any information disclosed as a result of this request to engage in public discussion and advocacy regarding the systemic inadequacies of the ministry's court interpreter service in order to enhance and protect the *Charter* rights at risk.

[237] Lastly, the appellant submits that the public interest at issue, that is, the integrity of the criminal justice system, overrides the purpose of the exemptions in sections 13(1), 15 and 17(1). With respect to section 13(1), the appellant argues that the records at issue have already been the subject of decisions and the resulting policies and programs are already in force. Therefore, the appellant submits, as undue pressure on the decision-maker is no longer an issue, denying the records for this reason is inconsistent with the purpose of section 13(1).

[238] With respect to section 17(1), the appellant argues that the affected party has conceded that the records at issue do not provide sufficient information regarding the "larger system." The appellant submits that, as a result, the informational assets cannot effectively be exploited in the marketplace and that withholding the records is unnecessary to fulfil the purpose of the exemption. The appellant also argues that the affected party's interests are purely pecuniary and that these interests will at most be "lessened somewhat" by the disclosure of the records.

[239] In reply, the ministry states that it does not dispute that the public has an interest in accessing information about interpretation services. The ministry advises that its website contains extensive information about the test, how it is marked, and the cut-off scores required for full and conditional accreditation. The ministry also advises that the public can obtain information about interpretation services in criminal trials through the province's open court system, decisions of which are available on sites such as CanLii, and notes that the appellant has referred to a number of decisions scrutinizing the quality of the interpreter services.

[240] The ministry goes on to state:

> Members of the public, if they are accused of an offence and require an interpreter, will also be informed, along with the judge and the prosecutor, if an unaccredited interpreter is assigned to the case. At that point, if the right is threatened, it is open to any party or the judge to further inquire into the interpreter's abilities.
>
> The Ministry respectfully submits that there is not a sufficient relationship between the particular records at issue and the public interest claimed. The records do not meaningfully add to the already extensive body of information the public has on which to form opinions or make political

> choices. As such, the public interest in these records does not outweigh the purposes of the exemptions.[98]

[241] The affected party was also invited to provide representations in response to the appellant's argument on the possible application of the public interest override to section 17(1), and did so. The affected party submits that the disclosure of the information in the records will not meaningfully add to the information the public has in relation to the performance and efficiency of the ministry's court interpretation services.[99] In addition, the affected party submits that the public interest override does not apply because a significant amount of information is available or has been disclosed, which satisfies the public interest.[100]

[242] Further, the affected party argues that the appellant has not demonstrated why the information available or previously disclosed to it is not sufficient to achieve its goals of reviewing the steps taken by the ministry in response to the systemic inadequacies, or engaging in public discussion regarding same. The affected party submits that the appellant can use the information already available to further the public interest without accessing the affected party's confidential informational assets and posing a reasonable risk of harm to its interests.

[243] Lastly, the affected party submits that the appellant's position that the affected party's informational assets "cannot effectively be exploited in the marketplace" and that its interests are "purely pecuniary" is without merit, as the affected party has provided detailed and convincing evidence that it would suffer both pecuniary and other loss should the records be disclosed. The affected party describes the other loss as the potential for damage to its reputation and credibility, loss of its position as an industry leader, and the complete loss of its court interpreting program.

[244] In order for me to find that section 23 of the *Act* applies to override the exemptions of the records I have found qualify under sections 13(1), 15 and 17(1), I must be satisfied that there is a compelling public interest in the disclosure of those particular records that clearly outweighs the purpose of the advice or recommendations, relations with other governments and third party information exemptions.

[245] I acknowledge the importance of the integrity of the criminal justice system in Ontario, and I agree that a public interest exists in the disclosure of information related to the quality and accountability of the ministry's provision of interpretation services in criminal cases. However, I do not accept the appellant's position that a public interest in the disclosure of the exempt records exists that is compelling in this case. I note that the ministry has disclosed a number of records about the court interpretation system in

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[98] Orders P-984 and PO-2556.
[99] Orders MO-2179 and P-984.
[100] Orders P-532, P-1597 and PO-2626.

response to this request and on its website, which I find satisfies the public interest that may exist in this subject area.

[246] Further, I find that disclosure of the records for which I have upheld the advice or recommendations, relations with other governments and third party information exemptions would not shed light on the ministry's actions or decisions with respect to the appellant's stated interests. I agree with the affected party that disclosure of the information that I have found to be exempt would not serve to inform the public about the activities of the ministry with respect to the performance and efficiency of its court interpretation services. I also agree with the ministry that the disclosure of the exempt information would not meaningfully add to the information the public has to make effective use of the means of expressing public opinion or making political choices.

[247] Therefore, I find that there is no compelling public interest in the disclosure of the records or portions thereof that I have found to be exempt under sections 13(1), 15 and 17(1). Thus, the "public interest override" provision in section 23 does not apply in the circumstances of this appeal.

Issue I: Did the institution conduct a reasonable search for records?

[248] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[101] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[249] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[102]

[250] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[103]

[251] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[104]

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[101] Orders P-85, P-221 and PO-1954-I.
[102] Orders P-624 and PO-2559.
[103] Orders M-909, PO-2469 and PO-2592.
[104] Order MO-2185.

[252] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[105]

[253] As part of the inquiry, the ministry was asked to provide the following information regarding its search for responsive records:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the institution did not contact the requester to clarify the request, did it:

   (a) choose to respond literally to the request?

   (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[254] The ministry submits that its search for responsive records was conducted by two Senior Policy and Business Analysts in the Court Interpretation Unit, each of whom had been working in their positions for at least two years. In addition, the ministry states that the analysts consulted with their director, legal counsel and with colleagues to identify potentially responsive records and map out a search plan.

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[105] Order MO-2246.

[255] The ministry further submits that the two analysts spent eight hours collecting and reviewing the records for responsiveness. The following places were searched within the ministry's record-holdings:

- all interpreter-related subfolders on the ministry's local area network drive;
- "Plone" which is an enterprise content management system that the ministry uses to share documents with the affected party;
- Colleagues who had involvement with the subject area provided records;
- Paper and electronic files compiled by the Senior Policy and Business Analyst who had been the project lead while the test was being developed and rolled-out in 2009 (but who has since left the Court Services Division); and
- Paper files compiled by the manager of the Court Interpretation Unit during the time the new test was being developed and rolled out.

[256] The two analysts who conducted the searches provided affidavits setting out the above information. The ministry advises that the search yielded 75 responsive records comprising over 1100 pages. Of those 75 records, the ministry states that 14 have been disclosed in full, and the appellant was referred to a publicly available source to access the 15th record.

[257] The ministry goes on to state that it did not contact the then requester for additional clarification because it was of the view that the request was sufficiently clear.

[258] The appellant submits that it is of the view that more records exist. In particular, part 5 of the request sought all records relating to the qualification of court interpreters subpoenaed or ordered to be produced by the ministry in any criminal case in the province since 2009, along with the name and particulars of the case in which the records were ordered produced. The appellant submits that the ministry failed to provide responsive records in relation to this part of the request, and that even if a list of the names and particulars of the cases does not exist in the format requested, it ought to be easy for the ministry to create such a list.

[259] The appellant cites Orders MO-2129 and MO-2130, in which the request was for information that existed in a recorded format different from the format asked for by the requester. This office held that the institution has dual obligations. First, if the

requested information falls within paragraph (a) of the definition of a record,[106] the institution has a duty to identify and advise the requester of the existence of these related records, i.e., the raw material. Second, if the requested information falls within paragraph (b) of the definition of a record the institution has a duty to provide it in the requested format if it can be produced from an existing machine readable record (e.g., a database) by means of technical equipment and expertise normally used by the institution.

[260] The appellant goes on to submit that it has no knowledge of the information management system available to the ministry, so it cannot comment as to whether the ministry has an obligation to create a record containing the names and particulars of cases in which the records were ordered produced in respect of the qualifications of court interpreters. Even if the ministry is not obliged to create the requested list, the appellant argues, the raw material from which a list could be generated, such as subpoenas, certainly exist.

[261] In reply, the ministry submits that the appellant has not provided the ministry with specific examples where records were ordered or subpoenas issued; nor has it suggested any additional locations for searching beyond what was described in the ministry's original representations. The ministry goes on to state that it located one record at pages 676-699, which it originally provided to the court in a particular criminal matter. In that case, the manager of the Court Interpretation Unit was subpoenaed to Old City Hall and provided materials on request from the judge. This instance, the ministry argues, was an atypical occurrence.

[262] The ministry goes on to state:

> Ordinarily, if an interpreter's qualifications are questioned, the parties will raise the issue at the hearing on the scheduled day. The court will either conduct an immediate *voir dire* into the qualifications of the interpreter or will adjourn and orally direct the interpreter to return without issuing a subpoena.
>
> Most interpreters are private contractors, and it is ultimately the judge's decision whether to permit the interpreter to act in a particular case. Inquiries into the qualifications of a freelance interpreter at the trial stage are therefore between the court and the interpreter. The Ministry does not receive a notice and is not routinely asked to provide documentation in such cases.

[106] Set out in section 2(1) of the *Act*.

> Additionally, the court case tracking system does not record *voir dires* or reasons for adjournment, and so it is not possible to compile a record from that source.

[263] Lastly, the ministry states that although there is no requirement for judicial officers to advise the ministry's Court Services Division of *voir dire* decisions, some of these cases are publicly available on the CanLii legal reporting database and the ministry suggests that the appellant may be able to access this information through that site.

[264] It is evident, based on the ministry's representations, that its staff have devoted significant time and resources to search for records responsive to the appellant's request. Experienced employees have searched for records relating to the court interpreter program. In my view, it has made significant efforts to locate records that would satisfy the appellant's request.

[265] The appellant has provided detailed representations that identify specific records which it believes should exist beyond those located by the ministry, specifically records relating to the qualification of court interpreters subpoenaed or ordered to be produced by the ministry in any criminal case in Ontario since January 2009. Given the court cases post-2009 cited by the appellant in its representations regarding potential systemic problems with court interpreters as identified by judges,[107] I agree with the appellant that it is concerning that the ministry has been unable to locate further records relating to this portion of the request. The ministry has indicated that the courts do not typically subpoena the ministry to provide records regarding an interpreter's qualifications, but I am of the view that it is reasonable to conclude that there may be more records relating to this issue than the one located by the ministry.

[266] In summary, I find that the ministry has made strong efforts to search for records responsive to the appellant's request. However, I am not satisfied that these efforts have reached the threshold of a reasonable search with respect to potential records relating to the qualification of court interpreters subpoenaed or ordered to be produced by the ministry in any criminal case in Ontario. Consequently, I will order that the ministry carry out additional searches for these records.

[267] In sum, I uphold the ministry's decision, in part. I find that portions of the records are responsive to the request and that other portions of the records are not excluded under section 65(6)3 of the *Act*. With respect to the exemptions claimed, I uphold the application of the exemptions in sections 13(1) and 19 to all of the records for which they were claimed and the exemptions in sections 15 and 17(1) to most of the records for which they were claimed. I uphold the ministry's exercise of discretion and find that the public interest override does not apply. Lastly, I do not uphold the

[107] These representations were made under the issue of the possible application of the public interest override in section 23.

ministry's search. I order the ministry to disclose some records to the appellant, to issue a new decision letter regarding other records, and to conduct another search for records responsive to part 5 of the request.

ORDER:

1. I order the ministry to disclose pages 409-444 to the appellant by **May 5, 2014** but not before **April 28, 2014**.

2. I order the ministry to issue a decision letter to the appellant with respect to pages 49-50, 64, 83, 91-93, 66-69, 72, 360-364, 378-379, 445-448, 451-453, 602, 611, 613, 744-745, 748 (except the first paragraph), 749-750, 756, 768-771, 799, 809-817, 824, 829-830, 848, 850-853, 911-916 and 926-1126 treating the date of this order as the date of the request. I have enclosed a copy of pages 911-916 and highlighted the portions that are not excluded under the *Act*.

3. I order the ministry to conduct a further search for records relating to the qualification of court interpreters subpoenaed or ordered to be produced by the ministry in any criminal case in Ontario since January 2009.

4. If, as a result of this further search, the ministry identifies additional records responsive to the request, I order the ministry to provide a decision letter to the appellant regarding access to these records in accordance with sections 26, 27 and 28 of the *Act*, treating the date of this order as the date of the request. I also order the ministry to provide me with a copy of any new decision letter that it issues to the appellant.

Original Signed By: March 26, 2014
Cathy Hamilton
Adjudicator