

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3972

Appeal PA18-1

Ministry of Health

June 28, 2019

**Summary:** The appellant submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for an educational video on immunization developed by the Ministry of Health (the ministry) and transcripts of that video. The ministry denied access to these records under the discretionary exemptions in sections 14(1)(i) (endangerment to security of a procedure) and 20 (threat to safety or health) of the *Act*. In this order, the adjudicator finds that the video and the transcripts are not exempt from disclosure under those provisions and he orders the ministry to disclose them to the appellant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 14(1)(i) and 20; *Immunization of School Pupils Act*, R.S.O. 1990, c. I.1., sections 3(1), 3(3) and 4; R.R.O. 1990, Reg. 645, section 4.

### OVERVIEW:

[1] The issues to be resolved in this appeal are whether an educational video on immunization developed by the Ministry of Health<sup>1</sup> (the ministry) and transcripts of that video are exempt from disclosure under the discretionary exemptions in sections 14(1)(i) (endangerment to security of a procedure) and/or 20 (threat to safety or health) of the *Freedom of Information and Protection of Privacy Act* (the *Act*).

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<sup>1</sup> Formerly known as the Ministry of Health and Long-Term Care.

[2] Under the *Immunization of School Pupils Act (ISPA)*,<sup>2</sup> parents of school-aged children must vaccinate their children against certain designated diseases, subject to specific exemptions. The *ISPA* requires parents who object to vaccinating their children for reasons of conscience or religious belief to attend an education session delivered by their local public health unit before obtaining an exemption. This education session consists of a video and/or transcripts of that video and a question-and-answer period with the local medical officer of health or a delegate.<sup>3</sup>

[3] This appeal arises from an access request that the appellant made to the ministry under the *Act* for the following records:

1. Any **Movie/Movies/education modules** shown to parents during the Education Session pursuant to [the *ISPA*].
2. **Any written transcript/s** of said Movie/Movies/education modules.

[emphasis in original]

[4] The appellant also specified the format in which she would like to receive the requested records and stated that this is a continuing access request for any responsive records created in the future.

[5] In response, the ministry located two responsive records (the video and the transcripts) and then sent a decision letter to the appellant which stated that it was denying her access to these records under sections 14(1)(i) and 20 of the *Act*.

[6] Section 14(1)(i) gives the ministry the discretion to refuse disclosure of a record if doing so could reasonably be expected to endanger, amongst other things, the security of a procedure established for the protection of items, for which protection is reasonably required. Section 20 gives the ministry the discretion to refuse disclosure of a record if doing so could reasonably be expected to seriously threaten the safety or health of an individual.

[7] In its decision letter to the appellant, the ministry provided the following reasons for refusing to disclose the educational video and transcripts:

The records requested are denied because the movie is only accessible under circumstances prescribed in the [*ISPA*]. The *ISPA* requires that

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<sup>2</sup> R.S.O. 1990, c. I.1, section 3.

<sup>3</sup> The Immunization for Children in Schools and Licensed Child Care Settings Protocol, 2018, pages 6–7, at:

[www.health.gov.on.ca/en/pro/programs/publichealth/oph\\_standards/docs/protocols\\_guidelines/Immunization\\_Schools\\_Child\\_Care\\_Protocol\\_2018\\_en.pdf](http://www.health.gov.on.ca/en/pro/programs/publichealth/oph_standards/docs/protocols_guidelines/Immunization_Schools_Child_Care_Protocol_2018_en.pdf)

school pupils be vaccinated for designated access under the *ISPA*, including measles, mumps and rubella. The parent of the pupil is responsible for vaccinating their child for these designated diseases (section 3 of the *ISPA*).

If a parent of a pupil has religious or conscience objection to the vaccination of their child, they must complete an education session with the medical officer of health, the details of which are set out in regulation (section 3.3 of the *ISPA*), and file a statement of conscience or religious belief with the local medical officer of health.

Regulation 645 of the *ISPA* requires that the education session be provided by the local medical officer of health or the local medical officer of health delegate. The education session includes a video component.

You are invited to attend your local public health unit so you can be provided with an in-person viewing of the video, as well as an opportunity to discuss any questions/concerns that you may have about the video and vaccination.

You can have access to the requested records only through the procedure as established in Regulation 645 and the Immunization Management Protocol, 2017 in the Ontario Public Health Safety Standards published by the Minister of Health and Long-Term Care under section 7 of the *Health Promotion and Protection Act*. The protocol specifies that the education session must be delivered in person at the board of health and the regulation under the *ISPA* (section 4(3)) states the session must be delivered by the medical officer of health or the medical officer of health's delegate.

Neither the regulation nor the Protocol permit the public to view the video, and parents of pupils who are requesting an exemption under the *ISPA* are only permitted to view it in accordance with this procedure.

PPHD is denying access based on section 14(1)(i) (Law Enforcement) of the *Act* because the restrictions imposed on the viewing of the video were put in place to ensure the video is not subject to manipulation or alteration. Disclosure could reasonably be expected to undermine the procedure the ministry put in place specifically to protect the integrity of the contents of the video. And the ministry believes that protection is reasonably required for the video because it serves a significant public health purpose. It describes the risks of harm to children and to the public at large, if students are not vaccinated.

The ministry is also denying access to the video based on section 20 (Danger to safety or health) of the *Act*. Should the video be disseminated,

its factual contents could be altered and result in parents misunderstanding the serious health risks posed to their children (and to the public at large) by their children if they are not vaccinated. In other words, disclosure could reasonably be expected to seriously threaten the health of individuals.

[8] The appellant appealed the ministry's decision to deny her access to the records to the Information and Privacy Commissioner of Ontario (IPC). A mediator was assigned to this appeal to assist the parties in resolving the issues in dispute.

[9] This appeal was not resolved during mediation and was moved to adjudication for an inquiry. I sought and received representations from the parties on the issues to be resolved in this appeal.

[10] In this order, I find that the video and the transcripts are not exempt from disclosure under section 14(1)(i) or section 20 of the *Act*. I order the ministry to disclose these records to the appellant.

## **RECORDS:**

[11] The two records at issue in this appeal are:

1. educational video on immunization; and
2. transcripts of that video

## **ISSUES:**

- A. Does the discretionary exemption at section 14(1)(i) apply to the records?
- B. Does the discretionary exemption at section 20 apply to the records?

## **DISCUSSION:**

### **Issue A: Does the discretionary exemption at section 14(1)(i) apply to the records?**

[12] Section 14(1)(i) states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

### ***Summary of the parties' representations***

#### *Ministry's representations*

#### Background

[13] At the outset of its representations, the ministry provides some background information about the statutory provisions, a regulation and a protocol that underlie the requirement that parents who object to vaccinating their children for reasons of conscience or religious belief attend an education session delivered by their local public health unit that includes viewing an educational video and/or transcripts on immunization.

[14] The statutory requirement that parents vaccinate their school-age children and the exception to that requirement are set out in sections 3(1) and (3) of the *ISPA*. These provisions state:

(1) The parent of a pupil shall cause the pupil to complete the prescribed program of immunization in relation to each of the designated diseases.

. . . .

(3) Subsection (1) does not apply to a parent who has completed an immunization education session with a medical officer of health or with a medical officer of health's delegate that complies with the prescribed requirements, if any, and who has filed a statement of conscience or religious belief with the proper medical officer of health.

[15] The ministry then refers to section 4 of Ontario Regulation 645, which sets out the "prescribed requirements" that apply to the immunization education session referred to in section 3(3) of the *ISPA*. Section 4 states:

(1) This section prescribes the requirements that apply to an immunization education session described in subsection 3(3) of the Act.

(2) The immunization education session must include information on,

(a) the benefits and risks of immunization; and

(b) vaccine safety.

(3) The immunization education session must be delivered by a medical officer of health or a medical officer of health's delegate.

(4) The immunization education session must provide a certificate of completion to every parent that completes it.

[16] The ministry also refers to a protocol published under the authority of section 7 of the *Health Protection and Promotion Act*,<sup>4</sup> which provides direction to boards of health on how to implement the *ISPA*.<sup>5</sup> The parts of this protocol that apply to the immunization education session include the following:

3) The board of health shall make clear to parents who are considering non- medical exemptions the requirements specified in the *ISPA* and Regulation 645 under the *ISPA*, including the requirement for a parent requesting the non-medical exemption to attend an immunization education session prior to filing the statement of conscience or religious belief.

4) The board of health shall deliver an in-person education session to the parent requesting the non-medical immunization exemption, necessitating face-to-face interaction. The education session shall be delivered by the medical officer of health or their delegate. The delegate shall be an employee of the board of health and be knowledgeable regarding vaccines and the process of being immunized.

5) The board of health shall deliver the education session using the digital education module and/or transcripts, as specified by the ministry.<sup>6</sup>

[17] Finally, in its confidential representations, the ministry cites a document that it issues to public health units that includes detailed information about how the latter bodies can access the educational video and transcripts.

#### Section 14(1)(i)

[18] The ministry submits that disclosing the “immunization education module” (the video and transcripts) could reasonably be expected to endanger the security of a procedure established for the protection of an item, for which protection is reasonably required, as stipulated in the section 14(1)(i) exemption.

[19] The ministry states that the video mandated by section 3 of the *ISPA* and section 4 of Regulation 645, together with the delivery method prescribed by the regulation and set out in greater detail in the confidential document that the ministry issues to public health units, is an immunization education “procedure.” It adds that the restricted,

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<sup>4</sup> R.S.O. 1990, c. H.7.

<sup>5</sup> *Supra* note 3.

<sup>6</sup> *Ibid.*

legislated procedure was established by the ministry precisely to secure the video's contents against fraudulent alteration and manipulation and deliberate or unintentional misrepresentation.

[20] The ministry submits that given the immunization program's significant public health goal, and the physical harm that could result to children and physically vulnerable members of the public if large numbers of children are not vaccinated, the factual integrity of the video reasonably requires protection. It cites Order PO-2391 and submits that the very nature of the information is such that it should be protected from tampering or unauthorized modification.

[21] The ministry further states that section 4 of Regulation 645 makes it clear that the video cannot be viewed by parents independently. Instead, it must be "delivered" by a medical officer of health or delegate who is responsible for providing the parent with a certificate of completion after the video is viewed. Only public health units have access to the video, and no one else, including parents who have viewed the video, are permitted to remove it or take a copy of it. The ministry submits that this level of restriction and oversight demonstrate that the ministry's intention is to treat the video as a record that must be secured.

[22] In short, the ministry submits that the measures imposed to restrict access to the video are a "procedure" established to protect the video, an item whose contents reasonably requires protection, for the purposes of section 14(1)(i). It claims that disclosing the video to a person under the *Act* rather than through the process mandated under the *ISPA*, would both "endanger" the security of that procedure and undermine it.

[23] The ministry further asserts that disclosing the video through the access process under the *Act* would effectively render section 3 of the *ISPA* and section 4 of Regulation 645 unenforceable. It claims that those provisions would be of no force or effect, since the video could be accessed simply through a freedom-of-information request, without the involvement of a medical officer of health, or the need for a certificate of completion.

[24] The ministry submits that for these reasons, disclosing the video and transcripts would not only undermine the security of the procedure put in place to protect the contents of the records, but also undermine the legislative scheme that establishes and supports the procedure.

[25] The ministry further submits that if the video and transcripts are disclosed to the appellant, she would be free to distribute the video widely and post it on social media, since disclosure to her is tantamount to disclosure to the world. It claims that this potentially widespread disclosure would make the public policy objectives of the *ISPA* provisions unachievable.

[26] The ministry claims that individuals, groups and organizations opposed to or

skeptical of the benefits of vaccination could freely alter the contents of the video to include misinformation about the health risks of vaccination, and uncorroborated studies regarding any of the issues canvassed in the video, thereby discouraging parents from having their children vaccinated. Similarly, these individuals, groups and organizations could misrepresent the contents of the video and transcripts to parents, either deliberately or unintentionally.

[27] In particular, the ministry points to an organization known as Vaccine Choice Canada (VCC), which it claims advocates against vaccination and cites two articles on VCC's website that attack the ministry's vaccination programs and policies, including the process for seeking an exemption for a child. The ministry provides a copy of a stick-figure image on VCC's website that shows a ministry bureaucrat putting a gun to the head of a parent, with a caption that says, "Ideas so good, they have to be mandatory."

[28] The ministry then cites an article published by the World Health Organization under its Global Vaccine Safety program whose purpose is to "address six common misconceptions about vaccination that are often cited by concerned parents as reasons to question the wisdom of having their children vaccinated."<sup>7</sup> It further states that the most tenacious misconception is that vaccines cause autism, despite solid proof to the contrary.

[29] The ministry submits that the records at issue address these misconceptions. Therefore, if they are disclosed, persons opposed to vaccination could easily manipulate the information presented in the video and transcripts specifically to weaken the facts and arguments that are meant to dispel these misconceptions.

[30] The ministry further states that although it is arguable that the information in the video and transcripts is general and even publicly available from various sources, the way the information is presented is unique because it is tailored to address the misconceptions that exist. It submits that the manner in which the information is presented, and directed to a very specific audience, removes it from the realm of general information.

[31] The ministry submits it has met the evidentiary threshold that the IPC refers to in its orders on section 14(1)(i). It claims that the small number of examples that it has provided illustrate how easily the text of the video could be manipulated so as to pervert its intention. In addition, it asserts that the VCC articles demonstrate how the information in the records could be misrepresented, not only by disputing the legitimacy of the scientific facts presented in the records, but also by stating that the ministry is deliberately misleading and lying to the public by knowingly disseminating false information.

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<sup>7</sup> [www.who.int/vaccine\\_safety/initiative/detection/immunization\\_misconceptions/en/](http://www.who.int/vaccine_safety/initiative/detection/immunization_misconceptions/en/)



[32] Finally, the ministry submits that the reason the video and transcripts reasonably require protection is that they serve a significant public health purpose, which is to ensure that parents who do not want their children vaccinated are well informed about the benefits of vaccination, and the risks of not vaccinating them, before they make an exemption decision. In addition, it claims that another reason the integrity of the video and transcripts requires protection is because the health risks associated with children not being vaccinated are significant. It submits that although unvaccinated children are at personal risk, they also pose health risks to other children, and to the public.

*Appellant's representations*

[33] The appellant submits that the ministry has not established that the video and transcripts are exempt from disclosure under section 14(1)(i) of the *Act*.

[34] She disputes the ministry's claim that the video "mandated" by section 3 of the *ISPA* and section 4 of Regulation 645, together with the delivery method prescribed by the regulation and set out in greater detail in the confidential document that it issues to public health units, is a "procedure established for the protection of items, for which protection is reasonably required," as required by section 14(1)(i).

[35] She states that there is no indication in the *ISPA*, the regulation or the protocol that the procedure set out was created to protect the video. She submits that such a claim is contradicted by common sense and by reading the legislation, and that it is clear that the set-up of the education session was created to help parents receive information and decide whether to immunize or file an exemption.

[36] The appellant further submits that since the *ISPA* and regulation do not discuss the video and restricting access to it, it cannot be claimed that this legislation was established to protect the video. She asserts that the ministry has failed to provide any evidence supporting the characterization of the video as an item for which protection is reasonably required, as stipulated in section 14(1)(i).

[37] She also disputes the ministry's argument that the "factual integrity" of the video requires protection because of "the very nature of the information." She submits that the video does not reasonably require protection against sharing a copy. In particular, an educational module, created to provide parents with information on health matters, is not an item for which protection is reasonably required.

[38] The appellant further submits that another reason why protection is not required is that if the video is disclosed to her, the ministry still retains the original records. She submits that sharing a copy with her would not interfere with nor threaten "the factual integrity" of the video, and that nothing in "the very nature of the information" in the video can be said to "reasonably require protection" under section 14(1)(i).

[39] The appellant also disputes the ministry's claim that the way the information in the video and transcripts is presented is unique because it is tailored to address the

misconceptions that exist. She submits that similar information is widely available and points to the following:

- a section of the ministry's website entitled, "Why you should vaccinate your child," which states that vaccines are safe and dispels the myth that vaccines cause autism;<sup>8</sup>
- short movies and transcripts on the ministry's website explaining why vaccines are important;<sup>9</sup>
- numerous official public health websites, including the World Health Organization's page that discusses six misconceptions about vaccinations;<sup>10</sup> and
- the discussion of vaccine safety and necessity on a Government of Canada website.<sup>11</sup>

[40] The appellant also claims that other jurisdictions have placed their entire immunization education curriculum on their public websites. In particular, she points to the Oregon Health Authority's public website, which allows parents to view a vaccine education module on that website and to print off a Vaccine Education Certificate and other documents they can submit to their child's school when requesting a vaccine exemption.<sup>12</sup>

[41] The appellant submits that given the wealth of information available from various reliable sources, there is nothing particularly "protection-worthy" in the information in the video developed by the ministry about vaccine benefits, risks, safety and myths.

[42] The appellant also disputes the ministry's claim that providing her with access to the video would render the procedure set out in section 3 of the *ISPA* and section 4 of Regulation 645 "unenforceable", and undermine the legislative scheme. She states that she is not a parent seeking to exempt herself from the education session and submits that providing her with access to the video does not change the legislative scheme that requires parents to obtain a certificate of completing the education session, prior to seeking an exemption on conscience or religious grounds.

[43] The appellant further asserts that if the ability to manipulate or edit a copy of a record disclosed is sufficient justification to exempt it from access under section

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<sup>8</sup> [www.ontario.ca/page/vaccines-children-school](http://www.ontario.ca/page/vaccines-children-school)

<sup>9</sup> [www.ontario.ca/page/vaccines](http://www.ontario.ca/page/vaccines)

<sup>10</sup> *Supra* note 7.

<sup>11</sup> [www.canada.ca/en/public-health/services/vaccination-children/safety-concerns-side-effects.html](http://www.canada.ca/en/public-health/services/vaccination-children/safety-concerns-side-effects.html)

<sup>12</sup> [www.oregon.gov/oha/ph/PreventionWellness/VaccinesImmunization/GettingImmunized/Pages/non-medical-exemption.aspx](http://www.oregon.gov/oha/ph/PreventionWellness/VaccinesImmunization/GettingImmunized/Pages/non-medical-exemption.aspx)

14(1)(i), this would serve as a reason to refuse access to any records held by the government. She submits that this interpretation is not supported by the language of the *Act*, and should not be allowed to succeed.

*Ministry's reply representations*

[44] The ministry states that it rejects the appellant's submission that the "factual integrity" of the video and transcripts does not require protection because the ministry still retains the original records. It submits that this argument would not reduce the danger described in section 14(1)(i), because the application of this exemption is not contingent on whether the original records remain intact. It submits that section 14(1)(i) protects against endangering the security of the procedure, which in this case is established to protect the video and transcripts. It further asserts that the security of the legislated, restricted immunization education procedure in this case would be endangered if the restricted procedure could easily be circumvented through a freedom-of-information request.

***Analysis and findings***

[45] I have reviewed the records at issue (the video and transcripts) and considered the representations of the parties. For the reasons that follow, I find that these records are not exempt from disclosure under section 14(1)(i) of the *Act*.

[46] Section 14(1)(i) gives the ministry the discretion to refuse disclosure of a record if doing so could reasonably be expected to endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required. In the circumstances of this appeal, the ministry is relying on the latter part of section 14(1)(i), which allows it to refuse disclosure of the video and transcripts if doing so could reasonably be expected to endanger the security of a "procedure established for the protection of items, for which protection is reasonably required."

[47] It is not enough for the ministry to take the position that the harms under section 14(1)(i) are self-evident from the records.<sup>13</sup> To establish that disclosing records "could reasonably be expected to" lead to the harms set out in the section 14(1)(i) exemption, the ministry must 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.<sup>14</sup>

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<sup>13</sup> Order PO-2040 and *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

<sup>14</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[48] In determining whether disclosing the immunization education video and transcripts to the appellant could reasonably be expected to lead to the harms set out in the section 14(1)(i) exemption, it is useful to first review the statutory, regulatory and protocol scheme that requires parents who object to vaccinating their children for reasons of conscience or religious belief to attend an education session delivered by their local public health unit before obtaining an exemption.

[49] Section 3 of the *ISPA* requires parents of school-aged children to vaccinate their children against certain designated diseases. However, this requirement does not apply to parents who complete an immunization education session with a medical officer of health, or that individual's delegate, and who then file a statement of conscience or religious belief with the medical officer of health.

[50] Under section 4 of Regulation 645 of the *ISPA*, the immunization education session must include information on the benefits and risks of immunization and vaccine safety. In addition, the immunization education session must be delivered by a medical officer of health or a delegate, and a certificate of completion must be provided to every parent that completes it.

[51] The *Immunization for Children in Schools and Licensed Child Care Settings Protocol, 2018*, provides direction to boards of health (i.e., public health units) on how to implement the *ISPA* and includes a number of requirements. For example, it states that the board of health must deliver an in-person education session to the parent requesting the non-medical immunization exemption, necessitating "face-to-face interaction." In addition, the board of health is required to deliver the education session using the "digital education module and/or transcripts," as specified by the ministry.<sup>15</sup>

[52] Finally, the ministry has issued a confidential document to public health units that includes detailed information about how the latter bodies can access the video and transcripts.

[53] As set out above, the ministry states that the requirements in section 3 of the *ISPA* and section 4 of Regulation 645, together with the delivery method prescribed by the regulation and set out in greater detail in the confidential document that it issues to public health units, are an immunization education "procedure" established for the protection of the video and transcripts, items for which protection is reasonably required under section 14(1)(i). It submits that disclosing the video and transcripts would render the procedure set out in the *ISPA* and Regulation 645 "unenforceable," and "undermine" the legislative scheme.

[54] In particular, the ministry claims that if the video and transcripts are disclosed,

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<sup>15</sup> *Supra* note 3.

individuals and organizations opposed to or skeptical of the benefits of vaccination could freely alter their contents to include misinformation about the health risks of vaccination, which would discourage parents from having their children vaccinated. It submits that protection is “reasonably required” for the immunization education “procedure,” in accordance with the latter part of section 14(1)(i), because the video and transcripts serve a significant public health purpose that would be undermined if these records are disclosed.

[55] I do not find the ministry’s submissions with respect to section 14(1)(i) to be persuasive for a number of reasons.

[56] Although section 14(1)(i) is found in a section of the *Act* dealing specifically with law enforcement matters, it is not restricted to law enforcement situations and can cover any building, vehicle, system or procedure which requires protection.<sup>16</sup> However, it is important to emphasize that section 1 of the *Act*, which sets out its purposes, states that necessary exemptions from the right of access should be “limited and specific.” Moreover, the Ontario Divisional Court has stated that the exemptions in the *Act* should be construed narrowly.<sup>17</sup>

[57] Even if I were to accept the ministry’s claim that the immunization education session requirement and the method for delivering it constitutes a “procedure established for the protection of items, for which protection is reasonably required,” I am not convinced that disclosing the video and the transcripts could reasonably be expected to endanger the security of this procedure, as required by section 14(1)(i).

[58] I recognize that dropping vaccine rates amongst children because of misinformation about vaccinations is a serious public health issue, and there is a compelling need to deliver scientific, evidence-based information to parents in order to dispel myths about the risks of vaccination. In addition, there is no doubt that in the age of the internet and social media, parents have access to range of information, including misinformation from individuals and organizations that are opposed to vaccinations.

[59] It is certainly possible that if the video and transcripts are disclosed to the appellant and end up in the public domain, an anti-vaccination group or individual might post a critique of these records on its website, post an altered, marked-up or edited version of these records, or spread misinformation about their contents. In my view, however, the ministry’s position that such disclosure could reasonably be expected to endanger the security of the immunization education procedure established for the

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<sup>16</sup> Orders P-900 and PO-2461.

<sup>17</sup> *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) at para. 45.

protection of the video and transcripts, items for which protection is reasonably required, is simply not credible.

[60] If an anti-vaccination group spreads misinformation about the video and transcripts, or puts up an altered version of these records on its website, parents seeking a non-medical exemption from the requirement that they vaccinate their school-aged children must still comply with the requirements and procedure set out in the *ISPA*, Regulation 645 and the protocol. Regardless of whether these parents might have seen misleading information or even an altered version of the video or transcripts, they are still required to attend an education session at a public health unit for a “face-to-face interaction” where they must view the original, unaltered versions of these records.

[61] The medical officer of health or delegate at a public health unit who delivers the immunization education session may have to address questions from some parents who may have seen altered versions of the video and transcripts online or other misinformation about these records. However, dispelling myths about vaccinations and correcting false information is the job of these public health officials. Disclosing the video and transcripts and subjecting them to possible analysis, scrutiny and even alteration by anti-vaccination groups may make the jobs of these officials more challenging, but this falls far short of constituting a reasonable expectation of endangerment to the security of the immunization education procedure, as required by section 14(1)(i).

[62] In short, I find that the ministry has failed to establish that disclosing the immunization education video and transcripts to the appellant could reasonably be expected to endanger the security of the procedure established for the protection of items, for which protection is reasonably required, as stipulated in section 14(1)(i) of the *Act*. As a result, I find that these records are not exempt from disclosure under that provision.

**Issue B: Does the discretionary exemption at section 20 apply to the records?**

[63] Section 20 states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

***Summary of the parties’ representations***

*Ministry’s representations*

[64] The ministry submits that the disclosure of the records could reasonably be expected to seriously threaten the health of individuals. It reiterates that the risk of the

records being altered or misrepresented is very high. It further states that the purpose for which the records would be altered or misrepresented would be to encourage parents to seek a vaccination exemption for their child, in accordance with the *ISPA*.

[65] The ministry further states that the greater the number of unvaccinated children, the greater the risk that vulnerable individuals will contract the infectious diseases targeted by the vaccines. It cites an interview with Dr. Joan Robinson, chair of the Canadian Pediatric Society's Infectious Diseases and Immunization Committee, on *Global News*, who stated that when parents choose not to immunize their children, they are putting other children, especially those with compromised immune systems, at risk. When they contract an infectious disease like chicken pox or measles, for example, their reaction will be far more severe than if a healthy child were to contract the same infectious disease. Dr. Robinson went on to explain that if the disease is measles, the health risk can be death.<sup>18</sup>

[66] The ministry also cites the WHO's "Global Vaccine Safety" publication, which makes the same point:

[T]he relatively few [preventable disease] cases that a country may currently have could very quickly become tens or hundreds of thousands of cases without the protection given by vaccines. We should therefore still be vaccinated, for two reasons. The first is to protect ourselves. Even if we think our chances of getting any of these diseases are small, the diseases still exist and can still infect anyone who is not protected.

The second is to protect those around us. There is a small number of people who cannot be vaccinated (because of severe allergies to vaccine components, for example), and a small percentage of people don't respond to vaccines. *These people are susceptible to disease, and their only hope of protection is that people around them are immune and cannot pass disease on to them.*<sup>19</sup> [emphasis added]

[67] The ministry concedes that the disclosure of the video and transcripts would not, in and of itself, pose a health risk to individuals but submits that since the disclosure could result in such a risk materializing, and that the health risk could be severe, the section 20 exemption should extend to this indirect situation as well.

[68] It submits that the risk that a vulnerable child could be infected with a preventable disease as a result of a person misrepresenting the information disclosed in the records, is a significant consideration that should be taken into account in

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<sup>18</sup> <https://globalnews.ca/news/3562615/why-this-mom-is-blaming-anti-vaxxers-for-her-daughters-hospitalization/>

<sup>19</sup> *Supra* note 7.

determining whether section 20 applies to the records. It submits that this risk is not remote and cites a U.S. case cited on *Global News* in which a child whose immune system was compromised as a result of a kidney transplant had to be hospitalized because she came into contact with another child who had chicken pox. In a media article on the issue, the child's mother, a registered nurse, explained why unvaccinated children pose a health threat to her daughter:

There are people who cannot have live vaccines, like my daughter, who had a kidney transplant when she was 2-years-old," the Atlanta-based mom said . . . . As a result of the exposure, Echols was told to bring Ashley to the emergency department by her nephrologist. While there, she received blood work and injections of immunoglobulin. "The incubation period of chicken pox is 7–12 days," Echols said. "So even with all we are doing, she could still become sick in the next 3 weeks. And that would mean an automatic admission to the hospitals for IV antiviral meds. She could become very, very sick from this."

She added, "And the people choosing to skip vaccinations put children like my daughter at risk. She has been through so much already. And this was avoidable."<sup>20</sup> [emphasis added]

*Appellant's representations*

[69] The appellant submits that the ministry's claim that disclosing the video and transcripts could reasonably be expected to cause a serious threat to health, as stipulated in section 20 of the *Act*, is simply not believable. She states that it is common knowledge that the internet is full of information on various issues, including vaccines, and asks, "How can anyone claim that of all available documents in the world, it is this particular document that is so dangerous, if it were to be misrepresented?"

[70] She states that the ministry's claim that the section 20 exemption applies to the records is "full of conjecture." She disputes the ministry's assertion that the risk of the records being altered is "very high" and that this will lead to more unvaccinated children and the risk of infectious diseases spreading. She submits that the ministry has not provided accurate data that would enable one to even estimate the real likelihood of such a scenario. Instead, it simply quotes an interview from *Global News* and a WHO publication and provides no actual statistics or data.

[71] The appellant submits that even if one were to accept the ministry's claim that an altered video or transcripts would result in more parents seeking exemptions, which would result in a few additional children becoming sick with either chicken pox or

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<sup>20</sup> *Supra* note 18.



rubella, it is a huge leap, to argue, without statistical evidence, that a serious threat to health could reasonably be expected to occur if the records are disclosed. She submits that the ministry has failed to provide real evidence demonstrating that the serious threat to health is plausible.

[72] The appellant also claims that the ministry "concedes" that disclosure of the records "would not . . . pose a health risk to individuals." Yet, it claims that the disclosure "could result in such a risk materializing" and suggests the section 20 exemption "should extend to this indirect situation as well." She submits that for the section 20 exemption to apply, the ministry should explain what serious threat to health is likely due to the disclosure of the actual records. She asserts that the ministry's submissions concede that no such connection exists, and instead, it makes a "vague" claim that a threat to health will result if the public is exposed to a hypothetical altered-record. She submits that this line of reasoning should be rejected.

[73] The appellant further states that if the ability to manipulate or edit a record is sufficient justification to exempt it from access under the *Act*, this would serve as a reason to refuse access to any and all records held by ministry. She submits that this interpretation is clearly wrong and should not succeed.

[74] Finally, the appellant states that even if one were to accept that the video and transcripts could be altered if they were disclosed, the serious risk to health described by the ministry does not exist. In particular, parents seeking an exemption from vaccinating their school-aged children for reasons of conscience or religious belief would still be required to attend an immunization education session and view the original video in the presence of a medical officer of health or delegate. She submits that those health professionals would be able to clarify any misconceptions and address any myths during the actual immunization education session, which means that there is no possible "causal connection" between the disclosure of the records and a possible threat to the health of any individuals.

### ***Analysis and findings***

[75] I have reviewed the records at issue (the video and transcripts) and considered the representations of the parties. For the reasons that follow, I find that these records are not exempt from disclosure under section 20 of the *Act*.

[76] Section 20 gives the ministry the discretion to refuse disclosure of a record if doing so could reasonably be expected to seriously threaten the safety or health of an individual.

[77] It is not enough for the ministry to take the position that the harms under

section 20 are self-evident from the records.<sup>21</sup> To establish that disclosing records “could reasonably be expected to” lead to the harms set out in the section 20 exemption, the ministry must 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.<sup>22</sup>

[78] As set out above, the ministry concedes that disclosing the video and transcript would not, in and of itself, pose a health risk to individuals but submits that since the disclosure could result in such a risk materializing, and that the health risk could be severe, the section 20 exemption should extend to this indirect situation as well.

[79] In particular, the ministry submits that if the video and transcripts are disclosed, the risk that anti-vaccination groups or individuals could alter these records or misrepresent their contents is “very high.” It claims that the purpose for altering or misrepresenting these records would be to encourage parents to seek a vaccination exemption for their child, in accordance with the *ISPA*.

[80] It further submits that the risk that a vulnerable child or children could be infected with a preventable disease as a result of a person misrepresenting the information disclosed in the records, is a significant consideration that should be taken into account in determining whether section 20 applies to the records. It claims that this risk is not remote and cites the example of a child in the U.S. whose immune system was compromised as a result of a kidney transplant who had to be hospitalized because she came into contact with an unvaccinated child who had chicken pox.

[81] I recognize that dropping vaccine rates, particularly amongst school-aged children, is a serious public health issue. As set out in the WHO's “Global Vaccine Safety” publication,<sup>23</sup> the relatively low number of infectious disease cases that currently exist in jurisdictions with high vaccination rates, including Ontario, could multiply rapidly if an increasing number of parents choose not to vaccinate their children. This poses a risk not simply to the health of those children but also to those individuals who cannot, for example, be vaccinated for medical reasons and rely on broader group immunity to protect them from being infected.

[82] The wording of section 20 makes it clear that for the exemption to apply, it is the disclosure of the requested records that must lead to a reasonable expectation of a serious threat to the safety or health of an individual. In my view, the section 20 exemption can still apply even if the disclosure of the records triggers intervening

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<sup>21</sup> *Supra* note 13.

<sup>22</sup> *Supra* note 14.

<sup>23</sup> *Supra* note 7.

events that then subsequently lead to a reasonable expectation that those harms will occur. However, I find that the chain of events described in the ministry's submissions that it claims could occur and then indirectly lead to a reasonable expectation of harm under section 20, amounts to speculation, which is not sufficient to satisfy the requirements of that exemption.

[83] The ministry's submissions on section 20 are based on the premise that if the video and transcripts are disclosed to the appellant and end up in the public domain, there is a "high chance" that an anti-vaccination group or individual would post an altered version of these records online or spread misinformation about their contents, which would encourage parents to seek a vaccination exemption.

[84] It is certainly possible that if the video and transcripts are disclosed to the appellant and end up in the public domain, an anti-vaccination group might post an altered version of these records on its website or spread misinformation about their contents, which might be seen by some parents. In addition, if parents seeking a non-medical exemption from vaccination attend the required immunization education session at a public health unit, but still choose to proceed with obtaining an exemption, there is a risk that their children could subsequently become ill from an easily preventable disease or spread that disease to other vulnerable individuals who are not vaccinated. This could be characterized as a serious threat to the health of those individuals, as stipulated in section 20.

[85] However, the ministry's suggestion that these harms could somehow be traced back to these parents having seen versions of the disclosed video or transcripts that were altered by anti-vaccination groups, is pure speculation. These parents may have been influenced by all kinds of factors in deciding to seek a non-medical vaccine exemption, including their own upbringing and belief system, discussions with like-minded peers, and exposure to a wide range of scientifically dubious websites and postings on social media about the risks of vaccinations. Moreover, although the ministry cites an alarming example about a child in the U.S. who had to be hospitalized because she came into contact with an unvaccinated child who had chicken pox, there is no evidence to suggest that this case came about because the unvaccinated child's parents had been influenced by viewing an educational video on immunization produced by public health officials that was altered or distorted by an anti-vaccination group.

[86] In short, I find that the ministry has failed to show that disclosing the video and transcripts could reasonably be expected to seriously threaten the health of an individual, as required by section 20 of the *Act*. As a result, I find that these records are not exempt from disclosure under that provision.

## **CONCLUSION:**

[87] I have found that the video and transcripts are not exempt from disclosure under

sections 14(1)(i) or 20 of the *Act*. As a result, I will order the ministry to disclose these records to the appellant.

[88] It is important to note that disclosing these records is consistent with the public accountability and transparency principles underlying the *Act*. The courts have consistently found that access-to-information legislation must be interpreted within the context of its purpose, which is to facilitate democracy by ensuring that citizens have the information required to participate meaningfully in the democratic process and to hold politicians and bureaucrats accountable to the citizenry. In addition, they have held that the exemptions in such legislation are to be construed narrowly.<sup>24</sup>

**ORDER:**

1. The appeal is allowed. I order the ministry to disclose the video and transcripts to the appellant by **July 29, 2019**.
2. To verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records that it discloses to the appellant.

Original Signed By: \_\_\_\_\_  
Colin Bhattacharjee  
Adjudicator

June 28, 2019 \_\_\_\_\_

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<sup>24</sup> *Supra* note 17.