Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3734

Appeal PA15-174

Ministry of Health and Long-Term Care

May 24, 2017

Summary: The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a record called, "[Named Consultant] Lab Services Review – Final Report (2012)." The ministry claimed that parts of the report are exempt under sections 13(1) (advice or recommendations) and 18(1)(c) (economic or other interests) of the *Act*. One affected party also relies on section 17(1) (third party information). In this order, the adjudicator determines that the report is not exempt under section 13(1) because the exception to the exemption in section 13(2)(f) (report or study on the performance or efficiency of an institution, or a particular program or policy) applies. As well, sections 18(1)(c) and 17(1) do not apply. The adjudicator orders the ministry to disclose the record in full to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 1(a)(ii), 13(1), 13(2)(a) and (f), 17(1) and 18(1)(c); *Health Insurance Act*, R.S.O. 1990, c. H.6; *Laboratory and Specimen Collection Centre Licensing Act*, R.S.O. 1990, c. L.1.

Orders and Investigation Reports Considered: P-726, PO-2683, PO-3496 and PO-3578.

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.

OVERVIEW:

[1] The appellant submitted an access request under the *Freedom of Information*

and Protection of Privacy Act (the *Act*) to the Ministry of Health and Long-Term Care (the ministry). The request was for a copy of the "[Named Consultant] Lab Services Review – Final Report (2012)" (the report). The ministry located the report. It relates to services provided by medical laboratories in Ontario.

[2] Pursuant to section 28(1) of the *Act*, the ministry notified a number of affected parties about the request, and sought their views regarding possible disclosure of the report.

[3] After receiving representations from a number of affected parties, the ministry issued a final decision to the requester and to the affected parties granting access in part. Access was denied to certain portions of the report pursuant to sections 13(1) and 18(1)(c) of the *Act*. The ministry delayed the disclosure of the portions that it had decided to disclose in order to allow 30 days for the affected parties to appeal in accordance with section 28(8) of the *Act*.

[4] None of the affected parties appealed the ministry's decision. Accordingly, the ministry disclosed the portions of the report to which it had decided to grant access. After receiving the redacted version of the report, the appellant filed an appeal of the ministry's decision to deny access to the withheld portions of it.

[5] Mediation did not resolve the appeal, which therefore proceeded to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[6] During the inquiry, the appellant retained legal counsel, who sent correspondence to this office stating:

> In our submission, the subject matter of this appeal concerns information that is of critical importance to the public interest. Specifically, the requested record relates to information concerning the quality and value of health laboratory services in Ontario and the public's access to such services. . . .

[7] This statement raises the possible application of the public interest override found in section 23 of the *Act*, and I therefore added this as an issue to be addressed in the appeal.

[8] In the circumstances of this appeal, I have also added the mandatory exemption at section 17(1) (third party information) as an issue.

[9] I invited representations from the ministry, the appellant and the affected parties. The ministry and the appellant provided representations, as did two of the affected parties, one of whom is the named consultant who prepared the report. Representations were exchanged in accordance with *Practice Direction 7* issued by this

office.

[10] The record at issue consists of the undisclosed portions of the Lab Services Review – Final Report (2012).

ISSUES:

A. Does the discretionary exemption at section 13(1) apply to the record?

B. Does the discretionary exemption at section 18(1)(c) apply to the record?

C. Did the institution exercise its discretion under sections 13(1) and 18(1)(c)? If so, should this office uphold the exercise of discretion?

D. Does the mandatory exemption at section 17(1) apply to the record?

E. Does the public interest override at section 23 of the *Act* apply?

DISCUSSION:

A. Does the discretionary exemption at section 13(1) apply to the record?

[11] 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.

[12] Section 13(2) of the *Act* sets out exceptions to the exemption. In this order, it is only necessary to discuss sections 13(2)(a) and (f). These sections state:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;
>
> . . .
>
> (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;

[13] The purpose of section 13 is to preserve an effective and neutral public service

by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[1]

[14] "Advice" and "recommendations" have distinct meanings.

[15] "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[16] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take. [2]

[17] "Advice" also includes information on how the institution "should view a matter" and "the parameters within which a decision should be made," as discussed by the Supreme Court of Canada in *John Doe v. Ontario (Finance)*:[3]

> In *Telezone*,[4] Evans J.A. distinguished this type of objective information seen in s. 13(2) from a public servant's opinion pertaining to a decision that is to be made, which he concluded would fall within the scope of "advice" in the analogous federal exemption. At paragraph 63, he stated:
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> > . . . a memorandum to the Minister stating that something needs to be decided, identifying the most salient aspects of an application, or *presenting a range of policy options on an issue*, implicitly contains the writer's view of what the Minister should do, *how the Minister should view a matter*, *or what are the parameters within which a decision should be made*. . . . [Emphases added.]

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

- the information itself consists of advice or recommendations; or

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[1] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[2] Cited above at footnote 1. See paras. 26 and 47.
[3] Cited above at footnote 1, and referred to throughout this order as "*John Doe*." See para. 31 of the decision. See also Order PO-3577 at para. 70.
[4] *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 F.C. 421 ("Telezone")

- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[5]

Representations

Ministry's initial representations

[19] The ministry has divided its initial representations on this exemption into three parts, under the following headings: the severed information contains advice and recommendations; the severed information would permit accurate inferences to be drawn about the advice; and the exceptions in section 13(2) do not apply. I will review each of these three parts in turn.

Severed information contains advice and recommendations

[20] The ministry submits that the severed portions of the record are exempt under section 13(1) because they contain advice of a consultant retained by the ministry.

[21] The ministry refers to *John Doe*'s holding that "advice" has a broader meaning than "recommendations," as I have already outlined in my summary of previous interpretations of this exemption, above.

[22] As well, the ministry argues that the record is a "detailed analysis of policy options to improve funding and patient access to Community Labs in Ontario." It states that the "Core Options and Recommendations" section "does more than merely list policy options. These pages provide detailed descriptions and analysis of the options. . . ."

[23] The ministry submits that other portions of the record "provide thorough detailed analysis of the policy options." According to the ministry, the record also contains alternative options in the form of "foundational enablers," which are "key issues that could offer improvements to the community lab system regardless of other options." The ministry identifies other pages that it says contain "detailed information on the foundational enablers."

Severed information would permit the drawing of accurate inferences about the advice

[24] The ministry submits that the redacted portions of the report ". . . would permit a person to draw accurate inferences about the advice if disclosed."

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[5] Orders PO-2084, PO-2028, 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.

[25] The ministry states that several pages of the report reveal the named consultant's "methods to select and evaluate the policy options and implementation concerns" and the "methods used to evaluate the policy options and the data, factors and analysis used in evaluating those options." In my opinion, the "methods used" are not advice or recommendations, nor do they reveal advice or recommendations. However, as I stated in Order PO-3578, "information on how the ministry 'should view a matter' and 'the parameters within which a decision should be made,' . . . are included in 'advice' by the Supreme Court of Canada in *John Doe*."[6]

[26] Referring to Order PO-3496, the ministry submits that this office has previously held that records containing "advice" will "invariably" contain some factual information and that factors considered in making advice and recommendations are also exempt from disclosure. It states further that the overall purpose of the severed pages is to provide advice and recommendations to the ministry. This is a reference to the "factual material" exception to the exemption, found at section 13(2)(a). As I stated in Order PO-3578, factual information found in the records that is severable without reducing it to meaningless snippets of information would constitute "factual material" within the meaning of section 13(2)(a). On the other hand, factual information that is interwoven with advice and/or recommendations does not fall under the section 13(2)(a) exception.[7]

[27] As well, the ministry argues that the report includes "implementation considerations" that are based on policy options and are issues that could arise on the ministry's adoption of various policy options – which suggests that the "implementation considerations" spell out the possible consequences of various options. The ministry argues that this information permits accurate inferences to be drawn about the advice given. I would go farther, and say that information outlining the possible consequences of various options is "advice" in the same way and for the same reason that the "advantages and disadvantages" of policy options qualifies as "advice."[8]

[28] The ministry also identifies "option elements" included in the report as "components or factors for the ministry to consider in reforming the lab sector," which fits the descriptions of information on how the ministry "should view a matter" and "the parameters within which a decision should be made."

[29] The ministry states that disclosing two pages in particular "would reveal information provided to the Named Consultant by other stakeholders as part of the evaluation of how to improve community lab funding and increase the value, quality and access to Community Labs in Ontario." The ministry argues that "[r]evelation of

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[6] Cited above at footnote 1.
[7] See also Order P-24.
[8] See *John Doe*, cited above, at para. 27.

this information could impact the 'full, free and frank' flow of information that the ministry receives from these sources." According to the ministry, this information would also allow a person to draw accurate inferences about the advice provided.

Severed portions of the record are not subject to exceptions under section 13(2)

[30] As already noted, section 13(2) sets out exceptions to the section 13(1) exemption, and in this order, it is only necessary to discuss sections 13(2)(a) and (f). I have already referred to the ministry's submissions on section 13(2)(a), above. In the circumstances of this appeal, based on the conclusions outlined below, further discussion of section 13(2)(a) is not necessary. With respect to section 13(2)(f), the ministry submits that:

- the report is not a report on the performance or efficiency of an institution and section 13(2)(f) does not apply; and
- the report is similar to the record in Order PO-2683, which was determined not to be a review of a government program's efficiency, but was, instead, an examination of whether or not the program should continue and if so in what form, and for this reason as well section 13(2)(f) does not apply.

Appellant's initial representations

[31] The appellant submits that section 13(1) should be construed narrowly, and that the exception to the exemption in section 13(2)(f) applies.[9]

[32] The appellant notes that the ministry is responsible for developing and managing all areas of medical laboratory services in Ontario, including private laboratories, and operating the province's public health laboratories. The appellant refers to the ministry's licensing and regulatory activities under the *Laboratory and Specimen Collection Centre Licensing Act*, and notes that the ministry is also responsible for payments for laboratory services under the *Health Insurance Act*.

[33] The appellant states that services under the community laboratory system are now offered by a small number of private providers, whose respective market shares are fixed by a "cap." The government's overall spending on community laboratory services is known as the "industry cap." The appellant submits that both of these policies were introduced in the mid-1990s to help control program costs and to curb utilization growth.

[34] It describes the report and the circumstances surrounding it in the following

[9] The appellant also relies on section 13(2)(g), but because of the conclusions I have reached in this order, it is not necessary to consider section 13(2)(g).

ways:

- the ministry engaged the named consultant to conduct a comprehensive review of the industry and corporate cap policies and to examine their impact on access, quality and value of laboratory services since their introduction;

- the report contains the named consultant's findings on the system's performance and on how to enhance the value, quality and access delivered by community laboratory services; and

- the report addresses the performance and efficiency of laboratory services.

[35] In arguing that the exemption should be interpreted narrowly, the appellant refers to section 1(a)(ii) of the *Act* and its statement that "necessary exemptions from the right of access should be limited and specific." I note that in *John Doe*,[10] the Supreme Court of Canada found that this office had previously taken an unreasonably narrow approach[11] to the "advice" component of section 13(1). The Court also provided extensive guidance on the proper approach to the interpretation and application of this exemption, and I will apply that approach in this order.

[36] Under section 13(2)(f), the appellant submits that the entire report should be disclosed.[12] It argues that this section applies because:

> In essence, [the report] consists of a performance review and an analysis of how to improve the efficiency of operations in laboratory services. The Lab Services Review involves the study of the enhancement of the value, quality and access delivered by community laboratory services. It offers not mere future policy options, but rather it identifies potential weaknesses in the existing laboratory system's performance and makes recommendations to strengthen that system.
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> . . .

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[10] Cited above at footnote 1. See para. 24 of the decision.

[11] which had previously been upheld on judicial review in *Ontario (Minister of Transportation) v. Cropley* (2005), 202 O.A.C. 379 (C.A.) and *Ontario (Minister of Northern Development and Mines) v. Information and Privacy Commissioner* (2005), 203 O.A.C. 30 (C.A.)

[12] The appellant cites Order P-726 as authority for the proposition that section 13(2)(f), if applicable, requires disclosure of the whole report. Order P-726 addresses this issue as follows: "Sections 13(2)(f) and (g) are unusual in the context of the Act in that they constitute mandatory exceptions to the application of an exemption for discrete types of documents, namely reports on institutional performance or feasibility studies. Even if the report or study contains advice or recommendations for the purposes of section 13(1), the Ministry must still disclose the entire document if the record falls into one of the section 13(2) categories."

> The [report] reviews the effectiveness of the current industry and corporate cap policies and their impact on access, quality and value of lab services, and addresses concerns that the current model does not provide adequate incentives to manage access.

[37] The appellant submits further that "[t]he focus of this report is on assessing the adequacy of the laboratory system as it is presently structured and on presenting options to optimize the delivery of lab services. As such, it bears features that strongly resemble other documents found by [this office, the IPC] to constitute a s. 13(2)(f) report."

[38] The "other documents" cited by the appellant are as follows:

- an audit report concerning two courts, which consists of opinions as to deficiencies in operations, and recommendations to improve the financial and operational management of part of an institution (Order PO-1696);
- a consultant's report on the operations of Ontario Realty Corporation (ORC) that "examined the management structures as well as budgetary and planning systems in place at the time at the ORC, and pointed to areas of performance in need of improvement," and resembled an audit report (Order PO-1884);
- a report commissioned by Humber College to review administrative matters pertaining to part of the college and to provide recommendations for addressing those matters (Order P-348);
- value for money audit reports of the Worker's Compensation Board that consider effectiveness, efficiency and economy (Order P-603); and
- a report that identified which provincial parks were contributing to the overall objectives of the system and presented options to rationalize the delivery of parks services (Order P-726).

[39] The appellant also seeks to distinguish Order PO-2683, which was cited by the ministry as already noted. As the adjudicator explained in that order, the consultant was not empowered to review the performance or efficiency of the program, but rather to make recommendations about whether the program ". . . ought to continue at all and if so, in what form." The appellant argues that, by contrast, the report offers "extensive analysis of the performance and efficiency of the current community laboratory services model and recommendations to improve its financial and operational management." I agree with the appellant that Order PO-2683 is distinguishable on this basis. I am also not convinced that a report considering whether a program or policy ought to continue at all is not a review of its performance or efficiency. In most cases, I would expect such a document to include such a review. Accordingly, even if it were on

point, I would not follow Order PO-2683.[13]

[40] As well, the appellant submits that the ministry improperly exercised its discretion by claiming this exemption, in view of the fact that the report was provided to two external groups:

- a research group at McMaster University who cited it in their Evidence brief entitled *Creating Community-based Specialty Clinics in Ontario*, and
- the Laboratory Services Review Panel convened by the Minister of Health and Long-term care, whose public report to the minister, entitled *Laboratory Services Expert Panel: Final* was released on November 12, 2015.

[41] While this information is not insignificant, it could only impact section 13(1) if I decide that the exemption applies, in whole or in part, and would then be required to consider the ministry's exercise of discretion.

Ministry's Reply Representations

[42] The ministry disputes the appellant's claim that section 13(1) should be interpreted "narrowly," arguing that this is "a direct contradiction" of *John Doe*.[14] As discussed above in my review of the appellant's representations, I will apply the approach in *John Doe*.

[43] The ministry also disagrees with the appellant about the application of section 13(2)(f), stating in brief submissions that the appellant "relies particularly" on Orders PO-1696 and PO-1884, which the ministry seeks to distinguish because they "contained recommendations respecting financial and operational management of the institution in question." It also argues that the report at issue here does not evaluate the performance or efficiency of a ministry program, but rather seeks to enhance "value, quality and access in the laboratory services sector - - which is not a Ministry program."

Affected parties' representations

[44] As already noted, the affected parties were notified of the appeal and invited to provide representations at the reply stage, and two of them did so. Neither of these parties addressed section 13 in their representations.

Appellant's sur-reply representations

[45] At sur-reply, the appellant disputes the ministry's contention that the report does

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[13] See *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, 1995 CanLII 108, at para. 14.
[14] Cited above at footnote 1.

not deal with a program or policy of the ministry. The appellant refers to passages from the redacted version of the report that it has already received, which refers to the "government *policy*" that created the industry cap and corporate cap systems described earlier in this order. The record states further that there "has not been a comprehensive Government-led review of the industry and corporate caps policies and their impact. . . ." [Appellant's emphases.]

[46] Citing Order P-658, the appellant also argues that the term, "program" applies to part of an institution, rather than the institution as a whole.

Analysis

Section 13(1)

[47] I have reviewed the record in detail, and conclude that parts of the severed information consist of the following components that would, under *John Doe*, qualify for exemption:

- actual recommendations;
- policy options with pros and cons;
- information on how the ministry "should view a matter"; and
- "the parameters within which a decision should be made."

[48] All of these categories of information qualify, as a matter of first impression, for exemption under section 13(1), subject to scrutiny under section 13(2).

Exceptions to the Exemption

[49] As I have already stated, the only exception that needs to be considered in this order is section 13(2)(f), which states that the exemption does not apply to "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."

[50] For the reasons that follow, I have concluded that this exception applies, and the report in its entirety is therefore not exempt under section 13(1) of the *Act*.

[51] Section 13(2)(f) applies where:

- the record is a report or study; and
- its subject is the performance or efficiency of an institution, or of a particular program or policy.

[52] In this case, the document is entitled, "Ministry of Health and Long-Term Care Lab Services Review Final Report." The public portion of the report indicates that the named consultant was engaged to "undertake a review of community laboratory services, with consideration of the broader laboratory system, including public health and hospital laboratories."

[53] Previous orders indicate that "report" means "a formal statement or account of the results of the collation and consideration of information."[15] It is clear that the report that is at issue in this appeal meets this description, given that it sets out information that was gathered, along with conclusions and recommendations based on very detailed analysis of the information. Accordingly, it is clearly a "report" within the meaning of this section. It also involves the study of a number of issues relating to laboratory services in Ontario, and thereby qualifies as a "study."

[54] It is also clear that the report measures the performance and efficiency of the industry cap and corporate cap, and that these are "policies" of the ministry. This is aptly demonstrated by the following statement from the public portion of the report: "There has not been a comprehensive Government-led review of the industry and corporate cap policies, and their impact on access, quality and value since their introduction."

[55] This point is underlined by another statement from the public portion of the report: "In the mid-late 1990s government policy created a fixed market share for each community lab provider (the 'corporate cap') and a limit to the total amount of money the government will spend on community lab services (the 'industry cap'). *As a result of these policies, the industry has evolved over time from a competitive market to a regulated partially-consolidated market.*" [Emphases added.]

[56] In other words, the laboratory services market is regulated by the government in accordance with the industry cap and corporate cap policy. I find that the record is a report on the performance and efficiency of this policy.

[57] I acknowledge the ministry's argument to the effect that the laboratory services sector is not a government program. Notably, the ministry does not argue that the corporate and industry caps, which are the focus of the report, do not represent a government policy. Section 13(2)(f) applies where the subject of the report or study is the efficiency of an institution, or of a program *or* policy. The simple answer to this argument is that the report addresses a policy.

[58] However, it is also accurate to describe the government's broader approach to laboratory services as a "program," in view of the following:

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[15] See, for example, Order P-658.

- laboratory services are an essential feature of providing health care to Ontarians, a significant mandate of the ministry;
- the ministry is responsible for licensing medical laboratories under the *Laboratory and Specimen Collection Centre Licensing Act*;
- the ministry provides substantial funding to laboratories under the *Health Insurance Act*; and
- the ministry regulates community laboratory services by means of the industry and corporate caps.

[59] This is a comprehensive package of measures aimed at ensuring that Ontarians have access to laboratory services as part of their health care.

[60] "Program" in the sense intended by section 13(2)(f) is defined as "a set of related measures or activities with a particular long-term aim."[16] By any standard, the corporate and industry cap policies, combined with the ministry's legislative and regulatory activities in this area, meets this definition.

[61] I find that the provision of medical laboratory services by the ministry qualifies as a "program" for the purposes of section 13(2)(f), and that the record is a report on the performance or efficiency of the program.

[62] I also conclude that, as long as the report measures the performance or efficiency of a government program or policy, it does not matter that the delivery of laboratory services is carried out by private entities.[17] In my view, this is an appropriate interpretation of section 13(2)(f), given its obvious purpose of disclosing documents that evaluate the success or failure of government policies and programs.

[63] Where section 13(2)(f) applies, the entire record is not exempt under section 13(1).[18] As I have outlined above, the report qualifies as a report or study on the performance or efficiency of the corporate and industry cap policy, and on Ontario's laboratory services program. I therefore find that the report, in its entirety, is not exempt under section 13(1) of the *Act*.

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[16] See item 1.1 in the *Oxford Living Dictionaries*' definition of "programme – US 'program'" at https://en.oxforddictionaries.com/definition/programme

[17] In Orders PO-3577 and PO-3578, I explained that the section 13(2)(f) exception did not apply to records relating to transitional racetrack funding because the racetracks are not "an institution." It would have been more accurate to say that section 13(2)(f) did not apply in these two orders because the records were not reports or studies about the performance or efficiency of a policy or program of an institution.

[18] Order P-726.

C: Does the discretionary exemption at section 18(1)(c) apply to the records?

[64] The ministry claims that section 18(1)(c) applies to the withheld information on pages 6, 82, 83 and 87-89.

[65] Section 18(1)(c) states:

> A head may refuse to disclose a record that contains,
>
> > (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[66] For section 18(1)(c) to apply, the institution must provide evidence and argument to demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[19]

[67] In some instances, harm may be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[20].

[68] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.[21]

[69] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[22]

[70] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a

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[19] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at paras. 52-4.
[20] Order MO-2363.
[21] See Orders MO-2363 and PO-2758.
[22] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report)

reasonable expectation of prejudice to these economic interests or competitive positions.[23]

[71] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[24]

[72] Section 18(2) provides an exception to the exemption where a record "contains the results of product or environmental testing carried out by or for an institution. . . ." The report does not contain such results, and section 18(2) therefore does not apply. I will not mention this section again.

Representations

Ministry's Initial Representations

[73] The ministry submits that there is a reasonable expectation that disclosure would prejudice the government's economic interests. It goes on to explain that the province pays fees to the Community Labs for testing services, and anticipates entering into negotiations with these labs in the near future. The ministry states that the redacted information is being used in formulating its strategy for these negotiations, which are aimed at ensuring that Ontarians receive accessible and high quality laboratory services that provide better value for money and future sustainability.

[74] The ministry asked that portions of its representations be withheld for reasons of confidentiality. I have reviewed and considered these parts of the ministry's representations, but cannot refer to them in any detail in this order. However, the ministry's concerns about the negative impact of disclosure relate to its view that making more information public could threaten the negotiations.

[75] While some kinds of commercial information need to be kept confidential in order to ensure the success of planned negotiations, the ministry's concerns relate more to whether or not a particular action should be taken. But in my view, in the circumstance described by the ministry, it is at least arguable that, rather than causing harm, making more information concerning this subject available to inform public debate could reasonably be expected to result in better outcomes. Moreover, the link between the issue identified by the ministry and much of the information on the pages it claims are exempt under this section is not apparent from a review of these pages, and is not

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[23] Orders P-1190 and MO-2233.
[24] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

explained by the ministry.

Appellant's initial representations

[76] The appellant did not have access to the confidential portion of the ministry's representations. However, it submits that the ministry's representations fail to provide sufficiently detailed and persuasive evidence of economic harm and has thereby failed to meet the standard of proof under section 18(1)(c). It also submits that the ministry's representations are purely speculative and lack a sufficient evidentiary basis.

[77] The appellant submits further that:

> . . . public debate and discussion by a wide range of stakeholders about matters of public interest is a healthy and normal aspect of a functioning democracy. At worst, the disclosure of the information will ensure that modernization occurs in a manner that includes the voices of all Ontarians who have an interest in the funding of the province's health laboratory services.

[78] The appellant also refers to the fact that the report was shared with two research bodies, arguing that this means that its disclosure could not reasonably be expected to cause economic harm. Given that the ministry has confidentiality agreements with those parties, I do not accept this argument by the appellant.

Ministry's reply representations

[79] The ministry responds to the appellant's argument that its evidence is not sufficiently detailed by saying that the standard of proof under section 18(1)(c) ". . . does not require documentary evidence." Rather, the ministry argues that it may be based on establishing a "clear and direct linkage" between the disclosure of the information and the harm that is alleged. In that regard, I note that "clear and direct linkage" is the product of earlier jurisprudence on the meaning of "could reasonably be expected to."[25]

[80] Rather than "clear and direct linkage," I will apply the standard of proof that a particular harm can be "reasonably expected" to occur that was articulated in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*.[26] This standard requires the ministry to demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.

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[25] For example, see Order M-202.
[26] Cited above.

[81] The ministry states that it is in the process of modernizing the community laboratory sector, which includes negotiation with community laboratory providers. It reiterates that the severed information is being used to formulate its strategy for those negotiations. However, it gives no specific examples of information in the records that is being used for this purpose, or how the information would be used for this purpose, nor does it provide any details as to how disclosure could reasonably be expected to produce economic harm. The ministry apparently considers these things to be self-evident, but they are not.

Affected parties' representations

[82] One of the affected parties provided representations on this exemption, and supports the ministry's position that it applies. The affected party appears to take the position that one additional page for which the ministry does not rely on this exemption is, nevertheless, subject to it. Because of my ultimate conclusion regarding section 18(1)(c), it is not necessary to consider whether to allow the affected party to claim this exemption where the ministry apparently does not.

[83] The affected party submits that the severed information it identifies as exempt is not "essential information" required to "understand the key points" in the remainder of the record. With respect, this is irrelevant to the issue of whether the harm in section 18(1)(c) is made out. As the affected party notes, it did not see the confidential portions of the ministry's representations. However, the affected party supports the ministry's position "[b]ased on the nature of the record and the importance of the Ministry's management of the lab system."

[84] The other affected party who submitted representations did not comment on section 18(1)(c).

Appellant's sur-reply representations

[85] The appellant states:

> The onus rests with the [ministry] to provide the evidence and argument that the release of the record will cause a risk of harm to the negotiations. . . . [T]he Ministry failed to provide evidence of harm. The [ministry] relies upon mere speculative comments with no reference to specific evidence or sufficient argument to support the conclusion that the consequences could reasonably be expected from disclosure of the records.

[86] The appellant also refers to the fact that the report was produced in 2012 and is now several years old, and refers to Order P-964, where that factor was relied on by the adjudicator in refusing to uphold section 18(1)(c). It also points to the release of subsequent reports on the issue of community laboratory services. These reports were

included in its initial representations.[27]

Analysis

[87] Section 18(1)(c) requires evidence that demonstrates a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. In the case of section 18(1)(c), the harm is prejudice to the economic interests of an institution or the competitive position of an institution.

[88] In assessing whether the ministry has met this standard, I am mindful of the difficulty of demonstrating a reasonable expectation of harm where the triggering event, disclosure, has not yet occurred.

[89] However, in my view, the ministry has failed to do so. I agree with the appellant that the ministry relies upon mere speculative comments with no reference to specific evidence or sufficient argument to support the conclusion that the consequences could reasonably be expected from disclosure of the report. That submission is consistent with my earlier observation that the ministry gives no specific examples of information in the records that is being used to formulate its strategy for negotiations, or how the information would be used for this purpose, nor does it provide any details of how disclosure could reasonably be expected to produce economic harm.

[90] As I stated above, the ministry apparently considers these things to be self-evident, but they are not. Based on the foregoing, I find that the ministry has not provided evidence that demonstrates a risk of harm that is "well beyond the merely possible or speculative." This is a sufficient basis to conclude that the exemption does not apply, and I so find.

[91] Moreover, previous jurisprudence indicates that the purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[28] I see no indication in the records or the representations that this is a situation where the ministry seeks to earn money in the marketplace, or is engaged in competition for business.

[92] Accordingly, I find that section 18(1)(c) does not apply to any part of the record,

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[27] See *McMaster Health Forum*, at https://www.mcmasterhealthforum.org/docs/default-source/Product-Documents/evidence-briefs/community-based-specialty-clinics-in-ontario-eb.pdf?sfvrsn=2 and the Laboratory Services Expert Panel Final Report, November 12, 2015, at http://www.health.gov.on.ca/en/common/ministry/publications/reports/lab_services/labservices.pdf

[28] Orders P-1190 and MO-2233.

including the pages specifically mentioned by the ministry.

[93] Because I have found that sections 13(1) and 18(1) (c) do not apply, it is not necessary to review the ministry's exercise of discretion (Issue D).

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

[94] The named consultant claims that sections 17(1)(a), (b) and (c) apply. These sections state:

> 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;
> >
> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[95] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[29] 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.[30]

[96] For section 17(1) to apply, the named consultant 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

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[29] *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.) (*Boeing Co.*).
[30] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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), or (c) of section 17(1) will occur.

[97] In its reply representations, the ministry states that, after it notified affected parties under section 28 of the *Act*, it determined that the report is not exempt under section 17(1). The ministry's position is based on the fact that the report was not "supplied in confidence" because the ministry retained the consultant to provide the report, and has a licence to use and disclose the record without the permission of the named consultant.

[98] For its part, the named consultant provided a highlighted copy of the report with its representations, and submits that these passages contain the proprietary methodology of the named consultant that was supplied in confidence to the ministry, has been treated by the named consultant as confidential at all times, and could reasonably be expected to result in harms under sections 17(1)(a), (b) and (c) if disclosed.

[99] The other affected party did not provide representations on section 17(1).

Part 1: type of information

[100] 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,
>
> (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.[31]
>
> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to

[31] Order PO-2010.

> the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.[32]
>
> *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.[33]
>
> *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.[34] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[35]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[36]
>
> *Labour relations* means relations and conditions of work, including collective bargaining, and is not restricted to employee/employer relationships.

[101] Under part 1 of the test, the named consultant does not specifically claim that any of the types of information that are identified in section 17(1) are actually included in the record, or can be inferred if it is disclosed. This is a significant omission.

[102] Rather, it argues that its "proprietary methodology" is a "proprietary benchmark database of financial information built over a 15 year period, as well as an economic model built specifically for the engagement." It does not say whether this benchmark database is pre-populated with information about lab services, or is some sort of template for use in conducting this type of analysis. And although it refers to "financial information" here, it does not expressly state that this *financial* information is included in the record, or can be inferred from it.

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[32] Order PO-2010.
[33] Order PO-2010.
[34] Order PO-2010.
[35] Order P-1621.
[36] Order PO-2010.

[103] In addition, the named consultant refers to a number of specific pages and states that they ". . . all contain information derived from the Proprietary Methodology." As already noted, the named consultant provided a highlighted copy of the record with its representations, marking the sections it is concerned about. No specific examples are given of exactly what reveals the proprietary methodology, and this is not apparent from a detailed review of the pages mentioned here by the named consultant, most of which it had highlighted in their entirety. The link between the proprietary methodology and the two pages that are only partly highlighted is also not apparent.

[104] The named consultant also mentions that another group of specified pages reveals the method it used to evaluate the policy options, "much of which is based on proprietary data modelling and analysis." Again, no examples are given and it is not clear exactly how the proprietary methodology or proprietary data modelling and analysis would be revealed by disclosing these pages (several of which are not even highlighted as information that should not be disclosed on the copy of the record provided by the named consultant). The analysis in the record appears to be driven by the nature and parameters of the assignment, which are unique, and by the particular data being analysed.

[105] Based on this analysis, I conclude that the named consultant's arguments under part 1 of the test are not sustainable, without even referring to the most serious problem they present, which is that, as I have already mentioned, the named consultant does not specifically claim that any of the types of information about it that are identified in section 17(1) are actually included in the record, or can be inferred if it is disclosed.

[106] To reiterate, these types of information are: "a trade secret or scientific, technical, commercial, financial or labour relations information." Although the report contains financial and commercial information, it does not pertain to the named consultant. It is also clear that the named consultant's proprietary methodology and its data modelling and analysis methods are *not* financial or commercial information, nor do they fall under the definitions of technical, scientific or labour relations information, as each of these terms have been defined in previous orders.

[107] The named consultant appears to suggest that the proprietary methodology and its data modelling and analysis are akin to trade secrets. I have already noted that it is not apparent from a review of the records exactly what the proprietary methodology is, or how disclosing the identified pages would disclose the proprietary methodology or the named consultant's proprietary data modelling and analysis. I have already observed that the analysis appears to be driven by the nature and parameters of the assignment, which are unique, and by the particular data being analysed. Without more explanation, I am unable to see how disclosing these pages discloses a trade secret.

[108] Moreover, on the question of whether, as a possible trade secret, the named

consultant's methodology or modelling is not generally known in the trade or business, or has economic value from not being generally known, I am not persuaded that these requirements are met. Any methodology that can be gleaned from the report is clearly driven by the nature and parameters of the assignment, and without denying the expertise of the named consultant, it is clear that similar methodology would have to be employed by anyone who wished to engage in this type of analysis or study.

[109] I find that the report does not reveal anything that could be considered a trade secret of the named consultant.

[110] Accordingly, part 1 of the test is not met, and as all parts must be met, I find that section 17(1) does not apply. For completeness, I will consider the other two parts of the test.

Part 2: "supplied in confidence"

[111] The named consultant refers to a "mutual understanding" with the ministry that their proprietary methodology and information must be treated as confidential. The named consultant provides no evidence of this implicit understanding of confidentiality. The ministry, for its part, submits that it has a license to use and disclose the report without the permission of the named consultant.

[112] I am not satisfied that the report was provided to the ministry with an implicit understanding that the ministry, as the body that commissioned and paid for the report, is nevertheless required to keep it confidential. I find that part 2 of the test is not met.

Part 3: harms

[113] Under the harms part of the test, the named consultant is required to meet the same standard of proof that applies under section 18(1)(c): it must provide evidence and argument to demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences. [37]

[114] The named consultant submits that the report contains proprietary information about the analysis and procedures it has developed, and shows how to successfully implement them. It submits that this information is "highly safeguarded" by its personnel. It also submits that this information is capable of commercial application and copying by its competitors.

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[37] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above, at paras. 52-4.

[115] I reject these arguments. The record does not set out a template for analysis, nor does it explain or demonstrate how any such template should be used. As I have already stated, any methodology that can be gleaned from the report is clearly driven by the nature and parameters of the assignment, and without denying the expertise of the named consultant, it is clear that similar methodology would have to be employed by anyone who wished to engage in this type of analysis or study.

[116] Based on the evidence and argument presented, I therefore find that the named consultant has not met the onus of demonstrating that the section 17(1)(a), (b) or (c) harms could reasonably be expected to occur if the report is disclosed. Accordingly, part 3 of the test is also not met.

[117] Because no part of the section 17(1) test is met, I find that the exemption does not apply.

[118] As I have not upheld the application of any claimed exemption, it is not necessary to consider whether the public interest override at section 23 of the *Act* applies.

ORDER:

I order the ministry to disclose the report to the appellant, in full, by sending a copy to the appellant not later than **June 28, 2017** and not earlier than **June 22, 2017**.

Original Signed by: May 24, 2017
John Higgins
Adjudicator