

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-3989

Appeal PA18-248

Ministry of the Attorney General

September 11, 2019

**Summary:** The ministry received an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for communications about safe access zones regarding abortion services. The ministry notified a third party pursuant to section 28 of the *Act*, seeking their representations regarding disclosure with respect to records in which they may have an interest. The ministry then denied access to the responsive records in part, relying on the exclusion in section 65(13) (provision of abortion services).

The third party appealed the ministry's decision claiming that additional information in the records was also subject to the section 65(13) exclusion, as well as claiming that certain records did not contain information that comes within the scope of the request.

In this order, the adjudicator finds that the information at issue in two records does not come within the scope of the request. She also finds that some of the information identified by the appellant in the remaining four records is excluded from the *Act* by reason of section 65(13) and finds that the ministry should not disclose this information under the *Act*.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 24 and 65(13)(a).

### OVERVIEW:

[1] The ministry received an access request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*), for the following information:

All communications and information provided to the Ministry of the Attorney General from external sources from January 1, 2017 to October 30, 2017 regarding the need for safe access zones [regarding abortion services], including information from external sources received from other ministries.

[2] Prior to issuing its access decision, the ministry notified a third party pursuant to section 28 of the *Act*, seeking their representations regarding disclosure with respect to records in which they may have an interest (Records 237, 238, 239, 241, 242, 243 and 276).

[3] The ministry subsequently issued its access decision regarding these records granting partial access to them, citing the mandatory exemptions in sections 17 (third party information) and 21(1) (personal privacy) and the exclusion in section 65(13) (provision of abortion services), as well as non-responsiveness to the request.

[4] The third party (now the appellant) appealed the ministry's access decision.

[5] During mediation, the appellant advised that they are claiming section 65(13) for additional severances for Records 237 to 239, and 241 to 243. The appellant also claimed that the additional severances for Records 237, 241 and 243 were not responsive to the request. Record 276 is not at issue in the appeal, as the appellant is not asserting additional severances for this record.

[6] During the mediation stage, the requester advised that they wish to pursue access and contend there is a public interest in disclosure.<sup>1</sup>

[7] The appeal could not be resolved at the mediation stage of the appeal and proceeded to the adjudication stage, where an adjudicator conducts an inquiry.

[8] During the adjudication of the appeal, representations were sought from the ministry, the appellant and the requester in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[9] The ministry did not provide representations. The appellant provided representations, which were shared with the requester. Portions of the appellant's representations were withheld from the requester as they contained confidential information.<sup>2</sup> The requester provided representations in response.

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<sup>1</sup> The public interest override in section 23 of the *Act* does not apply to the exclusions listed in the *Act*, including the one at issue in this appeal, section 65(13).

<sup>2</sup> I will be considering the appellant's representations in their entirety, although I will only be referring to the non-confidential portions of them in this order.

[10] In this order, I find that the information at issue in Records 241 and 243 does not come within the scope of the request and I order the ministry to withhold access to this information. I also find that some of the information identified by the appellant in Records 237 to 239, and 242 comes within the exclusion in section 65(13)(a). However, I find that certain portions of the information at issue in these records is not excluded from the *Act*. I order the ministry to disclose the information in Records 237 to 239, and 242 that does not come within the exclusion in section 65(13)(a).

## **RECORDS:**

[11] As only the third party appealed the ministry's decision, at issue is the application of section 65(13) to the additional severances raised by the appellant to Records 237 to 239, and 241 to 243 and whether these additional severances in Records 237, 241 and 243 are not responsive to the requester's request.

[12] The records at issue consist of the following:

- Record 237 - Email dated August 17, 2017
- Record 238 - Consultation Notes dated August 22, 2017
- Record 239 - Statement dated August 22, 2017
- Record 241 - Email dated September 13, 2017
- Record 242 - Email and letter dated September 15, 2017
- Record 243 - Email dated October 30, 2017

## **ISSUES:**

**Issue A: What is the scope of the request? Are Records 237, 241 and 243 responsive to the request?**

**Issue B: Does section 65(13) (provision of abortion services) exclude the information at issue in Records 237 to 239, and 242 from the *Act*?**

## **DISCUSSION:**

**Issue A: What is the scope of the request? Are Records 237, 241, and 243 responsive to the request?**

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

in part:

(1) A person seeking access to a record shall,

(a) make a request in writing to the institution that the person believes has custody or control of the record;

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

. . .

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[14] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.<sup>3</sup>

[15] To be considered responsive to the request, records must "reasonably relate" to the request.<sup>4</sup>

[16] The appellant states that the request was for information regarding the need for safe access zones and that while Records 237, 241 and 243 arguably deal with abortion issues generally, these records are not about the need for safe access zones.

[17] The appellant states that the email at Record 237 contains the conditions as to participation in a discussion with the Attorney General's office regarding the Attorney General's proposed safe access zone legislation. The appellant states that this email contains preconditions to engaging in a dialogue and not advocacy on the need for safe access zones.

[18] The appellant states that in the email at Record 241, the author of the email is critical of the Government of Ontario's approach to prenatal healthcare and provides a general critique of the Attorney General's past and present policies toward abortion care providers. It states that the author does not mention safe access zones even once in this email (either by name or by implication).

[19] The appellant states that by the time the email at Record 243 was sent, the safe

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<sup>3</sup> Orders P-134 and P-880.

<sup>4</sup> Orders P-880 and PO-2661.

access zone legislation had already been passed, and thus there was no need to discuss "the need for" safe access zones. They state that the focus of this Record 243 relates to the proper implementation of legislation that had already been passed.

[20] The requester did not provide representations on this issue.

### ***Analysis/Findings***

[21] The requester sought access to communications from external sources to the ministry regarding the need for safe access zones.

[22] Based on my review of Record 237, although I agree with the appellant that it contains information about the preconditions to a meeting, I find, nevertheless, that it contains information responsive to the request. Specifically, I find that the portions at issue in this record contain responsive information regarding the need for safe access zones. Therefore, I will consider whether the information at issue in this record is excluded from the application of the *Act* by reason of section 65(13).

[23] I agree with the appellant that Record 241 is not responsive to the request. As set out by the appellant, this record does not even mention safe access zones.

[24] I also agree with the appellant that Record 243 is not responsive to the request. It is not about the information set out in the request, the need for safe access zones. This record is a discussion of public education and outreach regarding the safe zone legislation after this legislation had already been passed by the Ontario Government.

[25] The information at issue in Records 241 and 243 does not relate to the subject matter of the request, namely the need for safe access zones. This information does not come within the scope of the request and, therefore, I will order the ministry to withhold access to this information. As well, as the information at issue in Records 241 and 243 does not come within the scope of the request, there is no need for me to consider whether it is excluded from the *Act* by reason of section 65(13).

### **Issue B: Does section 65(13) (provision of abortion services) exclude the information at issue in Records 237 to 239, and 242 from the**

#### ***Act?***

[26] Sections 65(13) and 65(15) state:

This Act does not apply to information relating to the provision of abortion services if,

- (a) the information identifies an individual or facility, or it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual or facility; or

(b) disclosure of the information could reasonably be expected to threaten the health or safety of an individual, or the security of a facility or other building. 2017, c. 19, Sched. 2, s. 1 (2).

(15) For greater certainty, this Act applies to statistical or other information relating to the provision of abortion services that does not meet the conditions of clause (13) (a) or (b). 2017, c. 19, Sched. 2, s. 1 (2).

[27] For information to be “relating to” the provision of abortion services in section 65(13), it must be reasonable to conclude that there is “some connection” between the information and the provision of abortion services.<sup>5</sup>

[28] If section 65(13) applies to the information in the records, this information is excluded from the scope of the *Act*. Section 65(15) provides that abortion services related information that does not come within section 65(13) is subject to the *Act*.

[29] Much of the appellant’s record-specific representations on the application of section 65(13) to the additional information they wanted withheld were confidential. In the non-confidential portions of their representations, the appellant states that without further redactions, any reasonably informed reader will know that the information at issue could identify the appellant as the author of the information at issue in the records.

[30] The requester did not address the application of the section 65(13) exclusion to the records.

[31] The requester does point out that they are aware of the locations that offer abortion services and provided its opinion about the safe zone legislation. They would like access to the records to know more about why the ministry enacted this legislation.

### ***Analysis/Findings***

[32] At issue in this appeal is the additional information in Records 237 to 239, and 242 identified by the appellant as also being subject to section 65(13). The appellant did not identify which subsection in section 65(13) they are relying on. Based on my review of the appellant’s representations, it is clear to me that they are relying on the exclusion in section 65(13)(a), not the exclusion in section 65(13)(b), in that the appellant is concerned about being identified should the information at issue be disclosed.

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<sup>5</sup> *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.). See also, Orders PO-3222 and PO-3442.

[33] For section 65(13)(b) to apply, disclosure of the information at issue could reasonably be expected to threaten the health or safety of an individual, or the security of a facility or other building. The appellant has not indicated that disclosure of the specific information at issue could reasonably be expected to threaten health or safety or security in the manner set out in section 65(13)(b).

[34] For section 65(13)(a) to apply, the institution must establish that the information relating to the provision of abortion services identifies an individual or facility, or that it is reasonably foreseeable in the circumstances that the information could be utilized, either alone or with other information, to identify an individual or facility.

[35] Four records remain at issue, Records 237 to 239, and 242. The ministry has identified the information in the records that it is applying the exclusion in section 65(13) to. The requester did not appeal the ministry's decision; therefore, the information that the ministry has identified as excluded by reason of section 65(13) is not at issue in this appeal.

[36] All of the information at issue identified by the appellant as subject to section 65(13) in Records 237 to 239, and 242 relates to the provision of abortion services. However, not all of this information relates to the provision of abortion services and identifies an individual or facility, or it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual or facility in accordance with section 65(13)(a).

[37] For example, although the information at issue in Record 237 contains the conditions as to participation in a discussion regarding the proposed safe access zone legislation and relates to the need for safe access zones, not all of this information could reasonably be expected to identify an individual or a facility in accordance with section 65(13)(a).

[38] Based on my review of the information at issue in the records, I find that certain limited information in Records 237 to 239, and 242 is not excluded from the *Act* as it does not come within the exclusion identified by the appellant, section 65(13)(a). As no other exclusions, including section 65(13)(b), and no mandatory exemptions apply, and the ministry has not claimed any discretionary exemptions, I will order this limited information disclosed.

[39] I agree with the appellant that the remaining information at issue in Records 237 to 239, and 242 is information that is excluded by reason of section 65(13)(a) of the *Act*. This information relates to the provision of abortion services and identifies an individual or facility, or it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual or facility related to the provision of abortion services. This information should not be disclosed to the requester by the ministry.

**ORDER:**

1. I order the ministry to withhold access to the information at issue in Records 241 and 243, as it does not come within the scope of the request.
2. I uphold the ministry's decision that certain information in Records 237 to 239, and 242 is not excluded from the *Act* by reason of section 65(13) and I order this information disclosed to the requester by **October 17, 2019** but not before **October 11, 2019**. For ease of reference, I am providing the ministry with a copy of these records highlighting this information that should be disclosed to the requester.
3. I find that the remaining information at issue identified by the appellant in Records 237 to 239, and 242 is excluded from the application of the *Act* by reason of section 65(13) and should not be disclosed by the ministry under the *Act*.

Original signed by \_\_\_\_\_

Diane Smith  
Adjudicator

September 11, 2019 \_\_\_\_\_