Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4095

Appeal PA19-00074

Ministry of the Solicitor General

December 17, 2020

Summary: A group of First Nations whose communities are policed by the Ontario Provincial Police under the Ontario First Nations Policing Agreement submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) with the ministry for records relating to a record titled, "Transitioning to Community Tripartite Agreements," created by the Indigenous Policing Bureau of the Ontario Provincial Police.

The ministry denied access to four responsive records in their entirety, claiming the application of the labour relations exclusion in section 65(6) of the *Act*. In the alternative, the ministry claimed the application of the exemptions in sections 13(1) (advice or recommendations) and 15.1(a) (relations with aboriginal communities).

The requesters appealed the ministry's decision. They abandoned their claim to the draft agreement but raised the possible application of the public interest override in section 23 of the *Act* in relation to the other three records.

In this order, the adjudicator finds that the records are not excluded from the *Act* under section 65(6). She upholds the ministry's decision to withhold two decision notes on the basis of the advice and recommendations exemption in section 13(1) and finds that the public interest override does not apply to them.

The adjudicator orders the ministry to disclose the remaining record, a report, on the basis that it is a feasibility study and therefore exempt from the application of section 13(1) because of section 13(2)(g). She finds, further, that the section 15.1(a) exemption does not apply to it.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31, sections 13(1), 13(2), 15.1, and 23.

Orders and Investigation Reports Considered: Orders 206, M-892, P-726, MO-2660, PO-1885 and PO-3111.

OVERVIEW:

[1] In Ontario, several First Nations communities are provided policing services by the Ontario Provincial Police (the OPP). OPP-administered policing services are just one method for providing police services under what is known as the Ontario First Nations Policing Agreement (OFNPA). Another method is a Community Tripartite Agreement.

[2] A group of First Nations communities for which the OPP provides policing services submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Solicitor General[1] (the ministry) for:

> … a copy of the assessment relating to the Ontario First Nations Policing Agreement entitled "Transitioning to Community Tripartite Agreements" and background documents, if any exist, providing additional details regarding the staffing numbers in the main documents on a First Nation-by-First Nation basis. These records were created by the Indigenous Policing Bureau of the Ontario Provincial Police.

[3] The ministry, the institution under the *Act* responsible for responding to access requests made to the OPP[2], located four responsive records and issued a decision denying access to the records in their entirety. The ministry claimed the application of the exclusion in section 65(6) (labour relations) of the *Act*. In the alternative, the ministry claimed the application of the exemptions in sections 12 (cabinet records), 13(1) (advice or recommendations) and 15.1(a) (relations with aboriginal communities).

[4] The requesters, now the appellants, appealed the ministry's decision.

[5] During mediation, the appellants confirmed their interest in pursuing the records in their entirety. The appellants also raised the possible application of the public interest override in section 23 of the *Act,* meaning that if the records are not excluded but exempt, they should still be disclosed in the public interest. Section 23 is therefore an issue in this appeal. The ministry maintained its access decision.

[6] Mediation did not resolve the issues under appeal. The file was transferred to the adjudication stage of the appeal process and an inquiry was conducted. The parties submitted representations in the inquiry, which were shared in accordance with the IPC's *Code of Procedure* (the *Code*) and *Practice Direction 7*.

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[1] Formerly the Ministry of Community Safety and Correctional Services.
[2] Order PO-2658.

[7] During the inquiry, the ministry ceased to rely on the exemption in section 12 (cabinet records) to withhold portions of the records and it is therefore not at issue in this appeal. However, the ministry raised the application of the exemption in section 19 (solicitor-client privilege) to two of the records – a draft agreement and part of a decision note – and this exemption was therefore added to the scope of the appeal, as well as the issue of whether the ministry was permitted to raise a discretionary exemption claim late.

[8] Also during the inquiry, the appellants ceased to seek access to the draft agreement, thereby further narrowing the issues in the appeal.

[9] In this order, I uphold the ministry's decision to withhold two decision notes on the basis of the advice and recommendations exemption in section 13(1). I do not find that there is a compelling public interest in disclosure of these notes sufficient to outweigh the interests protected by section 13(1). Having concluded that the decision notes are exempt under section 13(1), it is not necessary for me to consider the ministry's section 19 claims.

[10] I also order the ministry to disclose the remaining record, a report, on the basis of the feasibility study exception to section 13(1), and that the section 15.1 exemption also does not apply to it.

RECORDS:

The records are:

- A report, "Transitioning to Community Tripartite Agreements" dated March 5, 2018 (the report)
- A decision note dated August 16, 2017
- A decision note dated June 30, 2017

ISSUES:

A. Does the labour relations exclusion at section 65(6) exclude the records from the *Act?*

B. Does the discretionary exemption for advice and recommendations at section 13(1) of the *Act* apply to the records?

C. Does the discretionary exemption for relations with Aboriginal communities at section 15.1(a) of the *Act* apply to the report?

D. Did the ministry exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?

E. Is there a compelling public interest in disclosure of the decision notes that clearly outweighs the purpose of the section 13(1) exemption?

DISCUSSION:

Issue A: Does the labour relations exclusion at section 65(6) exclude the records from the *Act?*

[11] The ministry argues that all of the records are excluded from the *Act* by paragraph 3 of section 65(6), which states:

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

[12] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) apply, the records are excluded from the scope of the *Act*. There is no argument before me or any reasonable basis to consider whether the exceptions in section 65(7) apply to the records.

[13] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 3 of section 65(6), it must be reasonable to conclude that there is "some connection" between them.[3]

[14] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer- employee relationships.[4]

[15] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human

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[3] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

[4] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[5]

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

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

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

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

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

[18] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce.[7]

Representations

[19] The ministry submits that the records are excluded because they contain "communications about staffing and other human resource matters" that the OPP has an interest in as an employer.

[20] It argues that all three parts of the section 65(6)3 test have been established. First, it says that the records were prepared and used by staff in the Indigenous Policing Bureau, a unit that is part of the OPP. Second, it submits that the records were to be used for meetings, consultations, discussions or communications, stating that the nature of the records is "to discuss and convey policing options as part of the decision-making process."

[21] Regarding the third part, the ministry says that the records were created for either employment-related or labour-relations matters in which the ministry and the OPP have an interest. It says that employment related has been defined as, "human resources or staff relations issues arising from the relationship between an employer

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[5] Order PO-2157.
[6] *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (Div. Ct.) ("*Goodis*").
[7] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

and employees." It refers to Order PO-2658 that defined the term labour relations as "the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships."[8]

[22] The ministry says that the records deal with OPP staffing issues in Aboriginal communities[9], including salary costs, advice concerning where OPP members would work and be deployed from, recruitment, training, the kinds of staffing positions required as well as internal reporting relationships. The ministry says that each record at issue approaches these issues from different perspectives. Regarding the report, the ministry points to one appendix ("tab 7") that it says "deals solely with human resources considerations." Regarding the decision notes, the ministry submits that they contain concise summaries of labour and employment related issues.

[23] The ministry submits that it and the OPP have an employment and labour relations interest in the records. It says that OPP staffing in Aboriginal communities "requires special human resources considerations due to the geographic remoteness of many communities, the need to provide culturally appropriate policing," and that the records reflect these special considerations.

[24] The ministry refers to Orders PO-3101 and PO-3591 in support of its position that remuneration, accreditation, hiring of staff and the hiring process are labour relations matters in which the ministry has an interest.

[25] The appellants concede that the records meet the first part of the test, but not the second or third. The appellants submit that establishing the second part of the test – that the preparation was in relation to meetings, consultations, discussions or communications – requires that the meeting, consultation, discussion or communication involves a specific event such as collective bargaining, termination meetings, and negotiation strategy sessions. They submit that the ministry has not indicated for which specific events the records were prepared.

[26] Regarding the third part of the test, the appellants argue that the report is not about labour relations. They say that it is "about a policing model" and that it "could also be considered to be a policy or proposal." They say that even though staffing is discussed, this does not turn the report into a labour relations report. They submit that if this was the case, "almost every policy proposal would be exempt from [the *Act*] because all government endeavours involve staffing…."

[27] In reply, the ministry disputes the appellants' characterization of the report. It says that the report is "about the significant labour implications facing the OPP *if* a

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[8] The adjudicator in Order PO-2658 was referring to Order PO-2157, *Ontario (Minister of Health),* cited above.

[9] "Aboriginal communities" is a defined term in the *Act.*

Community Tripartite Agreement policing model had been adopted." It also submits that notwithstanding the appellants' argument that suggest staffing implications are a minor part of the report, the ministry disagrees and submits that the report "predominantly contains OPP-prepared labour relations analysis and discussion."

[28] The ministry also submits that to characterize the report the way the appellant has disregards the purpose of section 65(6), which it says, "is to exclude labour and employment related records from the application of the [*Act*], regardless of the purpose for which the records were created." It says that whether the report relates to a policing model is irrelevant. In support, the ministry refers to Order PO-3326-I where it says that the adjudicator held that the exclusion applied to many different types of records created for different purpose because they were all "related to matters in which the ministry has an interest and was acting as an employer, and terms and conditions of employment or human resources questions were at issue." It says, "Characterizing the record as a police model or otherwise should not be part of any determination."

Analysis and findings

[29] On the face of them, I find that the records were prepared and used by the ministry, satisfying the first part of the test.

[30] The second and third parts of the test require further consideration:

> 2. this collection, preparation, maintenance or use was in relation to meetings, consultations, discussions or communications; and
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> 3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[31] To assess whether the second and third parts of the test have been met, it is necessary to identify the matter in relation to which the records were prepared and used. That is, section 65(6)3 only applies if the records were prepared and used in relation to meetings, consultations, discussions or communications *about* labour relations or employment-related matters in which the ministry has an interest. This part of the analysis is necessary to respect the statutory intention of the exclusion and to ensure that the exclusion is not given broader reach than necessary to accomplish the goals of protecting information relating to an institution and its workforce.[10]

[32] Based on my review of them, the records were prepared to discuss and communicate to decision makers the ministry's obligations and possible options in

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[10] *Goodis,* cited above, and MO-3664, upheld on judicial review in *Brockville (City)* v. *Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (CanLII).

relation to provision of police services to First Nations communities in Ontario. As argued by the ministry itself, "to discuss and convey policing options as part of the decision-making process."

[33] It is accurate, as argued by the ministry, that the records contain components that deal with labour relations or employment related topics, including information about what the ministry has referred to as "human resources considerations." However, when viewed against the entirety of the records, I find that this information is incidental to a separate matter, the ministry's obligations and possible options in relation to the provision of police services to First Nations communities in Ontario.

[34] The ministry refers to Order PO-3326-I to support its position that records created for many different purposes may be excluded by section 65(6)3. In my view, Order PO- 3326-I does not assist the ministry because the adjudicator also found that several of the records were not excluded because they were only tangentially related to labour relations or employment issues.

[35] The application of the exclusions in the *Act* is based on a review of the record at issue. It is also carried out on a record-by-record basis[11], which emphasizes that the focus of the analysis is whether the record as a whole is in relation to meetings or discussions about labour relations or employment issues. That a record contains information that deals with labour relations or employment topics is not sufficient to attract the exclusion in section 65(6) without other evidence that the record as a whole was created or used for, in this case, a labour relations or employment related matter.[12]

[36] As the adjudicator in Order MO-2660 observed when finding that an organizational review did not qualify for the exemption, "[a]ll institutions operate through their employees. Employees are the means by which all institutions provide services to the public."[13] The issue is not whether the records include information pertaining to employees but whether the records were created to address matters in which the institution is acting as an employer, and the terms and conditions of employment or human resources questions are at issue.[14]

[37] In my view, the records at issue were prepared to assist and advise ministry decision makers regarding the matter of provision of police services to First Nations communities, which is not a labour relations or employment purpose. Although some of the records may touch on employment matters, I am of the view that none of the records at issue, when viewed in its entirety, was created or used for a labour relations

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[11] Orders PO-3642 and MO-3927.
[12] *Goodis,* cited above, Order MO-2660.
[13] Order MO-2660.
[14] See also Orders M-941 and P-1369 where the adjudicators discusses the "primary purpose of" or the purpose of the records.

or employment purpose. Accordingly, I find that section 65(6)3 does not apply to exclude the records from the scope of the *Act.*

Issue B: Does the discretionary exemption for advice and recommendations at section 13(1) of the *Act* apply to the records?

[38] The ministry's alternative argument is that section 13(1) applies to all of the records. 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.

[39] 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.[15]

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

[41] "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. [16] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

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

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[17]

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[15] *John Doe v. Ontario (Finance)*, 2014 SCC 36 ("*John Doe*"), at para. 43.
[16] See above at paras. 26 and 47.
[17] 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,

[43] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[18]

[44] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).[19]

[45] Examples of the types of information that have been found *not* to qualify as advice or recommendations include: factual or background information,[20] and information prepared for public dissemination.[21]

[46] Section 13(2) is a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13. Relevant parts of section 13(2) state:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;
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> …
>
> (g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;
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> …
>
> (i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;

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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.

[18] *John Doe*, cited above, at para. 51.

[19] *John Doe*, cited above, at paras. 50-51.

[20] Order PO-3315.

[21] Order PO-2677.

> (j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to Executive Council or its committees;

[47] The exceptions in section 13(2) can be divided into two categories: objective information, and specific types of records that could contain advice or recommendations.[22] The first four paragraphs in section 13(2), paragraphs (a) to (d), are examples of objective information. They do not contain a public servant's opinion pertaining to a decision that is to be made but rather provide information on matters that are largely factual in nature.

[48] The remaining exceptions in section 13(2), paragraphs (e) to (l), will not always contain advice or recommendations but when they do, section 13(2) ensures that they are not protected from disclosure by section 13(1).

[49] The word "report" appears in several parts of section 13(2). This office has defined "report" as a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact.[23]

[50] Factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.[24] Where the factual information is inextricably intertwined with the advice or recommendations, section 13(2)(a) may not apply.[25]

General representations

[51] The ministry submits that the records consist mainly of advice with some recommendations. It elaborates that the records were prepared by staff in the Indigenous Policing Bureau, a specialist unit within the OPP, to advise senior decision makers in the OPP. Further, it states that the advice and recommendations contained in the records is around the OPP "transitioning to a community tripartite agreement policing model."

[52] The ministry points to the records themselves in support of its position. It notes that the report is described as "exploring 'options'" and that therefore it is inherently

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[22] *John Doe*, cited above, at para. 30.
[23] Order PO-2681; Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).
[24] Order 24.
[25] Order PO-2097.

about providing advice within the meaning of the *Act.* Regarding the decision notes, the ministry submits that they were written so that the ministry could reach a decision based on those notes. It points to the latter pages of the notes that contain space where ministry and OPP officials could indicate their selected option and agreement with that choice.

[53] The ministry disputes that any of the exceptions to section 13(1) apply and provides representations on sections 13(2) (a) (g) (i) and (j). Regarding section 13(2)(a) (factual information), the ministry submits that because the records are about transitioning to a new model of policing, they are "hypothesizing" about something in the future and are therefore not factual. Regarding section 13(2)(j) (report of a committee or task force), the ministry says that the Indigenous Policing Bureau is not a committee, task force or similar body. I will discuss the ministry's position about the remaining section 13(2) exceptions below.

[54] The appellants' main argument is that the exceptions to the section 13(1) exemption in sections 13(2)(g) and (i) apply to the report, which is just one of the records at issue. I will discuss the appellant's section 13(2) arguments below. The appellants do not dispute that the records contain advice and recommendations, but they argue that they also contain factual information that is not eligible for exemption and which should be severed and disclosed.

Analysis and findings

The report contains advice and recommendations

[55] Based on my review of the report, it contains both advice and recommendations regarding options for service delivery models to be implemented if First Nations communities under the OFNPA transitioned from OPP-administered to the Community Tripartite Agreement policing model. While there are some parts of the report that contain factual information, it is my view that these parts are sufficiently interwoven with the advice that it is not reasonably possible to sever the factual information from the report.

[56] Although the report contains advice and recommendations, I have also concluded that the ministry may not rely on section 13(1) because of the exception in section 13(2)(g) for feasibility studies.

The section 13(2)(g) exception for feasibility studies applies to the report

[57] The appellants state that the report qualifies as a feasibility or technical study regarding a government policy or project within the meaning of section 13(2)(g). They submit that the policy or project is the potential transition from OPP-administered policing services to the Community Tripartite Agreement model. They submit that the report assesses the potential transition and qualifies as a feasibility study. They submit that it qualifies as a technical study because it assesses the potential transition based

on specialized knowledge. Finally, they submit that it qualifies as a cost estimate because it estimates various costs for the proposal.

[58] The ministry disputes that the report qualifies as a feasibility or technical study relating to a government policy or project under section 13(2)(g). It submits that the subject matter contained in the report is "still in the process of being developed" and therefore at a proposal stage, meaning that it is not a feasibility study which it says, is about implementing a final policy.

[59] The appellants disagree with the ministry's definition of "feasibility study" and points to the Merriam-Webster dictionary definition of a feasibility study, which is "a study to show if something can be done." It says that there is nothing in the definition of feasibility study that requires finality.

[60] In reply, the ministry says that the report does not relate to a "government policy or project" which is a requirement of the exception. It submits that the report was not part of any OPP or broader government policy or project and that the intention of the report is to "explore options" if First Nations communities under the OFNPA had transitioned to the Community Tripartite Agreement model. The ministry says that this model was not approved and it never happened and that therefore the transition did not become a part of government policy or a project. (At another point in its representations, the ministry also says that it has always been possible for First Nations to inquire and possibly transition to the Community Tripartite Agreement model under the OFNPA.)

[61] The ministry submits that I should adopt the definition of "feasibility study" established by the adjudicators in Orders P-726 and PO-3111: "the practicability of a proposed project." It states that the report is not about a proposed project because none has been proposed and rather, the report is exploring what would happen if a transition were to occur. It distinguishes the outcome in Order P-726, which it says was to recommend an organizational model for the provincial parks system.

[62] For the following reasons, I find that the report is a feasibility study and that section 13(2)(g) applies.

[63] IPC adjudicators have previously considered the term "feasibility study." In Order M-892, the adjudicator stated:

> The *Concise Oxford Dictionary* (8th edition) (the dictionary) defines the term "feasibility study" as a study of the practicability of a proposed project. The dictionary defines the term "study", in part, as: "the devotion of time and attention to acquiring information or knowledge, esp. from books; the pursuit of academic knowledge; make a study of; investigate or examine (a subject)".

[64] In Order M-892 (decided in relation to the equivalent to section 13(2)(g) in the

Municipal Freedom of Information and Protection of Privacy Act), the adjudicator found that the records at issue, relating to a technical evaluation of the tenders submitted to a town for the purposes of determining which tender best meets the requirements of the project, did not qualify for the exception because the type of activity did not contain the same depth, nor was it performed for the same purpose as that contemplated by exception.

[65] In Order 206, the adjudicator stated as follows about the meaning of "feasibility study":

> The term 'feasible' is defined by The Concise Oxford Dictionary, 7th ed., as: 'practicable, possible, manageable, convenient, serviceable, or plausible.". In Black's Law Dictionary, 5th ed., 'feasible' is defined as: "capable of being done executive, affected or accomplished. Reasonable assurance of success."

[66] Noting that the main purpose of the record at issue was to advise the institution on whether various proposals regarding the sale of Crown land for cottaging are feasible having regard to a variety of factors, the adjudicator in Order 206 concluded that the record at issue was a feasibility study.

[67] In Order P-726, the adjudicator stated,

> [The record at issue] examines the various organizational design models which may be applied to the parks system and recommends the model which the authors find to be the most appropriate based on established assessment criteria. I must now determine whether this document constitutes a "feasibility study relating to a government policy or project" for the purposes of section 13(2) (g) of the *Act*.
>
> The Concise Oxford Dictionary (8th edition) defines the term "feasibility study" as a study of the practicability of a proposed project. As indicated previously, the report under consideration recommends that a particular model for the organization of the provincial parks system be selected and goes on to assess the characteristics of this proposal.

[68] Using this definition, the adjudicator in Order P-726 concluded that the record at issue was a feasibility study, as follows:

> I have carefully reviewed this report and find that it may reasonably be described as a feasibility study relating to a government policy or project. That project is the selection of an organizational design to maximize the utility of the provincial parks system. While it is true that portions of the report provide stakeholder comments on the delivery of park services and evaluate the merits of competing models, the fundamental object of the study is to consider the feasibility of the design which the consulting firm

> has recommended. On this basis, I find that the section 13(2) (g) exception applies to those parts of the records which had previously qualified for exemption under section 13(1).

[69] Taking into account the plain and ordinary meaning of "feasibility study", its context within section 13(2) and with the benefit of the various dictionary definitions cited above, including those referred to by the parties, I find that a feasibility study referred to in section 13(2)(g) is a document that reflects a study, examination or investigation of the practicality or plausibility of a proposed project relating to a government policy or project.

[70] I am not persuaded by the ministry's arguments that section 13(2)(g) may only apply when a project being studied is one for which a final decision has been made. Such an interpretation would undercut the very notion of a feasibility study – one that examines the practicality or plausibility of a proposed project. It is inherent in the meaning of feasibility study that no final decision has been made on the project at issue. Some projects will undoubtedly not proceed further after a feasibility study that concludes it is implausible or impractical.

[71] In my view, the report at issue in this appeal is a feasibility study and qualifies for the section 13(2)(g) exception. That is, it is "a feasibility study …, including a cost estimate, relating to a government policy or project." In my view, the report is a study or examination of the plausibility of transitioning from one model for policing in Indigenous communities to another. The appropriate model for policing in Indigenous communities is a matter of government policy. In addition, the report is more than a bundle of related records but rather is a structured type of document consistent with the types of documents described in section 13(2).[26]

[72] I considered the ministry's argument that because the government had not and did not decide to transition or change the policing model for Indigenous communities, it was not a "proposed project." The phrase "proposed project" that the ministry relies upon to advance this argument is drawn from the dictionary definition used in Order P-726, not section 13(2)(g). There is nothing in the wording of section 13(2)(g) that requires or suggests that the object of the study must be final. To the contrary, use of the term feasibility study suggests that the object of the study is something under consideration.

[73] For all of these reasons, I find that the section 13(2)(g) applies to the report and the ministry is therefore not entitled to rely on section 13(1) to withhold it. As a result of this finding, I need not address whether the exception in section 13(2)(i) applies to the report. I will consider the ministry's alternative argument that section 15.1(a)

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[26] See Order PO-3111 at para 158.

applies to the report at Issue C, below.

[74] I will now consider the ministry's arguments in relation to the decision notes.

The decision notes contain advice and recommendations

[75] Based on my review, I find that the decision notes contain advice and recommendations within the meaning of section 13(1) of the *Act.* There are some small portions of the decision notes that contain factual information; however, I find that these portions are so interwoven with the advice and recommendations that they are not capable of being severed for disclosure.

[76] I find, therefore, that the decision notes are exempt under section 13(1). In light of my finding, I do not need to consider whether the exemptions at sections 19 and/or 15.1 also apply to the decision notes.[27] I will accordingly consider the ministry's exercise of discretion at Issue D, below, and whether the public interest override applies at Issue E, below.

Issue C: Does the discretionary exemption for relations with Aboriginal communities at section 15.1(a) of the *Act* apply to the report?

[77] The ministry claims that section 15.1 applies to all of the records. I have already concluded that section 13(1) applies to the decision notes but not the report, so I need only to consider whether section 15.1 applies to the report.

[78] Section 15.1 states that:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (a) prejudice the conduct of relations between an Aboriginal community and the Government of Ontario or an institution; or
> >
> > (b) …
>
> (2) In this section, "Aboriginal community" means,
>
> > (a) a band within the meaning of the *Indian Act* (Canada),
> >
> > (b) an Aboriginal organization or community that is negotiating or has negotiated with the Government of
> >
> > > Canada or the Government of Ontario on matters relating to,

[27] The ministry claimed that section 19 applied to part of one decision note.

> (i) Aboriginal or treaty rights under section 35 of the *Constitution Act, 1982*, or
>
> (ii) a treaty, land claim or self-government agreement, and
>
> (c) any other Aboriginal organization or community prescribed by the regulations.

[79] Under the discretionary exemption in section 15.1, records created in the course of working relations between an Aboriginal community and the provincial government or its institutions will be offered protection from disclosure if certain conditions are met.[28]

[80] For section 15.1 to apply, there must be detailed evidence about the potential for harm. The risk of harm must be well beyond the merely possible or speculative although it need not be proven 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.[29] The failure to provide detailed evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances.

Representations

[81] The ministry relies on section 15.1(a). It submits that the records were created by the Indigenous Policing Bureau of the OPP to provide advice and recommendations to OPP officials as to how much and what kinds of policing services would be required in various Aboriginal communities, based on a particular model of policing under consideration, although not implemented. The ministry states that the Indigenous Policing Bureau is a centre of expertise and that it serves as an "interface between the OPP and Aboriginal communities."

[82] The ministry says that disclosure of the records could interfere with existing and ongoing negotiations taking place with respect to provision of policing services by the OPP in Aboriginal communities. It says that because the role of the Indigenous Policing Bureau is to provide advice and recommendations on Aboriginal matters, disclosure would curtail those activities and staff would not able to "communicate freely and frankly if they knew that communications they prepared were subject to disclosure in the manner contemplated by this appeal."

[83] The appellants dispute that section 15.1(a) applies, denying that disclosure

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[28] Interim Order PO-3817-I.

[29] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

would prejudice the conduct of relations as alleged by the ministry. They say that the opposite is true and that disclosure would benefit relations between First Nations and the government specifically and "from the appearance of openness and transparency engendered by the sharing of this information." They submit that this office is part of the government of Ontario and that an order by this office to disclose the records would "bolster faith in the Government by the First Nations."

[84] The appellants submit that the ministry's evidence in support of the exemption does not meet the necessary standard of "detailed and convincing evidence of potential harm."

[85] The appellants submit further that the ministry has misinterpreted section 15.1 as a protection to benefit the government of Ontario's interests "at the expense of the interests of Aboriginal communities." They point to the language of section 15.1 ("prejudice the conduct of relations") and argue that the focus is on relations between Ontario and Indigenous communities, not on protecting the government's rights over Indigenous communities'.

[86] In reply, the ministry disputes that it has misinterpreted section 15.1 and submits that its position is based on the section as written and prior orders of this office as set out in the notices of inquiry in this appeal.

Finding and Analysis

[87] Section 15.1 protects interests similar to those protected by section 15, a discretionary exemption that permits withholding when disclosure could reasonably be expected to harm intergovernmental relations. Several orders of this office have applied the exemption in circumstances where there is sufficient information about the relationship at stake and the harms that could be caused from disclosure.[30]

[88] I find that section 15.1 does not apply to the report. Simply stated, the ministry has failed to provide "detailed evidence of potential harm" to *the relationship* that could reasonably be expected to arise if the records are disclosed. The harms described by the ministry are, as noted by the appellant, harms that may be suffered by the ministry without regard to whether those harms impact the relationship between the government and a particular Aboriginal community.

[89] More problematically, the ministry has not stated or described the particular relationship that could reasonably be expected to be harmed if the records are disclosed. For instance, the ministry has not identified which particular Aboriginal community or communities that it has a relationship with that it has reason to believe

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[30] For example, see Orders PO-1891-I, PO-2247 and P-270.

would be affected by the disclosure.

[90] I have also reviewed the report to determine whether there is anything apparent within it to establish that disclosure could reasonably be expected to prejudice the conduct of relations between a particular Aboriginal community and the government. I am unable to make such a conclusion. I find, therefore, that the ministry has not established the application of the section 15.1 exemption to the report. Since I have also found that section 13(1) does not apply to it, I will order the ministry to disclose it.

Issue D: Did the ministry exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?

[91] I have found that the section 13(1) exemption applies to the two decision notes. The section 13(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. The IPC's jurisdiction to review an institution's exercise of discretion emphasizes that even if a record is eligible for a discretionary exemption, the institution nevertheless has discretion to disclose the record at issue. Review of the institution's discretion is separate from the IPC's jurisdiction to review whether records at issue are eligible for an exemption.

[92] An institution must exercise its discretion. This means that an institution must ask itself two questions. First, does a discretionary exemption apply? And, second, should the record nevertheless be disclosed?

[93] Also, an institution must not err when exercising its discretion. An institution may be found to have erred where, for example,

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

[94] If an institution fails to exercise its discretion or it does so improperly, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[31] This office may not, however, substitute its own discretion for that of the institution.[32]

[95] Relevant to the present appeal, this office has found that following

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[31] Order MO-1573.
[32] Section 54(2).

considerations are relevant:[33]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - exemptions from the right of access should be limited and specific
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person.

Representations

[96] The ministry submits that it exercised its discretion correctly. It explains that it has exercised its discretion in consideration of the strong public policy interest in protecting internal advice or communications between public servants and senior officials and that disclosure of the records would significantly harm the activities of the Indigenous Policing Bureau.

[97] The appellants make no specific representations about the ministry's exercise of discretion. However, when viewed in their totality, the appellants' representations suggest that in making its access decision the ministry ought to have taken into account the special nature of the relationship between First Nations and the government[34] and the need to provide secure adequate, effective and equitable policing in First Nations communities.[35]

[98] When the ministry's representations are viewed in their totality, it is clear that the ministry did take these latter considerations into account, although the ministry and

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[33] Not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant: Orders P-344 and MO-1573.
[34] This is apparent in the appellants' representations regarding section 15.1.
[35] This is apparent in the appellants' representations regarding section 23.

the appellants have a difference of opinion about the impact that disclosure would have on the ministry's relationship with First Nations. Regarding the need to provide secure, adequate, effective and equitable policing in First Nations communities, the ministry submits that the OPP shares this as a goal but that disclosure of the records would not advance this goal.

Analysis and finding

[99] I have to determine whether the ministry properly exercised its discretion when it decided to withhold the decision notes based on section 13(1).[36] As noted above, this review is distinct from the analysis about whether the records are eligible for the exemption.

[100] After careful review, I am satisfied that the ministry was aware of the considerations advanced by the appellants but that it placed more weight on the protections afforded by section 13(1) of the *Act,* which are also relevant considerations.

[101] In my view, the ministry properly exercised its discretion and I uphold it. I will now consider the appellants' argument that there is a compelling public interest in disclosure of the decision notes that outweighs the purpose of the section 13(1) exemption.

Issue E: Is there a compelling public interest in disclosure of the decision notes that clearly outweighs the purpose of the section 13(1) exemption?

[102] The final issue that requires consideration is whether, as argued by the appellants, there is a compelling public interest under section 23 of the *Act* sufficient to outweigh the purpose of the section 13(1) exemption in relation to the decision notes. The ministry disputes that section 23 applies.

[103] Section 23 states:

> An exemption from disclosure of a record under sections **13**, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

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

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[36] As I have found that section 13(1) does not apply to the report, it will be disclosed and it is therefore not necessary to consider the ministry's exercise of discretion regarding the report.

[105] The *Act* does not state who bears the burden to prove that section 23 applies. This office has established that the appellant does not fully bear the burden because they do not have the benefit of reviewing the records at issue. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[37]

[106] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[38] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[39]

[107] A public interest does not exist where the interests being advanced are essentially private in nature.[40] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[41]

[108] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[42]

[109] Any public interest in *non*-disclosure that may exist also must be considered.[43] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling."[44]

[110] A compelling public interest has been found *not* to exist where, for example a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[45] or where the records do not respond to the applicable public interest raised by appellant.[46]

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

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[37] Order P-244.
[38] Orders P-984 and PO-2607.
[39] Orders P-984 and PO-2556.
[40] Orders P-12, P-347 and P-1439.
[41] Order MO-1564.
[42] Order P-984.
[43] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[44] Orders PO-2072-F, PO-2098-R and PO-3197.
[45] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[46] Orders MO-1994 and PO-2607.

[112] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[47]

Representations

Compelling public interest

[113] The appellants submit that there is a compelling public interest in disclosing all of the records. They argue that disclosure would advance the interests of ensuring equitable policing for residents of Ontario First Nations.

[114] They refer to the *Report of the Ipperwash Inquiry,*[48] which stated, "There is no reason why residents of First Nations in Ontario should have lower-quality policing than non-Aboriginal Ontarians do." Building on this principle, the appellants describe tragic deaths of individuals who died while in police custody in First Nations communities without adequate detention facilities and circumstances that illustrate the importance of providing equitable policing for residents of Ontario First Nations.

[115] The appellants also point to the 2007 findings of the *Ipperwash Inquiry* and the 2014 findings of the Auditor General of Canada regarding First Nations Policing Programs in Canada,[49] both of which concluded that policing services in First Nations is inequitable in relation to policing services outside of First Nations communities. They submit that there are several other reports that establish this inequitable treatment and conclude that it must be changed.

[116] The appellants say that disclosure of the records will assist them to encourage equitable policing in First Nations communities. They say that because the Community Tripartite model, which is examined in the records, is a possible alternative model, they would be better able to consider this option with the benefit of the records. The appellants say that the records would also assist them to achieve equitable policing by providing them with information about the resources required to ensure adequate and effective policing in their communities.

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[47] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.

[48] "The Ipperwash Inquiry was established by the Government of Ontario on November 12, 2003, under the *Public Inquiries Act*. Its mandate was to inquire and report on events surrounding the death of Dudley George, who was shot in 1995 during a protest by First Nations representatives at Ipperwash Provincial Park and later died. The Inquiry was also asked to make recommendations that would avoid violence in similar circumstances in the future. (Source: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/index.html)

[49] Chapter 5 of 2014 Spring Report of the Auditor General of Canada: https://www.oag-bvg.gc.ca/internet/English/att_e_39363.html

[117] They say that "disclosing materials that will assist First Nations in their efforts to secure adequate, effective, and equitable policing, which in turn could save lives, solve crimes, and secure safety and justice for communities greatly in need of those fundamental benefits" is a compelling public interest that favours disclosure. The appellants say that the public interest at stake outweighs any interests protected by the exemptions claimed.

[118] The appellants provided additional representations about how disclosure could advance the goal of equitable policing.

[119] First, they submit that the records would assist them to advocate for an increased number of officers in their communities. They explain that they have learned from the OPP that the Community Tripartite Agreement model would require additional officers but that the OPP has refused to provide further detailed information. They say that they therefore require the records to ascertain information such as specific estimates of staffing requirements and the methodology used to develop these estimates. The appellants state that the records would be shared with provincial and federal government officials to assist with negotiations about appropriate staffing levels.

[120] Second, they submit that the records would assist them to advocate for improved policing infrastructure, which they say would help them to substantiate their allegation that their communities have been provided with substandard infrastructure.

[121] Lastly, they submit that there are likely other aspects of the records that would assist them to advocate for increased resources to assist with achieving adequate and equitable policing.

[122] The ministry says that the appellants have not established a compelling public interest in disclosure. It states that the OPP shares the goal of the appellants (i.e. assisting First Nations in their efforts to secure adequate, effective and equitable policing…") and takes its role toward this end seriously. However, the ministry states that it does not understand how disclosure of the records could advance the appellants' goal.

[123] Regarding the appellants' argument that the records may be shared with political staff and government officials, the ministry submits that the appellants are attempting to gain a strategic advantage in their negotiations with the government. Furthermore, the ministry says that First Nations communities may seek information about policing and policing resources from the ministry.

[124] The ministry submits that one of the tragic deaths referred to by the appellants did not occur in a First Nations community for which the OPP provides policing services. It submits that while the incident was undeniably troubling, it is not relevant to the records at issue. In response to this point, the appellants argue that this death is relevant because the underlying circumstances are similar to the situations in some of the First Nations communities and so are the risks.

[125] Regarding the appellants' claim that they require the records to obtain information about the Community Tripartite Agreement model, the ministry submits that First Nations may inquire with the ministry about transitioning to this model.

Public interest outweighs purpose of exemption claimed[50]

[126] The ministry submits that any interest in disclosure is outweighed by the interests protected by section 13(1). That is, it argues that the purpose of section 13(1) is to preserve an effective public service by enabling public servants to freely and frankly advise and make recommendations within the deliberative process.

[127] The appellants dispute that the interests protected by section 13(1) outweigh the public interest. They dispute[51] the ministry's argument that staff will not be able to communicate freely and frankly if the records are disclosed. They argue that the ministry's argument is "stating nothing more than the fact that government officials do not want to release the documents." They argue that any section 13(1)-based concerns are not compelling enough to support withholding the records.

Analysis and finding

[128] In my view, there is not a sufficiently compelling public interest in disclosing the decision notes that outweighs the interests protected by section 13(1). In reaching this conclusion, I have taken into account that the report will be disclosed as a result of my determinations above.[52]

[129] For section 23 to apply, I must be satisfied that there is a compelling public interest in disclosure that outweighs the protections provided by section 13(1).

[130] Disclosure of the report in accordance with this order will shed considerable light on the approaches considered by the government to transition First Nations policing models in Ontario. To the extent that this information assists with encouraging equitable policing, there is a strong and arguably compelling public interest in its disclosure.

[131] Against that backdrop, the issue is whether there is a compelling public interest in the additional disclosure of the decision notes that is not outweighed by the protections provided by section 13(1) of the *Act.* While disclosure of the decision notes may shed additional light on options for First Nations policing models in Ontario, because of the information that will already be disclosed in the report, I am not able to

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[50] Both parties made arguments regarding sections 15.1 and 19, which are not necessary to describe because of my findings that section 13(1) applies to the decision notes.
[51] In their September 5, 2019 representations.
[52] See Orders PO-1885 and MO-2927.

conclude that there is a sufficiently compelling public interest in their disclosure. Whatever interest there may be, it is insufficient to outweigh the protections provided by section 13(1), the preservation of an effective and neutral public service.

[132] In conclusion, find that the public interest override in section 23 does not apply and I uphold the ministry's decision to withhold the decision notes on the basis of the advice and recommendations exemption in section 13(1).

ORDER:

1. I uphold the ministry's decision to deny access to the decision notes on the basis of section 13(1).

2. I order the ministry to disclose the report to the appellants by **January 21, 2021**.

3. In order to verify compliance with order provision 2, I require the ministry to provide the IPC with a copy of the access decision and the records sent to the appellant.

4. The timelines in this order may be extended if the ministry is unable to comply in light of the current COVID-19 Pandemic. I remain seized of the appeal to address any timeline-related issues if the parties are unable to resolve them.

Original Signed by: December 17, 2020

Valerie Jepson
Adjudicator