Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4259

Appeal PA19-00414

Ministry of Education

May 4, 2022

Summary: The Ministry of Education (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the submissions of nine specified stakeholders made during the 2018 public consultation about public education. The ministry withheld the records in full, under the introductory wording of the mandatory exemption at section 12(1) of the *Act* (Cabinet records). The appellant appealed the ministry's access decision. On appeal, the ministry also relied on the mandatory exemption at section 21(1) (personal privacy) of the *Act* for portions of three of the responsive records.

In this order, the adjudicator upholds the ministry's decision, in part. She finds that the ministry did not establish that the records are exempt under section 12(1) of the *Act*, but she upholds the ministry's decision to withhold certain personal information found in three records, under section 21(1) of the *Act*. The adjudicator finds that the public interest override at section 23 of the *Act* does not apply to this personal information. As a result, she orders the ministry to fully disclose six of the records, and the non-exempt portions of three of the records, to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 10(2), 12(1), 21(1), and 23.

Cases Considered: Orders 131, P-72, P-266, PO-1725, PO-2707, PO-3720, PO-3973, and PO-4221

OVERVIEW:

[1] A request was submitted to the Ministry of Education (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> With respect to the Ministry of Education's 2018 public consultations on education, [the requester] is seeking copies of the submissions made by [nine specified organizations].
>
> For greater clarity, these submissions were amon[g] those referenced in the response to [a specific access request].

[2] The ministry issued a decision denying access to the responsive records pursuant to section 12(1) (Cabinet records) of the *Act*.

[3] The requester (now appellant) appealed the ministry's decision to the Office of the Information and Privacy Commissioner of Ontario (IPC).

[4] The IPC appointed a mediator to explore resolution. During mediation, the mediator communicated with the appellant's representative and the ministry in order to discuss the issues in the appeal. The appellant confirmed an interest in pursuing access to the withheld records. The appellant also questioned the adequacy of the ministry's decision. The appellant stated that the ministry should have specified the subsections of section 12(1) that it is relying upon to withhold the responsive records and the ministry should have provided reasons for why section 12(1) applies to the records. The ministry indicated it would not change its decision with respect to the withheld records. In response to the appellant's concerns regarding the adequacy of the decision, the ministry explained the meaning of the word "including" in the opening wording of subsection 12(1). It did not address the appellant's concern regarding the provision of reasons for why section 12(1) applies to the records.

[5] After further discussions, the appellant's representative advised the mediator that he would like to pursue the appeal at adjudication. Accordingly, the appeal moved to adjudication, where an adjudicator may conduct an inquiry.

[6] As the adjudicator of this appeal, I began a written inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the ministry. I sought and received written representations from the ministry in response, some of which were not shared with the appellant for confidentiality reasons.[1] In the ministry's representations, it raised the application of the mandatory exemption at section 21(1) (personal privacy) to portions of three records. The appellant then provided representations in response to the Notice of Inquiry and the non-confidential portions of the ministry's representations. In doing so, the appellant indicated that it was no longer pursuing the ground of appeal under section 29(1)(b) of the *Act* with respect to the

[1] In accordance with the IPC's *Code of Procedure* for the sharing of representations.

adequacy of the ministry's decision, and does not seek the remedy of a new decision letter from the ministry. As a result, that issue was removed from the scope of the appeal.

[7] The parties exchanged further representations.

[8] I decided to provide an opportunity for the nine organizations (affected parties) whose submissions were at issue to comment on disclosure. Three affected parties replied: one consented to disclosure of their submission, one indicated they had already publicly posted their submission online, and one objected to disclosure. I then shared the substance of those replies with the ministry, and asked the ministry for representations on the effect, if any, of these replies on the ministry's position. The ministry provided representations in response, maintaining its position.

[9] For the reasons that follow, I uphold the ministry's decision, in part. I find that the ministry has not established that the records are exempt under section 12(1). Since the author of one of the records partially withheld under section 21(1) consented to the disclosure of the record relating to him or his organization, the personal privacy exemption at section 21(1) does not apply to his *personal information* in that record. However, I find that the ministry has established that the remaining *personal information* in that record and two other records is exempt under section 21(1), and I find that the public interest override at section 23 does not apply to that *personal information*.

RECORDS:

[10] The records remaining at issue are nine submissions, withheld in full under section 12(1).

[11] I will refer to the records that have been partially withheld under the mandatory personal privacy exemption at section 21(1) as records 1, 3, and 9.

ISSUES:

A. Does the mandatory exemption at section 12(1) apply to the records?

B. Do records 1, 3, and 9 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

C. Does the mandatory personal privacy exemption at section 21(1) apply to the personal information at issue?

D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21(1) exemption?

DISCUSSION:

Issue A: Does the mandatory exemption at section 12(1) apply to the records?

[12] In this appeal, the ministry acknowledges that it has claimed section 12(1) over records that were not put before Cabinet or its committees. As I explain below, such records can nonetheless be exempt under section 12(1) if their disclosure would reveal, or permit the drawing of accurate inferences about, the substance of Cabinet's deliberations. For the reasons that follow, I find that the ministry has not established that disclosure of the nine stakeholder submissions at issue would reveal the *substance of deliberations* of Cabinet or one of its committees, and as a result, I will order the ministry to disclose the records to the appellant.

Background information

[13] The ministry and the appellant provided background information, some of which is useful to understand the context of the records at issue in this appeal.

[14] In the fall of 2018, the ministry conducted a large-scale public consultation process about: "STEM" (science, technology, engineering, and math) in the curriculum; job skills (including skilled trades) and life skills (including Financial Literacy) in the curriculum; standardized testing through the Education Quality and Accountability Office; the use of cellphones in schools; the Health and Physical Education curriculum; a new Parents' Bill of Rights; and an open category of "other."

[15] The consultation process included three ways that the public could provide input about these subjects:

- an online survey,
- telephone town halls held across Ontario, and
- an open submission platform to provide more detailed input to the ministry.

[16] According to the ministry, there were over 72,000 engagements with the consultation by the public by the time the consultation closed on December 15, 2018.[2]

[17] The records at issue are the submissions of nine stakeholders, out of a list about 140 organizations that had provided the ministry with written comments during the consultation process. The appellant had obtained this list from the ministry through another request that it made under the *Act*.

[18] The appellant states that two of the nine organizations in question publicly

[2] The ministry published aggregated information and aggregated responses to the online consultation questions and the telephone town halls on its website. The ministry provided an online link to this public reporting, which can be accessed here: http://www.edu.gov.on.ca/eng/parents/consultations.html.

released parts of their written submissions.[3]

[19] The ministry denied access to the nine written submissions, in full, relying on the introductory wording of the mandatory exemption at section 12(1) of the *Act* to do so.

Section 12(1)

[20] The ministry has the burden of proving that the records at issue fall within the exemption at section 12(1).[4] The ministry did not specify any of the paragraphs under section 12(1) in its decision letter or its representations, relying instead on the opening words of section 12(1). That introductory wording of section 12(1) is:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

[21] Section 12(1) is a mandatory exemption ("[a] head shall refuse"). This means that an institution must withhold access to a record (or part of a record) to which section 12(1) applies.[5]

[22] The rationale for the section 12(1) exemption is maintaining Cabinet confidentiality. This rationale was identified in the Williams Commission Report entitled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy*, which formed the basis for the development of the *Act*:

> If Cabinet discussions were to become a matter of public record, individual ministers would be inhibited from expressing their frank opinions for fear of later being identified as dissidents. Moreover, if government policy were presented as a series of opposing views, the ability of members of the public and of the legislature to hold ministers responsible for government policy would be diminished.[6]

[23] I note the ministry's reliance (in its reply representations) on the balancing approach involved in section 12(1), and set out in Order PO-3973:[7] "This case is about

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[3] The appellant also provided a list of some of the other organizations that publicly released their written submissions to the ministry.

[4] Under section 53 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.

[5] This is different from the situation with discretionary exemptions, where an institution may choose to disclose information even if that information is exempt.

[6] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980,* vol 2 (Toronto: Queen's Printer, 1980) at 85.

[7] The Ontario government is currently seeking leave to appeal the decision of the Court of Appeal (which dismissed an appeal from the Divisional Court, which had upheld the IPC's decision) to the Supreme Court of Canada. However, I have included the ministry's submission in relation to this order because it seeks to

striking a balance…between a citizen's right to know *what government is doing* and government's right to consider *what it might do* behind closed doors" [emphasis in Order PO-3973].[8]

[24] The use of the term "including" in the introductory wording of section 12(1) means that any record which would reveal the *substance of deliberations* of an Executive Council (Cabinet) or its committees [not just the types of records listed in the various subparagraphs of section 12(1)], qualifies for exemption under section 12(1).[9]

[25] Order 131 and later IPC orders have used the following definitions[10] of the terms "substance" and "deliberations," which I agree with, and adopt in this appeal:

- The term *substance* is defined as "essence; the material or essential part of a thing, as distinguished from form," or "essential nature; essence or most important part of anything."

- The term *deliberation* is defined as "the act or process of deliberating, the act of weighing and examining the reasons for and against a contemplated act or course of conduct or a choice of acts or means."

[26] In addition, as the appellant notes, the IPC has held that the term *substance* "generally means more just the subject of the meeting."[11] Therefore, a record containing information about the *subject* of deliberations may not reveal the *substance* of deliberations.

[27] In the ministry's reply representations, it relies on the IPC's analysis in Order PO-3973[12] regarding the meaning of the term *deliberations*:

> I would not limit the substance of deliberations…to records which permit accurate inferences to be drawn regarding discussion of the pros and cons of a course of action. In my view, the words of the exemption may extend more generally to include Cabinet members' views, opinions, thoughts, ideas and concerns expressed within the course of Cabinet's deliberative process.

[28] The term "Executive Council" means Cabinet. Cabinet is composed of ministers, when they meet together as a group; the deliberations of an individual minister (with the exception of the Premier) do not constitute the deliberations of Cabinet.[13]

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rely on this part of the analysis in it, notwithstanding the application for leave to the Supreme Court of Canada.

[8] The IPC was quoting with approval from a Nova Scotia case involving a substantially similar exemption, *O'Connor v. Nova Scotia, 2001 NSCA 132*.

[9] Orders P-22, P-1570 and PO-2320.

[10] Found in Black's Law Dictionary (5th edition) and the Oxford Dictionary.

[11] See, for example, Orders M-703, MO-1344, and PO-3720.

[12] See Note 7.

[13] Order 131.

[29] The reference to "committees" in the introductory wording of section 12(1) is a reference to Cabinet committees ("the Executive Council or its committees"). These committees are composed of a subset of ministers.

[30] In Order PO-1725, the IPC discussed the special role of the Premier of Ontario in connection with setting the agenda of Cabinet and its deliberations, the indivisibility of the Premier's deliberations from the deliberations of Cabinet as a whole, and the important role that the Premier's "senior staff" have as the Premier's "eyes and ears." Order PO-1725 recognized that information presented to senior staff of the Premier *may* qualify as exempt under section 12(1).

[31] In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.[14]

Can section 12(1) apply when records have not been placed before Cabinet or one of its committees?

[32] As mentioned, in this appeal, the ministry acknowledges that the records at issue were never placed before Cabinet or its committees.

[33] A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1) if:

- disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or
- disclosure would permit the drawing of accurate inferences with respect to these deliberations.[15]

[34] When a record has not been placed before Cabinet or its committees, the test for section 12(1) is the same: the institution must establish a link between information in the records at issue and actual Cabinet deliberations.

[35] Therefore, the task before me is to consider whether the evidence put forward by the ministry sufficiently establishes that, although the records were not put before Cabinet or its committees, the circumstances are such that disclosure of the records would still reveal (or permit the drawing of accurate inferences about) the *substance of deliberations* of Cabinet.

[36] I will start by considering the ministry's evidence as it might pertain to any past deliberations, and then turn to the ministry's evidence about any future deliberations.

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[14] Order PO-2320.
[15] Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

Would disclosure of the nine records at issue reveal the substance of past deliberations of Cabinet or its committees?

The ministry's evidence

[37] As mentioned, the ministry states that there were over 72,000 engagements with the consultation by the public by the time the consultation closed. The nine records at issue are the submissions made by nine organizations to the ministry (out of about 140 organizations that participated in the public consultation).

[38] The ministry states that the minister's office monitored the consultation process closely, and liaised with the Premier's Office and ministry staff regarding the work of the consultation. A steering committee was formed around the beginning of the consultation process to manage the project. The steering committee "was generally comprised of" specified staff from office of the Minister of Education (the minister),[16] one of whom provided an affidavit in support of the ministry's representations (the affiant).[17]

[39] The steering committee met regularly during the consultation, usually weekly. The affiant attests that he or his staff attended these meetings. The affiant attests that over the course of the public consultation, the ministry's staff would "share information" from the weekly steering committee meetings with (unspecified individuals in) the Premier's Office.

[40] The ministry describes the work of the minister's office with the steering committee as "interactive and iterative": the minister's staff would share information, including concerns and requests relating to the consultation from the weekly steering committee meetings with the Premier's Office, and the minister's staff would convey concerns and requests from the Premier's Office back to the steering committee. The ministry states that "these concerns and requests were reflected in the contents, focus, and organization of summaries and information drawn from stakeholder submissions, including the nine stakeholder submissions" at issue in this appeal. The ministry states that "[t]his ongoing discussion among the Steering Committee, Minister's Office, and the Premier's Office, informed government policy-setting."

[41] With respect to the aforementioned "summaries," the affiant and his staff were responsible for "compiling and organizing the results of the consultations and responding to requests from the Minister's Office and Premier's Office for information regarding stakeholder submissions." The affiant then attests that "these concerns and requests were reflected in the contents, focus, and organization of summaries and

[16] More specifically, the minister's chief of staff and the director of operations; the deputy minister and her executive assistant and senior policy advisor; the assistant deputy ministers of the Strategic Policy and Planning division, the Indigenous Education and Well-Being division, and the Student Achievement division; the directors responsible for Communications, Curriculum, French-Language Education, Incubation and Design, and Policy, Priorities, and Engagement; and various senior staff from the Directors' branches.

[17] This ministry employee was the acting director of the ministry's Incubation and Design Branch in the Strategic Policy & Planning division.

information drawn from stakeholder submissions, including the nine stakeholder submissions" at issue. The ministry's representations state that "[i]nformation drawn from the records at issue in this appeal was included in summaries that were provided to the Steering Committee, and then shared by the Minister's Office with the Premier's Office and Cabinet Office both during and after the consultation period to support policy making and priority setting."

[42] The ministry's representations contain assertions about the records that were not made in the affidavit:

- that the minister's staff on the steering committee "shared the records with the Premier's Office," and
- "like other records relating to the 2018 Consultations, [the records at issue] were central to an ongoing dialogue with the Steering Committee, which included staff from the Minister's Office."

[43] The ministry also submits that the records "involve the results of consultations." The ministry submits that Order PO-3973 "recognized that the results of any consultations *could* be subject to the section 12 exclusion"[18] [emphasis mine]. The ministry submits that the records at issue "comprise public input into several topics that were being considered in relation to setting policy and priorities in connection with public education in Ontario."

[44] In addition, the ministry states that after the consultation period ended, some steering committee members (including the affiant) would occasionally meet with (unspecified) staff from the Premier's Office and Cabinet Office, and that these meetings "were informed by the records at issue in this appeal."

[45] The ministry submits that disclosing the records at issue would allow the appellant "to determine the trends and themes emerging from the stakeholder submissions." The ministry submits that "that, in turn, would give insight into recent, current and future deliberations of Cabinet, including government priority setting in relation to education matters."

The appellant's representations

[46] Having reviewed the ministry's representations and affidavit evidence, the appellant submits that the evidence does not establish a sufficient link between the nine requested records and *any* deliberations of Cabinet.

[47] The appellant submits that the ministry's statement that "the ongoing discussion among the Steering Committee, Minister's Office, and the Premier's Office informed government policy-setting" is unsupported by the evidence put forward by the ministry. In response to the ministry's reliance on Order PO-1725, emphasizing the special role of

[18] Order PO-3973, para. 119.

the Premier in Cabinet, the appellant points out that in Order PO-1725, the IPC held that *only a small subset of the senior staff* in the Premier's Office may assume the tasks of the Premier.[19] The individual found to have taken on the Premier's tasks was very senior and integral to the Premier's day-to-day functions.

[48] The appellant submits that there is no evidence of any relevant deliberations by Cabinet, the Premier or his senior staff. More specifically, the appellant submits that there is no evidence that Cabinet, the Premier, or any of his senior staff did either of the following, in relation to the nine records at issue:

- engaged in an assessment or decision-making process in respect of the nine submissions; or
- made any determinations which relied on the substance of the nine submissions.

[49] In addition, the appellant submits that there is no evidence that Cabinet, the Premier, or his senior staff *received* the nine submissions. The appellant notes that the affidavit does not provide any evidence that the records were put before Cabinet, the Premier, or his senior staff. As a result, the appellant argues that the claim that the records were shared with the Premier's office "is baseless."

[50] In arguing that there is no evidence that the nine records at issue were specifically deliberated upon, the appellant also notes that the ministry provided it with a list of approximately 140 organizations that had made written submissions to the ministry through the consultation process. The appellant submits that there is no evidence that those 140 submissions, and the nine at issue, more specifically – were explicitly deliberated upon by Cabinet, the Premier, or his senior staff, either in original or summarized form. The appellant notes that organizations provided their written submissions to the ministry, not to Cabinet.

[51] Accordingly, the appellant argues that the evidence establishes that the *ministry* considered and analyzed the information generated from the consultation, not Cabinet, the Premier, or his senior staff. In support of this, the appellant points to the ministry's press release issued at the end of the consultation, which stated that the "ministry is currently analyzing the feedback received." In addition, the appellant relies on Order 131, which held that the section 12(1) exemption does not extend to the "individual Minister level." As a result, the appellant submits that the nine records at issue are not transformed into Cabinet records if the Minister of Education reviewed them.

[52] Furthermore, although the ministry described the steering committee as the hub of dialogue about the consultation process, the appellant submits that the steering committee's deliberations are not Cabinet deliberations. In addition, the appellant points out that neither the Premier, his senior staff, or a Cabinet minister sat on the steering committee, and that it was staffed by civil servants.

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[19] Order PO-1725

[53] The appellant also notes the stated purpose of the steering committee: to "manage the project" of the consultation, which was a process of gathering information. The appellant submits that the steering committee did not deliberate upon and make determinations about education policy.

[54] With respect to the ministry's position that disclosure of the records would allow the appellant to identify "trends and themes arising from the consultation" and thus have insight into Cabinet deliberations, the appellant submits that trends and themes are simply topics or subjects, which cannot reveal the *substance* of Cabinet's deliberations. By way of example, the appellant states that a trend may be broad support for improving financial literacy, but that would not reveal what the substance of a discussion about public support for improving financial literacy entails. In addition, the appellant provided detailed representations regarding the ministry's (undisputed) publicization of the trends and theme arising from the consultation, through the publication of aggregated data arising out of the online survey and the telephone town halls. The appellant argues that the "fact that a substantial portion of the information collected from the consultation at issue in this appeal has been publicly released demonstrates that the requested records are not subject to Cabinet secrecy." Pointing to two specified reports made available by the ministry online regarding the online surveys and telephone town hall sessions, the appellant submits that these reports compile a mass of public information but do not reveal anything about Cabinet *deliberation*.

[55] Furthermore, the appellant notes that the ministry repeatedly stated in its representations that its recent planned changes to Ontario's education system are informed by the feedback received from the public consultation, including feedback from organizations. The appellant submits that these announcements provide insight into themes and trends from the consultation because the ministry's changes are allegedly based on what the public collectively said they wanted.

[56] In addition, the appellant states that the ministry routinely releases summaries of consultations regarding education matters, and provided an example of this (a 2018 public release of a summary of a consultation on education funding,[20] which presented trends and themes from the consultation and summarized numerous stakeholder group's opinions and proposals).

[57] The appellant also notes that many organizations have already publicly released their submissions, and that the nine records at issue were generated through the same consultation process, addressed the same issues, and ultimately were part of the same mass of information generated.

[58] The appellant submits that the ministry has not established that there is a rare or exceptional circumstance here such that records that were never placed before Cabinet or its committees could still be exempt under section 12(1). The appellant submits that

[20] This release can be retrieved at: http://www2.edu.gov.on.ca/eng/funding/1819/gsn-discussion-summary-en.pdf.

it is a high bar for the ministry to meet in order to show that disclosure of the records would disclose the substance of actual deliberations. To meet this high bar, the appellant submits that the ministry must provide evidence and argument sufficient to establish a linkage between the content of the record and the actual substance of the deliberations, but that it has not.

The ministry's reply representations

[59] In its reply representations, amongst other points made by the ministry, the ministry acknowledges that the records were not put directly before Cabinet.

[60] However, the ministry submits that "information drawn from the public submissions was shared" (in the manner it had explained in its initial representations) with (unspecified) staff in the Premier's office.

[61] The ministry then reiterates general principles it had previously set out in its initial representations regarding the Premier's unique role in Cabinet, as the First Minister in setting policy and priorities for the government, and about his staff, who act as his "eyes and ears", and his "voice" in certain meetings, and "even more, they assist with his deliberative process in so doing."

[62] The ministry also notes that Cabinet is the only body that could make decisions regarding the issues raised and explored in the records at issue. It also argues that "what the government might do" is the *substance of deliberations*, and it highlights the IPC's statement in Order PO-3973 that "the words of the exemption may extend more generally to include Cabinet members' views, opinions, thoughts, ideas and concerns expressed within the course of Cabinet's deliberative process."

[63] Furthermore, the ministry submits that the records "involve the results of consultations." The ministry submits that Order PO-3973 "recognized that the results of any consultations' *could* be subject to" (emphasis mine) section 12(1).[21] The ministry submits that the records at issue "comprise public input into several topics that were being considered in relation to setting policy and priorities in connection with public education in Ontario."

[64] In addition, the ministry states the following in reply to the appellant's position that "rare and exceptional circumstances" do not exist such that records not put before Cabinet would still reveal the substance of deliberations if disclosed: "a once-in-a-generation consultation on education in the province of Ontario, covering a wide range of topics, and resulting in over 72,000 stakeholder submissions, gives rise to such rare and exceptional circumstances."

Analysis/findings

[65] Having considered the representations of the ministry and the appellant, and the

[21] Order PO-3973, para. 119.

records themselves, in my view, the appellant's representations are persuasive. As I will explain below, I find that the ministry has not provided sufficient evidence that the disclosure of the records would reveal past deliberations of Cabinet, a Cabinet committee, the Premier, and/or the Premier's senior staff.

[66] While the ministry's representations set out generally accepted principles regarding section 12(1) and details about the consultation process (including the ministry-staffed steering committee), I find that the ministry's evidence insufficiently links the contents of the records with the substance of any deliberations by Cabinet or a Cabinet committee, or for that matter the Premier or his senior staff on his behalf. I find insufficient evidence before me to conclude that disclosing the records at issue, which are raw submissions of third parties, not manipulated or summarized in any way, would reveal the deliberations of Cabinet, a Cabinet committee, the Premier, or senior staff of the Premier on his behalf.

[67] Considering the meaning of the term *deliberations* that the ministry relies on from Order PO-3973, based on the evidence before me, I am unable to determine what views, opinions, thoughts, ideas or concerns were expressed through a deliberative process, if at all, by Cabinet, a Cabinet committee, the Premier, or any specific senior staff member of the Premier's office on the Premier's behalf, would be revealed in relation to disclosure of any of the records.

[68] I acknowledge that the IPC recently issued an order upholding the ministry's claim of section 12(1) over summaries generated by the steering committee, Order PO-4221. It is clear to me from the adjudicator's reasoning in that order that the ministry had sufficiently established through the evidence presented to the adjudicator, and from the adjudicator's review of the records themselves, that disclosure of the summaries would reveal the substance of the deliberations of the Premier. The records at issue in Order PO-4221 were described, in part, this way:

> The ministry confirmed the consultation was an evolving process and the survey questions were changed to reflect the concerns and requests of the Premier's Office. As such, the records, particularly the weekly summaries, reflect the evolution of the Premier's considerations and concerns. The ministry submits that the weekly summaries both reflected the Premier's previous week's concerns and interests and informed the following week's decisions. Based on my review of the records and the ministry's representations, I find the records would, if disclosed, reveal the concerns, issues and deliberations of the Premier throughout the consultation process. Given the Premier's unique role in government, I accept that the records would reveal the substance of the deliberations of Cabinet.

[69] In contrast, the records before me are of an entirely different nature than the records at issue in Order PO-4221. The records before me are the expressed views of nine organizations about one or more topics that the ministry was seeking the public's views about. I find that the records before were not generated out of an iterative

process involving Cabinet, a Cabinet committee, the Premier, or any of his senior staff. The ministry did not sufficiently explain how the nine organizations' submissions to the ministry during the consultation could lead to an understanding of the views, opinions, thoughts, ideas or concerns as expressed through a deliberative process of Cabinet, any Cabinet committee, the Premier, or any of his senior staff on the Premier's behalf.

[70] Regarding the ministry's submission that the records at issue "involve the results of consultations," and that Order PO-3973 "recognized that the 'results of any consultations'" could be subject to section 12(1), I am not persuaded that this means the nine records at issue are exempt under section 12(1). In my view, in Order PO-3973, the former Commissioner was not saying that all "results of any consultations" could qualify for the exemption under section 12(1). It is worth noting a more complete context for the phrasing upon which the ministry relies ("results of any consultations"), from Order PO-3973:

> While the mandate letters may be said to reveal the subject matter of what *may* come back to Cabinet for deliberation at some point in the future, they do not reveal the substance of any minister's actual proposals or plans for implementation, or the results of any consultations or program reviews and options. Consequently, they do not reveal the substance of any material upon which Cabinet members will actually deliberate in the future and, for that reason, do not reveal the substance of any such future deliberations. [Emphasis in original.]

[71] In my view, the phrasing "the results of any consultations" is properly understood in the context of comments about materials that would be deliberated on by Cabinet ("Consequently, they do not reveal the substance of any material upon which Cabinet ministers will actually deliberate . . ."). The passage above from Order PO-3973 does not mean that all records that can be characterized as "the results of any consultations" qualify for the exemption at section 12(1), even if there is insufficient evidence of deliberations of Cabinet or its committees. As a result, I am not persuaded to accept the argument that the nine records at issue, having been generated because of a consultation process, are exempt under section 12(1), in consideration of the analysis that the ministry relies on in Order PO-3973.

[72] Furthermore, although the ministry initially asserted that the records were shared with the Premier's Office, its affidavit evidence did not contain a similar claim, and the ministry later acknowledged that the records were not put directly before Cabinet. The evidence before me does not establish that the nine records were provided to the Premier of his senior staff either.

[73] As mentioned, the ministry submits that "a once-in-a-generation consultation on education in the province of Ontario, covering a wide range of topics, and resulting in over 72,000 stakeholder submissions, gives rise to such rare and exceptional circumstances." Even if I accept the assertion that the consultation was "once-in-a-generation," I find that the wide range of topics and the resulting engagement by the public are not sufficient evidence to establish that disclosure of the nine records at issue

would reveal the substance of Cabinet deliberations despite Cabinet not seeing the records or their substantive contents.

[74] It is worth noting that in past IPC appeals where the exemption at section 12(1) was upheld despite the records not having been before Cabinet, the institutions had provided sufficient evidence linking the content of the records and Cabinet deliberations. For example:

- In Order P-72, the adjudicator refers to evidence that showed that the record was created as a direct result of a Cabinet committee's request for the specific information contained in the record. Therefore, he accepted that disclosure of that record would reveal the substance of the deliberations on matters that were under active consideration by that Cabinet committee.

- Conversely, in Order P-266, the adjudicator refers to evidence that parts of the records were incorporated into submissions made to Cabinet, which Cabinet deliberated on. There was evidence that parts of the records had been reviewed by several Cabinet ministers and incorporated into the submissions to specific Cabinet committees on certain dates. In the circumstances, the adjudicator found that a review of the representations, supporting documents, and the records themselves led to the conclusion that disclosing the records would lead to accurate inferences being drawn about the substance of deliberations.

[75] In my view, the ministry's evidence falls short of such details so that I can conclude that disclosure of the records would reveal the substance of deliberations of Cabinet or its committees, or the Premier (or his senior staff on the Premier's behalf), despite the records not having been brought before Cabinet or its committees, the Premier or his senior staff.

[76] For these reasons, I find that the ministry's representations and affidavit evidence do not sufficiently establish that the nine records at issue would reveal the substance of deliberations of Cabinet or its committees, or the Premier and/or his senior staff.

[77] I will now consider the ministry's position that disclosure of the records would reveal the substance of future Cabinet deliberations.

Is there sufficient evidence that disclosure of the nine records would reveal the substance of future deliberations of Cabinet or its committees?

The ministry's evidence

[78] While the ministry made announcements about its decisions on most of the topics of the consultation (by the date of the ministry's representations), the ministry states that three topics explored in the consultation have not been the subject of public announcements:

- standardized testing through the EQAO;
- the desire for and desired contents of a Parents' Bill of Rights; and
- the open category of "other."

[79] The ministry submits that "[g]iven Cabinet's continuing mandate to improve public education in the province, the information in the records that are at issue in this appeal may reasonably be expected to support future decision-making in the broad areas of the consultation." The ministry submits that this includes "in particular, the three topics" for which there had been no public announcements at the time of writing.

[80] The ministry also submits the following:

> The submissions received from stakeholders in response to the 2018 Consultation are a rich source of information to support government decision-making. Given the large number of engagements with the 2018 Consultation overall and the use that has been made of all responses, it can reasonably be expected that information from the responses, including the stakeholder submissions that are the subject of this appeal, will be drawn on consistently in the near future for reports back to Cabinet and to support ongoing deliberations and decision-making as it pertains to important education issues in the province.

[81] The ministry argues that the relationship between "the information in the records at issue . . . and the decisions of Cabinet is close and compelling, as only Cabinet can provide policy direction on behalf of government."

[82] In addition, the ministry argues that disclosure of the records at issue "would likely inhibit open and frank Cabinet discussion of significant public policy matters for the province." The ministry submits that "Cabinet should be given time and space to deliberate on the materials received in response to the consultation to inform its decision-making."

The appellant's representations

[83] The appellant submits that there is no evidence that Cabinet, the Premier, or any of his senior staff will do either of the following in the future:

- an assessment or decision-making process in respect of the nine submissions; or
- make any determinations which rely on the substance of the nine submissions.

[84] The appellant submits that the ministry's position that disclosure of the nine records at issue "would likely inhibit open and frank Cabinet discussion" is "baseless." The appellant argues that the key to the underlying concern about maintaining Cabinet confidentiality is disclosure of discussions, as noted by the stated rationale for the exemption: "if Cabinet discussions were to become a matter of public record, individual

ministers would be inhibited from expressing their frank opinions." The appellant states that it is not seeking any record detailing actual discussions, such as minutes of a meeting or a Minister's personal notes. Rather, it is seeking the disclosure of nine records created by non-government organizations that the appellant believes "were not intended for Cabinet [and] are wholly unrelated to the opinions the Premier, his senior staff or a Cabinet member may express behind closed doors."

[85] The appellant disputes the ministry's assertion that disclosure will inhibit Cabinet's deliberations. The appellant notes that despite the disclosure of a large amount of information collected from the consultation, the government has announced many changes to Ontario's education system since the end of the consultation, which the ministry listed in its representations. The appellant submits that the ministry is trying to prevent disclosure of some of that information while already having publicly disclosed other portions of it, despite the fact that it all forms one mass of information the ministry may draw on. Based on this public disclosure, the appellant argues that the ministry is not inhibited by the public release of the online survey and telephone town hall data, as well as numerous organizations publicly releasing their own submissions.

[86] The appellant also points to the context of the records as significant. Noting that there were about 140 organizations that provided written submissions to the ministry (based on the list the ministry provided to the appellant), the appellant submits that Cabinet's deliberations cannot be revealed through, or inferred from, such a large mass of raw information. The appellant submits that disclosure of the requested records submitted by the nine organizations cannot reveal anything other than that they were part of a mass of public information submitted to the ministry.

[87] In addition, the appellant submits that possible use by Cabinet of the records in the indeterminate future is not sufficient to deny access to the records under section 12(1) of the *Act*. The appellant submits that the ministry did not provide "concrete evidence of planned future deliberations regarding the substance" of the records. The appellant notes that in Order PO-2707, the IPC held that section 12(1) of the *Act* "does not permit an institution to deny access to records which may – at some indeterminate point in the future – inform the deliberations of Cabinet or one of its committees." The appellant also states that Order PO-2707 says that there should be a specific plan with timelines to utilize information.

[88] The appellant submits that the ministry is trying to expand the application of section 12(1) "to cover vague, indeterminate future possibilities." The appellant points to the ministry's position that the information collected in the consultation "can reasonably be expected" to be drawn on in "the near future," noting that no timeline was provided. Furthermore, the appellant notes that the ministry provided no details about what information would be used, and how it would be used. The ministry submits that there is no evidence that Cabinet, the Premier, or his senior staff will review, discuss, or make decisions on the records at issue in the future.

[89] In any event, the appellant submits that even if there were sufficient evidence that the nine records would be deliberated on in the future, disclosure of the records

would not reveal the substance of those future deliberations. The appellant states that it is not seeking any records that relate to the deliberations of Cabinet or its committees, but rather records created by non-government organizations as part of a public consultation process. The appellant submits that the records are part of a large mass of information generated through the consultation, and do not provide insight into the substance of any subsequent deliberations.

[90] Finally, the appellant submits that the ministry's claim of section 12(1) over the nine records at issue is "an attempt to invoke the privilege in an unjustified and undemocratic manner." It submits that the reasoning of the ministry's position is that "certain stakeholders have greater influence on the Ministry than the stakeholders who participated in the online survey and telephone town halls and whose data has been publicly released." The appellant submits that in Order PO-3720, the IPC found this same "selective application" of section 12(1) to records received from third parties to be inappropriate. In Order PO-3720, the IPC found that

> if every third parties' records could be labelled as . . . Cabinet records, Ontario's whole system of democratic open government devoid of having any perceived conflict of interest would be rendered hollow, with success going to the most effective lobby group's efforts who influenced their internal decision making…[22]

The ministry's reply

[91] The ministry's reply representations address both past use of the records and future use. The ministry reiterates the statement in Order PO-3973: "This case is about striking a balance…between a citizen's right to know what government is doing and government's right to consider what it might do behind closed doors" [emphasis in Order PO-3973].

[92] The ministry also reiterates that decisions have been made on some, but not all, of the topics in the 2018 consultation. The ministry asserts: "The nature of the 2018 education consultations, and the topics that were canvassed on which no decisions have yet been taken . . . make it a virtual certainty that the stakeholder feedback will be put before Cabinet for further deliberations." As a result, the ministry argues that the contents of the records could reveal the substance of Cabinet's deliberations in relation to these topics.

[93] The ministry also submits that the term *deliberations* is "not limited to conversations or meetings immediately preceding a decision." Rather, the ministry submits that "[o]ther discussions that contribute to decision-making and the policy-making and priority setting role of Cabinet and the Premier can be protected by subsection 12(1) when the records of same would permit the drawing of accurate inferences or reveal the substance of Cabinet deliberations." Therefore, the ministry maintains its position that disclosure of the records at issue would "allow a

[22] Order PO-3720, at paragraph 53.

sophisticated reader to infer how stakeholder views and impacts factor into the review of the topics raised in the 2018 Consultation by the Premier and Cabinet."

Analysis/findings

[94] Based on my review of the representations of the ministry and the appellant, and the records themselves, I find that the ministry has provided insufficient evidence that disclosure of the records would reveal the substance of future deliberations of Cabinet, a Cabinet committee, the Premier, and/or any of the Premier's senior staff on his behalf.

[95] The appellant's arguments regarding possible use of the records in the indeterminate future are persuasive. I agree with, and adopt in this appeal, the reasoning in Order PO-2707, that section 12(1) of the *Act* does not permit an institution to deny access to records which may at some indeterminate point in the future inform the deliberations of Cabinet or its committees, and that a specific plan with timelines for use is needed. The ministry did not provide such evidence in support of its claim of future deliberations regarding the nine records at issue in this appeal. In my view, the "government's right to consider *what it might do* behind closed doors" is not relevant here, when the deliberations leading to what it "might do" will take place at an indeterminate point in the future, if at all.

[96] Furthermore, I find that the wide-ranging topics covered by the consultations, and the level of engagement that ensued overall, is not a sufficient evidence that disclosure of the nine stakeholder submissions at issue would reveal the substance of future Cabinet deliberations.

[97] In addition, I find the fact that some topics have not been the subject of decisions is not sufficient evidence that the nine records at issue will be the subject of future Cabinet deliberations at all, on the evidence before me.

[98] I also do not accept the ministry's submission that "[g]iven Cabinet's continuing mandate to improve public education in the province, the information in these records may reasonably be expected to support future decision-making." The mandate of Cabinet is too vague and sweeping a basis for withholding records under an exemption meant to protect the *substance of deliberations* of Cabinet. Accepting this argument would allow the ministry (or Cabinet) to claim section 12(1) over virtually any record relating to the improvement of public education.

[99] In addition, I agree with the appellant that the following analysis from Order PO-3720 is relevant here, and I adopt it, setting it out below again, for ease of reference:

> if every third parties' records could be labelled as . . . Cabinet records, Ontario's whole system of democratic open government devoid of having any perceived conflict of interest would be rendered hollow, with success

> going to the most effective lobby group's efforts who influenced their internal decision making…[23]

[100] Based on my review of the records themselves, I find that there is insufficient evidence to conclude that their disclosure would reveal the substance of future deliberations of Cabinet or its committees, or the Premier, or his senior staff on his behalf. As stakeholder submissions made by nine organizations to the ministry during a public consultation process, I also find that the records themselves do not reveal the reasons for or against a particular course of action, or the views, opinions, thoughts or ideas of Cabinet, any of its committees, the Premier, and/or his senior staff on his behalf that may take place in the future.

[101] For these reasons, I find that there is insufficient evidence that the records at issue would reveal the substance of any future deliberations of Cabinet or its committees, or the Premier, or his senior staff on his behalf.

Conclusion on section 12 exemption

[102] Given my findings that there is insufficient evidence that disclosure of the records would reveal the substance of any past or future Cabinet deliberations, I find that the records are not exempt under section 12(1). Therefore, I will order the ministry to disclose the records to the appellant, subject to my decision on whether portions of three of the records are also exempt under the mandatory personal privacy exemption at section 21(1), and if so, whether the public interest override at section 23 would apply to that information.

Issue B: Do records 1, 3, and 9 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[103] In additional to the section 12 Cabinet records exemption, the ministry relied on the personal privacy exemption in section 21(1) to withhold some of the information in records 1, 3 and 9. In order to decide whether the section 21 applies, I must first decide whether the record contains "personal information," and if so, to whom the personal information relates.

What is "personal information"?

[104] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."

Recorded information

[105] "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.[24]

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[23] Order PO-3720, at paragraph 53.
[24] See the definition of "record" in section 2(1).

About

[106] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.[25] See also sections 2(3) and 2(4), which state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[107] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.[26]

Identifiable individual

[108] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.[27]

What are some examples of "personal information"?

[109] Section 2(1) of the *Act* gives a list of examples of personal information, in part:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

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[25] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[26] Orders P-1409, R-980015, PO-2225 and MO-2344.
[27] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

. . .

(d) the address, telephone number, . . . of the individual, [and]

. . .

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[110] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."[28]

Statutory exclusions from the definition of "personal information"

[111] Sections 2(2), (3) and (4) of the *Act* exclude some information from the definition of personal information. Sections 2(3) and (4) are described above. Section 2(2) states that personal information does not include information about an individual who has been dead for more than thirty years.

Whose personal information is in the record?

[112] It is important to know whose *personal information* is in the record. If the record contains the requester's own *personal information*, their access rights are greater than if it does not.[29] Also, if the record contains the *personal information* of other individuals, one of the personal privacy exemptions might apply.[30]

[113] The ministry submits that three of the records at issue contain *personal information*. The ministry submits that some of the stakeholder submissions or the covering emails accompanying those submissions include *personal information* relating to the employment history, educational background, family status and children of identifiable individuals. The ministry states that there is also a list in one of the submissions that includes personal email addresses and other *personal information* of a large number of identifiable individuals.

[114] The appellant states that since it has not seen the three records, it cannot adequately comment on whether or not the records contain *personal information*.

[115] Based on my review of the ministry's representations and the contents of the three records themselves (records 1, 3, and 9), I find that these records contain *personal information* as that term is defined under section 2(1) of the *Act*. Specifically, I find that the records contain information relating to the marital or family status of

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[28] Order 11.

[29] Under sections 47(1) and 49 of the *Act,* a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

[30] See sections 21(1) and 49(b).

identifiable individuals, as well as information relating to employment history and educational background, personal contact information, and/or names appearing with other *personal information*. This is information that qualifies as *personal information* under paragraphs (a), (b), (d), and (h) of the definition of *personal information* at section 2(1) of the *Act*. I find that the information about the individuals referenced in the records is information in the personal capacity of those individuals, and that the individuals may be identified if the information is disclosed.

[116] Since records 1, 3, and 9 contain *personal information* belonging to identifiable individuals, but not to relating to the appellant, I must consider any right of access that the appellant may have to the *personal information* withheld in portions of records 1, 3, and 9 under the mandatory personal privacy exemption at section 21(1) of the *Act*.

Issue C: Does the mandatory personal privacy exemption at section 21(1) apply to the personal information at issue?

[117] Where a requester seeks *personal information* of another individual, section 21(1) prohibits an institution from releasing this information *unless* one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. The ministry identified the portions of records 1, 3, and 9 that it believes would be subject to the exemption at section 21(1). For the reasons that follow, I uphold the ministry's decision to withhold those portions of the records, in part.

[118] The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 21.

Do any of paragraphs (a) to (e) of section 21(1) apply?

[119] If the information fits within any of paragraphs (a) to (e) of section 21(1), it is not exempt from disclosure under section 21.

[120] The ministry submits that none of these exceptions apply.

[121] However, during the inquiry, I sought the views of the affected parties who had created the records. The affected party who authored record 3 provided consent to the full disclosure of record 3. Despite this consent, based on my review of the record, I find that the record also contains the *personal information* of other individuals, whom the IPC could not locate to inquire about consent. As a result, the exception at section 14(1)(a) (consent) applies to the *personal information* in record 3 that strictly relates to the author, and the ministry will be ordered to disclose it in full. However, the exception at section 14(1)(a) does not apply to the remaining *personal information* withheld in record 3.

[122] The affected parties who created records 1 and 9 did not provide consent to the disclosure of the *personal information* at issue, so the exception at section 21(1)(a)

does not apply.

[123] On my review of these records, none of the other exceptions at sections 21(1)(b) to (e) apply either.

[124] As a result, I will now consider whether disclosure of the *personal information* at issue in records 1 and 9, and remaining at issue in record 3, would not be an unjustified of personal privacy, under the exemption at section 21(1)(f) of the *Act*.

21(1)(f): disclosure not an unjustified invasion of personal privacy

[125] Under section 21(1)(f), if disclosure would *not* be an unjustified invasion of personal privacy, it is not exempt from disclosure.

[126] Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

Do any of the presumptions in paragraphs (a) to (h) of section 21(3) apply?

[127] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.[31]

[128] The ministry submits that the presumption at section 21(3)(d) applies.

21(3)(d): employment or educational history

[129] A person's name and professional title, without more, does not constitute "employment history."[32]

[130] Information contained in resumes[33] and work histories[34] falls within the scope of section 21(3)(d). In addition, information which reveals, for example, the dates on which former employees are eligible for early retirement, the start and end dates of employment, and the number of years of service has been found to fall within the section 21(3)(d) presumption.[35]

[131] The ministry submits that records 1, 3, and 9 contain information that relates to the employment history of identifiable individuals. The ministry also submits that record 9 contains information that relates to the education history of identifiable individuals.

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[31] *John Doe v. Ontario* (*Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767 (Div.Ct.).
[32] Order P-216.
[33] Orders M-7, M-319 and M-1084.
[34] Orders M-1084 and MO-1257.
[35] Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050; see also Orders PO-2598, MO-2174 and MO-2344.

[132] Based on my review of the ministry's representations and the records, I agree, and find that some of the *personal information* withheld in records 1, 3, and 9 relates to employment and/or educational history, under the presumption at section 21(3)(d) of the *Act*.

21(3)(f): information relating to finances

[133] This presumption covers information related to an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

[134] Based on my review of record 1, I find that the presumption at section 21(3)(f) also applies to some *personal information* withheld because that information relates to the financial history or activities of an identifiable individual.

No presumptions apply to the remaining personal information at issue

[135] The remaining *personal information* at issue consists of information relating to the marital or family status of the respective individuals who made submissions during the consultation process, as well as names and personal contact information. The ministry has not claimed that any presumptions apply to this *personal information*. Based on my review of it, I find that no other presumptions at section 21(3) of the *Act* apply to it.

Do any of the section 21(2) factors apply?

[136] Once a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by one or more factors or circumstances under section 21(2).[36] In this appeal, that means that the information relating to employment and/or educational history (to which section 21(3)(d) applies), and the information relating to finances (to which section 21(3)(f) applies) cannot be rebutted by one or more factors or circumstances under section 21(2).

[137] In assessing the personal privacy exemption in section 21(1), if no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[37] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).[38]

[138] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances *favouring* disclosure in section 21(2) must be present. In the *absence* of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption

[36] *John Doe v. Ontario* (*Information and Privacy Commissioner*), cited above.
[37] Order P-239.
[38] Order P-99.

applies.[39]

[139] Neither the ministry nor the appellant identified any factors and/or circumstances favouring disclosure in section 21(2) regarding the remaining *personal information* withheld. Based on my review of this remaining *personal information*, I find that there are no factors and/or circumstances that favour its disclosure. Therefore, the exception at section 21(1)(f) is not established and I uphold the ministry's determination that the mandatory personal privacy exemption at section 21(1) applies to this *personal information*.

[140] In conclusion, I order the ministry to disclose the portions of record 3 to which the author of this record could consent to the disclosure of, and I uphold the ministry's decision to withhold the remaining *personal information* that it withheld in records 1, 3, and 9, subject to my examination of whether the public interest override at section 23 of the *Act* applies to it, as the appellant claims.

Issue D: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21(1) exemption?

[141] As I will explain below, I am not persuaded that the public interest override at section 23 applies to the *personal information* at issue in records 1, 3, and 9.

[142] 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.

[143] 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.

[144] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[40]

Compelling public interest

[145] 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

[39] Orders PO-2267 and PO-2733.
[40] Order P-244.

central purpose of shedding light on the operations of government.[41] 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.[42]

[146] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[43]

[147] Any public interest in *non*-disclosure that may exist also must be considered.[44] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling."[45]

[148] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation[46]
- the integrity of the criminal justice system has been called into question[47]
- disclosure would shed light on the safe operation of petrochemical facilities[48] or the province's ability to prepare for a nuclear emergency[49]
- the records contain information about contributions to municipal election campaigns.[50]

[149] 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[51]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[52]
- the records do not respond to the applicable public interest raised by appellant.[53]

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[41] Orders P-984 and PO-2607.
[42] Orders P-984 and PO-2556.
[43] Order P-984.
[44] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[45] Orders PO-2072-F, PO-2098-R and PO-3197.
[46] Order P-1398, upheld on judicial review in *Ontario* (*Ministry of Finance*) *v. Ontario* (*Information and Privacy Commissioner*), [1999] O.J. No. 484 (C.A.).
[47] Order PO-1779.
[48] Order P-1175.
[49] Order P-901.
[50] *Gombu v. Ontario* (*Assistant Information and Privacy Commissioner*) (2002), 59 O.R. (3d) 773.
[51] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[52] Order P-613.

The appellant's representations

[150] The appellant states that it is seeking disclosure of the records to "meaningfully participate in the democratic process," which is precisely the purpose of the *Act*. The appellant describes itself as an experienced and active participant in public dialogues and policy development regarding education in Ontario. It states that it is trying to take an active role in current dialogue that was initiated by the ministry regarding education reform.

[151] The appellant submits that its "efforts to fully engage in dialogue, like other education-sector stakeholder[s], are hampered by not having full information of what was said during the consultation." The appellant further states that "[d]ialogue with the government is difficult when there is information asymmetry."

[152] The appellant also submits that if I find that section 23 does not apply to information that is exempt under section 21(1), the ministry should disclose as much information as possible, under section 10(2) of the *Act*.

The ministry's reply representations

[153] With respect to the question of whether there is a compelling public interest, the ministry submits that "it seems clear that there is a public interest." It states that the 2018 public consultation was the largest public consultation on education in recent history in Ontario, and reiterates that the consultation generated 72,000 responses on eight wide-ranging topics. The ministry states that "the government recognized this public interest and has shared summary information relating to the 2018 Consultation for that very reason."

[154] However, the ministry submits that a compelling public interest would not be served by the disclosure of the specific portions of the records withheld under the personal privacy exemption, thus, failing the second part of the test for section 23. Given my finding, below, that the first part of the test is not met, it is not necessary for me to set out the rest of the ministry's representations on section 23.

[155] With respect to severing the records, the ministry submits that it strove to be judicious in its proposed redactions in records 1, 3, and 9, limiting them only to those sections of the records that contain *personal information*. As a result, the ministry submits that it has fulfilled the requirements of section 10(2).

Analysis/findings

[156] While I appreciate that the appellant has not seen the *personal information* withheld in records 1, 3, and 9 and, therefore, is limited in what it can argue about section 23, I have been able to review the records and I am unpersuaded that section 23 applies here.

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[53] Orders MO-1994 and PO-2607.

[157] As mentioned, for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the information at issue in the records. Second, this interest must clearly outweigh the purpose of the exemption. I find that the first part of the test for section 23 is not met.

[158] Although the ministry appears to be conceding that a compelling public interest clearly exists overall due to the size of the consultation and the breadth of topics and level of engagement involved, what I must decide regarding part one of the test for section 23 is whether there is a compelling public interest *in the personal information withheld in records 1, 3, and 9*. The issue is not whether there is a compelling public interest in public education reform generally, or the 2018 consultation process more specifically, or the records at issue as a whole.

[159] Based on my review of the *personal information* withheld in records 1 and 9, and the remaining at issue in record 3, I find insufficient evidence that there is a compelling public interest in it. As mentioned, 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.[54] I am not persuaded that disclosure of the names, marital or family status, contact information, employment and/or education history, and/or information relating to financial history at issue in these records qualifies as *compelling* ("rousing strong interest or attention"). I find that the *personal information* withheld in these records does not respond to the issue of public education reform such that it may reasonably be considered as informing or enlightening the citizenry about the activities of government or its agencies. In my view, the evidence does not sufficiently establish that this *personal information* adds in some way to the information that the public has to make *effective* use of the means of expressing public opinion or to make political statements.

[160] For these reasons, I find that section 23 does not apply to the *personal information* at issue in records 1, 3, and 9.

[161] Turning to the appellant's remarks about severance if I find that section 23 does not apply to the *personal information*, as the appellant stated, section 10(2) of the *Act* requires the ministry to disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions. Based on my review of the ministry's proposed redactions in records 1, 3, and 9, I find that the ministry has complied with section 10(2) in its approach to redacting *personal information* in these records.

[162] Accordingly, I uphold the ministry's decision to withhold the *personal information* in records 1 and 9, and remaining at issue in record 3, and dismiss that portion of the appeal.

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[54] Orders P-984 and PO-2556.

ORDER:

1. I uphold the ministry's decision, in part. I uphold the ministry's decision to withhold *personal information* in records 1, 3 and 9, under the mandatory exemption at section 21(1) of the *Act*, except for the personal information directly relating to the author of record 3.

2. I do not uphold the ministry's decision under section 12(1) of the *Act*. I order the ministry to disclose records 2, 4, 5, 6, 7, and 8, in full, and to disclose the portions of records 1, 3, and 9 that are not exempt under section 21(1) to the appellant. I order the ministry to disclose this information to the appellant by **June 8, 2022** but not before **June 3, 2022**.

3. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records disclosed, pursuant to order provisions 1 and 2.

Original signed by: May 4, 2022

Marian Sami
Adjudicator