Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4290

Appeal PA17-503

Ministry of Health

August 17, 2022

Summary: Pursuant to the *Act*, the appellant made a multi-part request regarding immunization and proposed amendments to the *Immunization of School Pupil Act* to the Ministry of Health. In responding to the request, the ministry divided the request into three separate batches. This order deals with the denial of access to records responsive to batch 2 of the request. The ministry denied access, in part, on the basis of the mandatory exemption in section 12(1) (Cabinet records), and the discretionary exemptions in sections 13(1) (advice or recommendations) and 14(1)(i) (security of a system or procedure). The ministry also withheld records and information as non-responsive to the appellant's request. At mediation, the appellant raised the issue of the possible application of the public interest override in section 23. The appellant also took the position that additional responsive records relating to her request should exist. In this order, the adjudicator upholds the ministry's decision, in part. She finds that the information identified as non-responsive is not responsive to the request, upholds many of the ministry's exemption claims and finds that section 23 does not apply to the information that is exempt under section 13(1). She orders the ministry to disclose two non-exempt records. Finally, she finds the ministry's search for responsive records to be reasonable.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 12(1), 13(1), and 14(1)(i).

Order Considered: Order MO-1450.

OVERVIEW:

[1] The appellant made a request to the Ministry of Health[1] (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> …the issue of immunization/vaccination and the Ministry of Health and other stakeholders' efforts to increase vaccination/immunization cover rates, reduce vaccine hesitancy and require those who administer immunization to provide information to the local medical officer of health.
>
> I am interested in all records related to the proposed amendments to *Immunization of School Pupil Act* (*ISPA*). Including (1) records re Bill 87 (*An Act to implement health measure and measure relating to seniors by enacting, amending or repealing various statutes*) and (2) records re the former Bill 198 (*Immunization of School Pupils Amendment Act, 2016*)
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> Format of Records: Wherever possible, I would like to receive records in electronic format.
>
> Definition of *including* – in this letter, including mean *including but not limited to*.
>
> Definition of *records* – in this letter, records mean all records, including reports, briefing notes, policy papers, presentations, recommendations, meeting notes, legal opinions, reviews, surveys, discussion papers and communication (letters, emails, messages and other correspondence).
>
> Please provide the following:
>
> 1. For the period January 1, 2012 to April 10, 2017 all briefing notes which mention/discuss (a) proposed amendments to ISPA; or (b) ways to increase vaccination/immunization rates or reduce vaccine hesitancy.
>
> 2. For the period January 1, 2012 to April 10, 2017, all records regarding (a) the legal implications of changes to vaccination/immunization legislation, including (b) the legal implications of the amendments to *ISPA* which are proposed by Bill 198 and Bill 87. (These include *Canadian Charter of Human Rights and Freedoms* implication *Human Rights Code* implication and International Treaties, Privacy Legislation, Right to Informed Consent, right to education and all other legal implications of the proposed changes.)
>
> 3. For the period January 1, 2012 to April 10, 2017, all records (including reviews and surveys) which discuss solutions employed or considered by

[1] At the time of the request, the ministry was known as the Ministry of Health and Long-Term Care.

other jurisdictions in order to increase immunization/vaccination coverage rates and/or reduce vaccine hesitancy.

4. For the period January 1, 2012 to April 10, 2017, all records discussing increasing vaccination/immunization rates and/or reducing vaccine hesitancy which involve vaccine/immunization stakeholders. Including records prepared by, provided by or in consultation with such stakeholder. (Without limiting the generality of the request, stakeholders include medical association, manufacturers/vendors of vaccines, lobby groups and any other party or organization which has an interest – financial or otherwise – in increasing vaccination rates or which supports increasing vaccination rates.)

5. For the period January 1, 2012 to April 10, 2017, all records of meetings (including paperless meetings) in which stakeholders (a defined in 3 above) and Ministry of Health staff participated, in which improving vaccination/immunization coverage rates, mandatory vaccination, vaccine hesitancy or reducing exemptions from vaccination were discussed. This includes a list of such meetings.

6. For the period of January 1, 2012 to April 10, 2017, all records concerning the drafting of proposed amendments to *ISPA* – including all drafts, proposals, versions/iterations.

7. For the period January 1, 2012 to April 10, 2017, all records which consider the strengths and weaknesses of proposed amendments to *ISPA*.

8. For the period January 1, 2012 t April 10, 2017, all records which discuss the details of education sessions proposed under said amendments to *ISPA*, including records discussing location and timing, how educations content of sessions would be created and by whom, frequency of sessions, who the educators would be and possible cost.

Such records may involve Ontario Ministry of Health (including Ontario's Health Minister, The Deputy Health Minister, Associate Deputy Minister and other Ministry of Health public servants), Ontario Cabinet, any Ontario advisory body/board/commission dealing with vaccines/immunization/health. Ontario's Public Health, Ontario's Attorney General or Ministry of Health Legal Services Branch, the Ministry of Education and other government and non-government stakeholders.

[2] The appellant specified that she would prefer to receive the records in electronic format; requested detailed information regarding any withheld records; and requested a fee waiver on the grounds of financial hardship.

[3] The ministry acknowledged the request and advised the appellant that the

request would be split into three separate requests and they would process the requests in batches. The subject matter of this appeal is the part of the request relates to parts 3, 7 and 8 of the appellant's request set out above which the ministry labelled as batch 2. The ministry also asked the appellant to narrow the scope of her request by removing emails due to the significant search time for these types of records. Also, the ministry suggested removing *vaccine hesitancy* as a phrase in its search and instead use phrase *increasing immunization rates* to improve the number of responsive records.

[4] The ministry then gave notice to a number of affected parties (organizations whose interests may be affected by disclosure of the record) and it issued an interim decision to the appellant granting partial access to the records. The ministry withheld certain information on the basis of the mandatory exemption at section 12(1) (cabinet records), and the discretionary exemption at section 19 (solicitor-client privilege). The ministry also granted a partial fee waiver, reducing the fee.

[5] Following payment of the fee, the ministry issued a final decision in which it disclosed responsive records to the appellant withholding information on the basis of sections 21(1) (personal privacy) and 13(1) (advice or recommendation) in addition to sections 12(1) and 19 already claimed in its interim access decision. The ministry also withheld information on the basis that it was not responsive to the request.

[6] The appellant appealed the ministry's decision to the Information and Privacy Commissioner (IPC). A mediator was appointed to explore the possibility of resolution. During mediation, the appellant raised the issue of the discrepancy in the number of responsive records identified in the ministry's interim decision versus the number of responsive records she was provided with as a result of the ministry's final decision. The mediator confirmed that the ministry had erred in its identification of the number of responsive records in its interim decision. The appellant advised the mediator that further responsive records should exist relating to parts 3 and 8 of her request. The appellant also advised that she seeks access to the information identified as not responsive to her request.

[7] The mediator asked the ministry to conduct a further search for records and to provide a description of the searches and for it to reconsider the disclosure of information it deemed as not responsive. The mediator further asked the ministry to provide the relevant exemptions and subsections that it relied on to withhold the exempt information.

[8] The ministry conducted a further search and issued a revised decision granting access, in part, to information previously denied as not responsive to the request. The ministry advised the appellant that some of the information previously deemed as non-responsive to the request, had now been withheld pursuant to sections 13(1) and 14(1)(i) of the *Act*. The ministry also provided further detail of the exemptions claimed and provided the appellant with an updated index. The appellant informed the mediator that she is no longer appealing access to the information withheld under sections 19

and 21(1) but she continues to seek access to the information withheld under sections 12(1, 13(1), and 14(1)(i) as well as to information identified as not responsive to her request. The appellant also continues to believe that additional responsive records should exist and the reasonableness of the ministry's search was added to the scope of the appeal. The appellant also believes that the ministry inappropriately narrowed the scope of her request so the issue of scope and responsiveness was also added to appeal. Finally, the appellant raised the possible application of the public interest override in section 23 to the withheld information.

[9] As mediation did not resolve the appeal, the file was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*. The adjudicator assigned to the appeal decided to conduct an inquiry. He sought and received representations from the ministry and the appellant. Representations were shared in accordance with the IPC's *Code of Procedure*.

[10] The appeal was then transferred to me to continue with its adjudication.[2] In this order, I partly uphold the ministry's decision to withhold records and information under sections 12(1), 13(1) and 14(1)(i). I find that the information identified as not responsive is not responsive to the appellant's request. I find that the public interest override does not apply to the information and record I found exempt under section 13(1) and finally I find the ministry's search for records to be reasonable. I order the ministry to disclose the records and information that I find are not exempt.

RECORDS:

[11] The records at issue consist of emails and their attachments as set out in the Index of Records in the appendix to this order.

ISSUES:

A. Did the ministry properly identify parts of the records as not responsive?

B. Does the mandatory exemption at section 12(1) for Cabinet records apply to the records?

C. Does the discretionary exemption at section 13(1) for advice and recommendations apply to the records?

D. Does the discretionary exemption at section 14(1)(i) apply to records, 185, 189, 191, and 195?

[2] I have reviewed all the file materials and representations and have determined that I do not require further information before making my determination.

E. Did the ministry properly exercise its discretion in claiming sections 13(1) and 14(1)(i)?

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

G. Did the ministry conduct a reasonable search for records?

DISCUSSION:

Issue A: Did the ministry properly identify parts of the records as not responsive?

[12] The ministry identified four records (95, 163, 230 and 246) as not responsive to the appellant's request. Section 24 of the *Act* imposes certain obligations on appellants and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> …
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[13] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[3] To be considered responsive to the request, records must *reasonably relate* to the request.[4]

[14] The ministry submits that the appellant's request provided a clear description of the records sought and the responsive records fell into three categories and relate to three subject matters:

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[3] Orders P-134 and P-880.
[4] Orders P-880 and PO-2661.

1. *Information from other jurisdictions* on ways to increase immunization coverage/vaccination rates;

2. Assessments of the *proposed amendments to the Immunization of School Pupils Act* (*ISPA*); and

3. The specifics of the *education sessions* under the proposed amendments to the ISPA. [emphasis in the original]

[15] The ministry submits that it broadly interpreted the appellant's request in order to ensure that its search captured all the records reasonably related to the request. Further, the ministry submits that it contacted the appellant to clarify her request including proposing that the term "vaccine hesitancy" be removed as that term is rarely used by the ministry. The ministry states:

> Any references to vaccine hesitancy that might be included in a record would be found in a search for the more commonly used phrase: *ways to increase vaccination/immunization rates*. The ministry's suggestion was not an attempt to reduce the scope of the request; on the contrary, the purpose was to focus the search on the more common phrase. Nevertheless, since the appellant did not accept the ministry's suggestion, the ministry did in fact include the term *vaccine hesitancy* in its search – even though it knew that few records would contain this term.

[16] The ministry submits that the records that it identified as not responsive do not relate to the subject matters identified in the appellant's request.

[17] The appellant submits that because the ministry chose to divide her requests up into batches, the records it identified as not responsive may be responsive to other parts of her request but were never captured by the ministry's search for responsive records when it responded to the other batches of her request. Instead, the appellant submits that the ministry would have identified the record as a duplicate instead of as reasonably relating to her request. The appellant provided specific examples where this occurred. The appellant asks that I review records 95, 163, 202, 230 and 246 to determine if they are not responsive to any of the eight items in her request bearing in mind that her request should be given a liberal interpretation and ambiguities decided in her favour.

[18] The appellant also asked that I consider the fact that the ministry initially claimed that certain records were not responsive but then changed its decision and claimed either section 13 or 14(1)(i) for this information. The appellant provided specific examples which she submits is evidence of the ministry's claim of non-responsiveness to prevent access to certain information.

Analysis and finding

[19] I have reviewed the parties' representations and the records claimed not to be responsive by the ministry. For the reasons below, I find that the records and information identified by the ministry as non-responsive are not reasonably related to the appellant's request.

[20] In reaching this conclusion, I considered and agreed with the appellant's submission that if the ministry identified information as not responsive, I should review their decision considering whether the information would be responsive to any of the parts of her request and not just those parts that are being dealt with in this *batch* of records.[5]

[21] However, I also accept the ministry's submission that the appellant's request, not just those parts covered in this batch, was very specific and clear as to the information that she was seeking. The appellant was seeking particular information relating to records about immunization, including proposed amendments to *ISPA*. The appellant's request further sets out the breadth of the records she sought. I find that there was little room in the appellant's request for ambiguity in determining the records she is seeking.

[22] I give little weight to the appellant's argument that the ministry's change in decision is evidence of bad faith in its claim of non-responsiveness. As noted by the ministry in its reply representations, a claim of non-responsiveness is a valid claim under the *Act* and not evidence of an attempt to thwart access.

[23] Records 95, 163, 202, 230 and 246 do not relate to any of the eight parts of the appellant's request. As these records are not responsive to the appellant's request, I can not provide more detail about their contents. However, I confirm that these records are not responsive because they do not relate to immunization or vaccination and/or the proposed amendments to the *ISPA*. These records relate to other matters in the ministry's jurisdiction as well as other public health issues.

[24] Furthermore, I find that a liberal interpretation of the appellant's request would not result in a finding that these records would be responsive to the appellant's request. In reviewing these records, I reviewed all of the parts of the appellant's request and the subject matter she was seeking. I confirm that these records do not reasonably relate to the appellant's request and I uphold the ministry's decision to withhold these records on the basis that they are not responsive.

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[5] I note that PA18-100 deals with Batch 3 of the records relating to the appellant's request. That appeal is also currently before me.

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

[25] The ministry submits that the following records, in part or in full, are exempt under section 12(1): 5, 6, 13, 14, 16-18, 20, 21, 26, 27[6], 28, 30, 31, 33, 34, 36, 39, 46, 48, 67, 68, 70, 96, 120, 129-131, 133-135, 138-143, 145-151, 154, 157, 158, 160-162, 164[7], 166-170, 173, 183, 184, 192, 193, 204, 205, 212, 216, 217, 227, 236, 239, 243-245, 251, 254-257.

[26] Section 12(1) protects certain records relating to meetings of Cabinet or its committees. It reads, in part:

> 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,
>
> (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
>
> (b) record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
>
> (f) draft legislation or regulations.

[27] The Executive Council, which is more commonly known as Cabinet, is a council of ministers of the Crown and is chaired by the Premier of Ontario.

[28] Any record that would reveal the substance of deliberations of the Executive Council (Cabinet) or its committees qualifies for exemption under section 12(1), not just the types of records listed in paragraphs (a) to (f).[8]

[29] A record never placed before Cabinet or its committees may also qualify for exemption, if its disclosure would reveal the substance of deliberations of Cabinet or its committees, or would permit the drawing of accurate inferences about the deliberations.[9]

[30] The institution must provide sufficient evidence to show a link between the

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[6] During the inquiry, the ministry withdrew its claim for the slide deck that was attached to records 27 and 164. As the emails for these records has not yet been disclosed, I will consider the application of section 12 to the emails only.
[7] Ibid.
[8] Orders P-22, P-1570 and PO-2320.
[9] Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

content of the record and the actual substance of Cabinet deliberations.[10]

Ministry's representations

[31] The ministry submits that the very nature of the appellant's request is for Cabinet records as she specifically requested records that relate to the proposed amendments to the ISPA:

> All records which consider the strengths and weaknesses of proposed amendments to *ISPA*
>
> All records which discuss the details of education sessions proposed under said amendments to *ISPA*

[32] The ministry explains that all proposed legislative amendments are submitted to Cabinet and the materials that accompany the proposed amendments contain discussions of policy options, recommendations and/or background explanations and analysis related to the amendments under consideration. Accordingly, the ministry submits that any records responsive to the appellant's requests (set out above) would necessarily and inevitably *reveal the substance* of Cabinet deliberations. The ministry goes on to explain that, in responding to the request, it searched for Cabinet records in particular because those records would contain the most relevant and responsive information about the proposed *ISPA* amendments that are of interest to the appellant.

[33] For the records withheld in full under section 12(1), citing Orders P-22, P-1570 and PO-2320, the ministry submits that under the introductory wording of section 12(1) any record that would reveal the substance of Cabinet deliberations qualifies for exemption. Further, the ministry submits that the record does not need to be placed before Cabinet or its committees to qualify for exemption if its disclosure would reveal the substance of deliberations of Cabinet or its committees or would permit the drawing of accurate inferences regarding the deliberations.

[34] The ministry submits that all of the records for which it claims that section 12(1) applies reflect the substance and content of a Cabinet committee's deliberations on the proposed amendments to the *ISPA* as they were all either submitted to, prepared for submission to, or used to develop submissions to Cabinet. In addition to the introductory wording of section 12, the ministry claims that sections 12(1)(a), (b) or (f) also apply to the records. The ministry states:

> Records 14, 131, 135, 158 and 236 contain Cabinet minutes. These records clearly fall within the exemption under section 12(1)(a), as well as the opening words of section 12(1).

[10] Order PO-2320.

> Records 5, 6, 16, 18, 20, 21, 46, 48, 67, 70, 120, 129, 130, 131, 138, 142, 146, 147, 149, 150, 151, 157, 162, 167, 173, 204, 205, 216, 227 and 243 contain recommendations and/or policy options developed for submission to Cabinet or its committees, as such they too are exempt under section 12(1)(b) and the opening words of section 12(1).
>
> Many of the records contain discussions of the policies for which the ministry was seeking Cabinet's approval, and include recommendations as well. For example, records 142, 146 and 147; the final versions of these records were included in a Cabinet submission.
>
> Records 14, 67, 216 and 227 fall squarely within 12(1)(f) as they contain draft legislative amendments to the ISPA.
>
> Some records, such as record 145, contain information that was used to develop submissions.

[35] For the partial records that were withheld under section 12(1), the ministry submits that records 26, 36, 68, 133, 134, 148, 154, 168, 184 and 212 qualify for exemption under the introductory wording of section 12(1). The ministry notes that portions of these records relate to the Cabinet submission on amendments to the *ISPA* such that disclosure would reveal the substance of deliberations of Cabinet or its committees.

[36] The ministry was given an opportunity to respond to the appellant's representations, which are summarized below. The ministry disputes that it was required to identify the specific paragraph of section 12(1) that applied to each of the withheld records where that exemption was claimed. Finally, the ministry addressed the mandatory exception in section 12(2)(b) to section 12. The ministry submits that section 12(2)(b) does not apply because:

> …The records withheld under section 12 were prepared for a Cabinet which no longer exists because of the change in government in June 2018. Consequently, the Ministry submits it has no discretion to disclose or consider seeking Cabinet's consent to disclose these records.

Appellant's representations

[37] The appellant submits that in its access decisions to her, the ministry failed to provide a clear and helpful index of record setting out the specific paragraph for section 12 that was being claimed for each record. The appellant argues:

> The ministry failed to provide extensive evidence with respect to each document for which it claimed a section 12 exemption. There was no affidavit explaining details, such as how each document would reveal the substance or Cabinet deliberations, in choosing to rely on broad, vague

> statements which fail to discuss specific records, the ministry failed to meet the burden of proving the exemptions.

[38] The appellant believes that the ministry applied section 12 in an overly-broad manner and argues that a covering email or attachments of the records at issue may not be exempt under section 12 as their disclosure would not reveal the substance of deliberations and should be disclosed to her. The appellant submits that where documents were shared with people who are not government employees or were distributed outside the government to various stakeholders or were created by stakeholders – these documents should not be exempt under section 12.

[39] The appellant also disputes the ministry's position that the very nature of her request meant that only Cabinet records would be identified as responsive. The appellant suggests that I consider whether the records at issue are actually exempt and not simply assume that the records are exempt under section 12.

[40] The appellant also made specific representations regarding the application of the introductory wording of section 12(1), and sections 12(1)(a), (b), (c), (e) and (f). I have reviewed these representations but do not set them out here. Essentially, the appellant argues that I should consider whether the records could be severed to disclose information to her that would not reveal the substance of Cabinet deliberations. The appellant also notes that for those records claimed exempt under sections 12(1)(c) and (e), once background information is used to develop a submission it can no longer be exempt once Cabinet renders a decision and the decision is implemented.

[41] Lastly, the appellant submits that the ministry's reasons for its decision not to seek Cabinet's consent to disclose the records are not compelling.

Analysis and findings

[42] As I noted above, any record that would reveal the substance of deliberations of the Executive Council (Cabinet) or its committees qualifies for exemption under section 12(1), not just the types of records listed in paragraphs (a) to (f). The ministry claims that some of the records are exempt under the introductory wording, while others are exempt under specific paragraphs (paragraphs (a), (b) and (f)). I disagree with the appellant that the ministry has not been clear in which parts of section 12 it has applied to the records.

[43] For section 12(1)(a), "agenda" means a specific record created as an official document of Cabinet Office that identifies the actual items to be considered at a particular meeting of Cabinet or one of its committees. An entry in a different record that describes the subject matter of an item considered or to be considered by Cabinet is not usually considered to be an agenda.

[44] For a record to be exempt under section 12(1)(b), a record must contain policy options or recommendations, and must have been either submitted to Cabinet or its

committees or at least prepared for that purpose. Such records remain exempt after Cabinet makes a decision.

[45] For a record to be exempt under section 12(1)(f), the record must consist of draft legislation or regulations.

[46] I have reviewed the parties' submissions and the withheld records. For the reasons below, I find the records at issue are exempt under section 12(1), with the exception of records 27 and 164. For the appellant's information, I have added a description of the withheld records in the index which is in the appendix to this order.

[47] 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 at issue and the actual substance of Cabinet deliberations.[11] Previous orders of this office have found that:

- *deliberations* refer to discussions conducted with a view towards making a decision;[12] and

- *substance* generally means more than just the subject of the meeting.[13]

[48] Based on my review of the records and the ministry's representations, I find I have sufficient evidence to find that the introductory wording in section 12(1) applies to exempt records 13, 14, 26, 28, 30, 31, 33, 34, 36, 39, 68, 96, 133-135, 143, 145, 148, 154, 158, 160-161, 166, 168-170, 183, 184, 192, 193, 212, 217, 236, 239, 244, 245, 251, 254-257 from disclosure. Specifically, I find that the detailed nature of the email records, the nature and content of the attachments and the ministry's representations all demonstrate that disclosure of the records would reveal the substance of deliberations of Cabinet and/or its committees.

[49] I also find that subsections (a), (b) and (f) of section 12(1) apply the records for which the ministry made such claims. Having reviewed the records, I make the following findings:

- Records 14, 131, 135, 158 and 236 all contain Cabinet minutes and are therefore exempt under section 12(1)(a).

- Records 5, 6, 16, 18, 20, 21, 46, 48, 67, 70, 120, 129, 130, 131, 138, 142, 146, 147, 149, 150, 151, 157, 162, 167, 173, 204, 205, 216, 227 and 243 all contain policy options and recommendations for submission to Cabinet or its committees and are exempt under section 12(1)(b).

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[11] Order PO-2320.
[12] Order M-184.
[13] Orders M-703 and MO-1344.

- Records 14, 216 and 227 all contain draft legislative amendments to the *ISPA* and are exempt under section 12(1)(f).

[50] Regarding record 67, the ministry's representations suggest that it contains draft legislation. It does not contain draft legislation but I accept that section 12(1)(b) applies to it because it contains recommendations developed for submission to the Legislation and Regulation Committee of Cabinet.

[51] For the records withheld under the introductory wording of section 12(1), the ministry must provide sufficient evidence to show a link between the content of the record and the actual substance of Cabinet deliberations.[14]

[52] The appellant does not dispute that there were proposed amendments to be made to the *ISPA* and that the content of the records at issue may relate to these amendments. The appellant submits that the ministry did not provide sufficient information about the records and evidence to establish the application of the introductory wording of section 12(1). I agree with the appellant that the ministry's representations do not provide detailed descriptions or summaries of the records, and the deliberations of Cabinet or its committees that would be disclosed if the records were found not to be exempt. However, in the circumstances of this appeal, the records themselves provide sufficient evidence to establish the necessary link with actual substance of Cabinet deliberations.

[53] As stated above, the records are emails with attachments and I have reviewed them. The emails contain detailed discussions which describe:

- The Cabinet or committee meeting that was being prepared for including questions raised by Cabinet Office, the Minister of Health or staff members about the proposed amendments.

- Back and forth discussions about the documents that needed to be reviewed or prepared for Cabinet and committee meetings.

- Discussions about changes required to be made to documents relating to aspects of the proposed amendments as a result of the deliberations at Cabinet or committee meetings.

- Feedback from the Ministry of Education about the proposed amendments and the changes required to be made to Cabinet submissions.

[54] Considering the content and the subject matter of the emails and their attachments, and the context in which they were prepared, it is evident to me that disclosure of them would disclose the actual substance of deliberations of Cabinet or its committees and its committees or permit the accurate inference of the substance of the

[14] Order PO-2320.

deliberations. As stated, the government at the time was considering amendments to the *ISPA.* Any such amendments would have required Cabinet approval. In the circumstances, and given the timing of the creation of the records at issue, I have no difficulty concluding that their disclosure would reveal the substances of Cabinet's deliberations about the proposed amendments.

[55] The appellant also argues that the ministry applied the section 12(1) exemption too broadly and may have applied it to records that would not disclose the substance of deliberations of Cabinet or its committees. She also states that some of the records were shared outside of government. I observe that, depending on the context, records shared outside of government may still reveal the substance of Cabinet's deliberations. However, in any event, and in order to address the appellant's concern, I observe that the emails were not sent or received by individuals outside the government. The emails do not include stakeholder information or submissions. The emails are all amongst ministry staff, Ministry of Education staff, and Cabinet Office staff.

[56] As stated above, I find that records 27 and 164 are not exempt under the introductory wording of section 12(1) or any of its paragraphs. Records 27 and 164 consist of emails and an attached slide deck. The attached slide deck has been disclosed to the appellant and I am unable to find that disclosure of the email would disclose the actual substance of deliberation of Cabinet or its committees. Nor am I able to find that disclosure of these emails would permit the inference of the substance of such deliberations. As these emails are not exempt under section 12(1), and the ministry has not claimed any discretionary exemptions for them nor do any mandatory exemptions apply, I will order the ministry to disclose these emails to the appellant.

[57] I have reviewed the exceptions to section 12(1) in section 12(2) and find that neither apply. Only section 12(2)(b) may possibly apply; it states:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,
>
> > (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

[58] The head of an institution is not required under section 12(2)(b) to seek the consent of Cabinet to release the record. However, the head must at least turn their mind to it.[15]

[59] Only the Cabinet in respect of which the record was prepared can consent to the disclosure of the record.[16]

[60] While the appellant takes issue with the ministry's reasons for not seeking

[15] Orders P-771, P-1146 and PO-2554.
[16] Order PO-2422.

consent, I accept that given the fact that the records withheld under section 12(1) were prepared for a Cabinet which no longer exists, the ministry decided that it would not endeavour to seek the former Cabinet's consent to disclose the records at issue. I accept that the ministry turned its mind to Cabinet consent.

[61] Lastly, the appellant also asks that I consider whether the records could be severed under section 10(2) of the *Act* to disclose any information to her that is not exempt under section 12(1). I have considered whether the records could be severed and find that they cannot. The records contain only information that is exempt under section 12(1).

Issue C: Does the discretionary exemption at section 13(1) apply to the records?

[62] The ministry submits that record 200 is exempt, in full, under section 13(1) and that records 68, 122, 123, 126, 128, 144, 152, 155, 156, 210, 211 and 214 are exempt, in part, under section 13(1). Section 13(1) of the *Act* 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.

[63] Section 13(1) of the *Act* exempts certain records containing advice or recommendations given to an institution. This exemption aims 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.[17]

[64] Section 13(1) applies if disclosure would "reveal" advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.

[65] The relevant time for assessing the application of section 13(1) is the point when the public servant or consultant prepared the advice or recommendations. The institution does not have to prove that the public servant or consultant actually communicated the advice or recommendations. Section 13(1) can also apply if there is no evidence of an intention to communicate, since that intention is inherent to the job of policy development, whether by a public servant or consultant.

Representations

[66] The ministry submits that in *John Doe* v. *Ontario (Finance)*, cited below, the

[17] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

Supreme Court of Canada held that advice and recommendations have distinct meanings. Recommendations, which can be expressed or inferred, refer to material that relates to a suggested course of action for the ministry to accept or reject. The Supreme Court of Canada held that advice under section 13(1) has a broader meaning than recommendations. Advice involves an evaluative analysis of information. Advice includes policy options, which are lists of alternative courses of action, and the view or opinions of a public servant relating to the policy options. The record does not need to be communicated in order for section 13(1) to apply.

[67] Further, the ministry notes that this office has adopted the analysis from *John Doe* in Orders PO-3365, PO-3734 and PO-3496. The ministry submits that according to Reconsideration Order PO-3470-R, the Supreme Court of Canada's holding has changed how the IPC applies and interprets the section 13(1) exemption. This is set out in paragraphs 57 and 58 above.

[68] Finally, the ministry submits that *advice* also includes information on how the institution "should view a matter" and "the parameters within which a decision should be made" as discussed in *John Doe* and reiterated in Order PO-3734.

[69] Regarding the specific records for which section 13(1) is claimed, the ministry states the following:

- Record 200 is an email in which recommendations regarding the proposed amendments to the *ISPA* are discussed. The entire email relates to the recommendations, such that disclosure of any part of the email would reveal the content of the recommendations.

- Record 68 includes a number of attachments. The portions containing analyses of policy options fall squarely under section 13(1) based on the *John Doe* decision.

- The severed portions of records 122, 123, 128, 144 and 152 contain advice of ministry staff. The finalized versions of these records were disclosed in record 168.

- Portions of records 126, 155 and 156 were severed because they contain advice as well as detailed analyses of policy options.

- The severed portion on pages 1 and 7 of record 210 would, if disclosed, reveal a recommendation. The same information was severed from records 211 and 214.

[70] The ministry states that since the severed portions of the records contain views, opinions, and analyses of various policy options they fall within the ambit of advice under section 13(1) as described in *John Doe*. And the disclosure of this information would reveal or permit the drawing of accurate inferences regarding the advice and/or recommendation given by staff.

[71] The ministry submits that none of the mandatory exceptions in section 13(2) apply to the withheld information as the records do not contain any of the specified type of information listed in section 13(2). The ministry notes that while some of the severed portions contain factual information, that information is linked to the advice and/or recommendation being provided. In Order PO-2097, the ministry notes that the IPC found the following and this applies to the withheld information in the present appeal:

> …the factual information relied upon by the reviewers is inextricably intertwined with the advice and recommendations being provided to the ministry…it is not possible to separate the factual information from the advice and recommendations…and [therefore] the exception in section 13(2)(a) has no application to it."

[72] The appellant submits that there are a number of types of information that have been found by this office to not qualify as advice or recommendation under section 13(1) including:

- Factual or background information
- Analytical information
- Evaluative information
- Notification or cautions
- Views
- Draft documents
- A supervisor's direction to staff on how to conduct an investigation[18]

[73] The appellant submits that it is highly unlikely that all of record 200 which the ministry claimed is fully exempt under section 13(1) contains advice or recommendation. The appellant submits that it more likely that only a portion of record 200 is exempt under section 13(1) and the remaining parts may include factual information which is excepted from the exemption in section 13(2)(a).

[74] With respect to the records 68, 122, 123, 126, 128, 144, 152, 155, 156, 210, 211 and 214 which were withheld in part, appellant submits that it is her belief that the ministry applied the section 13(1) exemptions broadly and even the withheld parts of these records do not contain advice or recommendations. The appellant notes that while the ministry submits that there are instances where it may not be possible to

[18] Order P-434; Order PO-1993, Order PO-2115, Order P-363, upheld on judicial review in *Ontario (Human Rights Commission)* v. *Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

separate the factual information from the advice or recommendation, she notes that the ministry did not point to a specific example. The appellant also submits that the ministry did not discuss the possible application of the other exceptions in section 13(2) and asks I consider their possible application to the withheld information.

[75] Lastly, the appellant submits that I should carefully consider whether the ministry's claim of section 13(1) to withhold information in records 210, 211 and 214 is legitimate since it had initially claimed this information was not responsive to the request. The appellant notes that the withheld not-responsive information was clearly responsive and she submits that the ministry may be trying to shield the information in these records from disclosure by claiming the application of the section 13(1) exemption.

Analysis and finding

[76] Based on my review of the parties' representations and the records themselves, I find that section 13(1) applies to the withheld information.

[77] For records 68, 122, 123, 126, 128, 144, 152, 155, 156, 210, 211 and 214[19] which were withheld in part, I find that the withheld information consists of the following:

- Record 68 – A list of options and a detailed discussion of their details and considerations.
- Record 122 – A draft document with comments and an email chain containing a discussion about the draft document.
- Record 123 – A draft document with comments and an email chain regarding the draft document, circulated for comment and approval.
- Record 126 – A draft briefing note with attached chart containing list of options and proposed actions circulated for comment and approval.
- Record 128 – A draft document with comments circulated for comment and approval
- Record 144 – A draft document with comments circulated for comment and approval.
- Record 152 – A draft document with comments circulated for review.

[19] The ministry's representations refer to a Record 215 but the ministry's index notes that Record 215 was disclosed in full. The ministry's index also refers to Record 214 which was withheld under section 13(1). I have considered whether Record 214 was exempt under section 13(1).

- Record 155 – A draft document with comments including chart with list of options and proposed actions. Email contains questions from the Minister.
- Record 156 – A draft document with comments including chart with list of options and proposed actions.
- Record 210 – A draft version of a document containing edits circulated for review and signature.
- Record 211 – A draft version of a document containing edits circulated for review.
- Record 214 – A final version of a document with email containing suggested course of action regarding the document.

[78] Record 200 is an email chain amongst staff at the ministry containing advice regarding vaccine requirements.

[79] I find that disclosure of all of these records would reveal the advice or recommendation sought or given by staff at the ministry regarding the vaccine requirements and the *ISPA* amendments. All of the records at issue are emails with attached documents. In each case, the emails expressly refer to the attached documents and contain recommendations and discussion about the substance of the draft attached documents. I find that all of the records are exempt under section 13(1) of the *Act*.

[80] Given the nature of the records at issue, emails with attached documents, I also considered whether any of the pages of the records or emails could be severed or would be subject to the mandatory exceptions to section 13(1) set out in section 13(2). In particular, I considered whether there was factual information in the records that would be excepted from exemption under section 13(2)(a). Based on my review of all of the withheld information, I find that the factual information in the records is inextricably intertwined with the advice and/or recommendation such that I am unable to find that the exception in section 13(2)(a) applies. Furthermore, because the factual information and the advice and/or recommendations are intertwined, I am unable to find that the records can be severed in such a way to disclose information to the appellant.

[81] Accordingly, I find section 13(1) applies to the records for which it was claimed and I will consider the ministry's exercise of discretion below.

Issue D: Does the discretionary exemption at section 14(1)(i) for security apply to records 185, 189, 191, and 195?

[82] The ministry submits that section 14(1)(i) applies to part of record 195. Record 195 is an email with an attached document that is approximately 230 pages including

the appendix.

[83] Also, the ministry's index indicates that teleconference information in records 185, 189, and 191 was withheld under section 14(1)(i).

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

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required

[85] The parties resisting disclosure of a record cannot simply assert that the harms under section 14 are obvious based on the record. They must provide *detailed* evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 14 are self-evident and can be proven simply by repeating the description of harms in the *Act.*[20]

[86] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[21] However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.[22]

[87] Although the section 14(1)(i) provision is found in the section of the *Act* dealing specifically with law enforcement matters, it is not restricted to law enforcement situations and can cover any building, vehicle or system which requires protection.[23]

Representations

[88] The ministry submits that record 195 contains detailed descriptions and instructions on how to perform data entry in a data management program called Panorama. The ministry explains that Panorama is a closed system not available to the public and the disclosure of record 195 could reasonably be expected to endanger the security and integrity of the system or the ministry's procedures established for the protection of personal health information related to immunization held within the Panorama system.

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[20] Orders MO-2363 and PO-2435.
[21] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[22] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc.* v. *Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.
[23] Orders P-900 and PO-2461.

[89] The ministry cites Order PO-2391 in support of its position that the IPC has found that information pertaining to computer and operating systems can qualify for exemption under section 14(1)(i). In Order PO-2391, the IPC found that disclosure of the responsive records relating to a request for manuals, procedures, guides and directives relating to the Registrar General's computer system could reasonably be expected to endanger the security of the Office of the Registrar's computer systems and/or operational procedures. The ministry notes:

> Because the system protected a broad range of personal information collected under the *Vital Statistics Act*, the IPC was satisfied that protection of this information is reasonably required to prevent tampering and unauthorized modification and that disclosure of detailed technical information about the workings of the system or procedure established for the protection of information could be expected to lead to harms pursuant to section 14(1)(i).

[90] The ministry submits that the same rationale applies to the protection of record 195 and protection of the information in the record is necessary to safeguard the personal health information contained in the system. The ministry submits that disclosure of record 195 could result in knowledgeable persons using the technical information in the record to manipulate and undermine the integrity of Panorama, thereby disrupting the system's ability to conduct population surveillance for vaccine preventable diseases. The ministry submits that it would also threaten the security of the personal health information contained in Panorama. The ministry states:

> If knowledgeable individuals gain access to record 195 once it is disclosed to the appellant, they could use the information in the record to target specific data through electronic sabotage or computer attack, thereby undermining the Panorama system. In addition, if the system is successfully infiltrated, a person could use the information in record 195 to learn how to access an individual's personal health information relating to their immunization history, thereby undermining the public health unit's ability to protect this personal health information from unauthorized access, as they are required to do under the *Personal Health Information Protection Act, 2004* (*PHIPA*).

[91] Finally, the ministry argues that disclosure of record 195 could reasonably be expected to also undermine the functionality of Panorama. The ministry notes that it is important to maintain the integrity of the data in Panorama as inaccurate data would disrupt its ability to perform population surveillance for vaccine preventable diseases. In addition, any manipulation of system or its data could interfere with public health units' ability to correctly assess who is at risk for contracting vaccine preventable diseases and to hold mass immunization clinics.

[92] The appellant submits that if record 195 is exempt under section 14(1)(i) then

she would expect it to contain actual information about how to log into Panorama including passwords and URLs. The appellant states, "I submit that just because entry-points to Panorama may be worthy of protection, does not mean that information about how to enter certain immunization data into the system is something covered by section 14(1)(i)."

[93] The appellant submits that she does not believe that record 195 contains information about how to hack into Panorama or how to gain access to the system. Therefore, she notes that even if Panorama is a system that holds personal health records, it does not mean that any document that mentions Panorama or the data that it holds should be exempt under section 14(1)(i). The appellant further argues that the scenario set out in the ministry's representations about the possible harm on disclosure of the information is speculative and the ministry has failed to explain what information in record 195 could make it easier for individuals to infiltrate the Panorama system.

[94] Finally, the appellant submits that because the ministry initially identified information in record 195 as not responsive and then later identified the information as responsive but exempt under section 14(1)(i), the ministry's claim of the exemption is suspect and should be scrutinized carefully. The appellant submits that I should carefully consider whether the withheld information in record 195 could be severed to disclose to her any information that is not exempt under section 14(1)(i).

Analysis and finding

[95] I find that pages 2 – 236 of record 195 are exempt under section 14(1)(i). While the ministry submits that these withheld pages contain standards and best practices for data entry in Panorama, I would more accurately describe these withheld pages as a manual on how to use and access Panorama.

[96] I find pages 2 – 236 contain detailed descriptions and instructions on how to access and use Panorama. Many of the withheld pages include screen shots of the actual system and how data would appear in the system including an explanation of the type of data to be entered into specific fields. Based on the highly-specific and technical nature of the withheld information, I accept the ministry's submission that disclosure of the withheld information could reasonably be expected to endanger the security of the Panorama system and its procedures. Furthermore, I accept that the data to be protected – immunization information relating to various public health units, is information where protection is reasonably required.

[97] I sympathize with the appellant's scepticism of the ministry's claim of section 14(1)(i) for the hundreds of withheld pages. However, given the level of technical information and the specific detail of instructions and screen shots of the Panorama system, I find that the ministry's claim of section 14(1)(i) for record 195 to be reasonable.

[98] Finally, I considered whether any of pages 2 – 236 could be severed to disclose information to the appellant. I note for the appellant's benefit that the instructions and specifications contained in record 195 do not relate to immunization only but contains information about how to correctly enter and record data relating to individuals. Based on my review of the withheld information, I find that it is all exempt under section 14(1)(i) and cannot be severed.

[99] The ministry also claimed that section 14(1)(i) applies to the withheld teleconference information in records 185, 189 and 191. The ministry's representations do not address the possible harm that could reasonably be expected to occur if this information is disclosed. Based on my review of the records, it is not clear to me that disclosure of the teleconference code information could reasonably be expected to endanger the security of a system or procedure established for the protection of items, for which protection is reasonably required. Accordingly, I find section 14(1)(i) does not apply to the withheld information on these records and will order them disclosed.

[100] Accordingly, as I have found pages 2 – 236 of record 195 exempt under section 14(1)(i), I will proceed to consider the ministry's exercise of discretion in claiming this exemption below.

Issue E: Did the ministry properly exercise its discretion in claiming sections 13(1) and 14(1)(i)?

[101] The section 13(1) and 14(1)(i) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[102] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example: it does so in bad faith or for an improper purpose; it takes into account irrelevant considerations; or, it fails to take into account relevant considerations. In any of these cases, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[24] This office may not, however, substitute its own discretion for that of the institution.[25]

Representations

[103] The ministry submits that it properly exercised its discretion in claiming sections 13(1) and 14(1)(i) to withhold the records at issue. In exercising its discretion to claim section 13(1), the ministry submits that it considered:

- The importance of protecting the free, full, and frank review of all policy options and related considerations by ministry staff

[24] Order MO-1573.
[25] Section 54(2).

- The ministry only severed one record in full based on the exemption
- Finalized copies of a number of severed records were provided to the appellant.

[104] In exercising its discretion to claim section 14(1)(i), the ministry submits that it considered:

- The importance of protection personal health information
- Public interest in maintaining the integrity of the data stored in Panorama, considering the system is used to assess who may be at risk for contracting vaccine preventable diseases
- The ministry consistently treats technical records as confidential.

[105] The appellant submits that the ministry has failed to demonstrate that it properly exercised its discretion in withholding the records at issue under sections 13(1) and 14(1)(i). The appellant submits that the ministry did not provide evidence of its exercise of discretion nor did it provide an affidavit of its head regarding the factors considered in exercising its discretion.

[106] The appellant submits that it is evident to her that the ministry used an extremely broad interpretation of the exemptions when applying the exemptions. The appellant submits that this is demonstrated in the ministry's representations and "…shown by the unusual interpretation suggested for section 14(1)(i)."

[107] The appellant states that the ministry only weighed considerations that favour keeping information sheltered rather than those factors favouring disclosure. She submits that the ministry failed to consider the following factors:

- The values behind access legislation and the importance of making information available to the public, such as a citizen's right to access to information created and obtained at taxpayer's expense, and the need to hold government accountable;
- The right to access with respect to legislative amendments to the *ISPA*. These amendments impact the right to education. They also place limits on freedom of religion and conscience by imposing limits on the right to claim conscientious and religious exemptions; and
- The fact that, by the time access decisions were made, the proposed amendments have been made and implemented and the information lost at least some of its sensitive nature.

Analysis and finding

[108] I find the ministry properly exercised its discretion in claiming section 13(1) and 14(1)(i) to withhold the records at issue. I find the ministry did not exercise its discretion in bad faith or that it improperly exercised its discretion in failing to consider those considerations set out in the appellant's representations.

[109] While I am sympathetic to the appellant's argument that it is her belief that the ministry broadly interpreted the claimed exemptions and this resulted in a large number of records being withheld from her, I wish to emphasize that the *Act* also recognizes that *necessary* exemptions from the right of access should be limited and specific. There is nothing improper about the ministry claiming exemptions that it has decided should apply to the records at issue. Furthermore, I have reviewed the records and the claimed exemptions and find that the exemptions were applied in a limited and specific manner given the nature of the withheld information.

[110] Accordingly, I uphold the ministry's exercise of discretion.

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

[111] The appellant submits that there is a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13(1) exemption. Section 23 of the *Act* states:

> An exemption from disclosure of a record under sections 13, 15, 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.

[112] 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.

[113] 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 the appellant because the appellant has not had the benefit of reviewing the records before making her submissions in support of her position that section 23 applies. Accordingly, I will consider whether there could be a compelling public interest in disclosure of the records which clearly outweighs the purpose of the section 13(1) exemption.[26]

Representations

[114] The appellant submits that the ministry must bear the burden of proving that there is not a compelling public interest in disclosure of the records at issue. To that

[26] Order P-244.

end, the appellant submits that her access request demonstrates the purpose she sought the records which was why the government chose to propose the legislation. The appellant states:

> I asked to know what other options the government has considered. I asked to know about the legal implications of the proposed legislation, including Charter and Human Rights implications and asked about stakeholders' involvement and input in the process. I also asked to learn about the cost and other details.

[115] The appellant submits that she believes it is in the public interest to get as much information as possible about the issues identified in her request because, she states:

> The legislation affects health and the right to attend schools. The legislation shows what the government's priorities are. I believe that there is a compelling public interest in learning why the government chose to address this particular issue and not other pressing public health issues, such as, for example, driving under the influence issues, distracted-driving or the growing number of children with life-threatening food allergies.

[116] The appellant submits that the public has a compelling interest in learning about government priorities and spending. The public has a right to learn as much as possible about government's spending of taxpayer's money. The appellant submits that it is her belief that some of the withheld information in records 210, 211 and 214 relate to the cost of the proposed amendments.

[117] The ministry submits that there is no compelling public interest in disclosure of the information it has withheld under section 13(1). The ministry acknowledges that there is public interest in vaccinations – and more particularly their safety. The ministry submits that the specific information withheld under section 13(1) would not be the information that would address the public interest in vaccinations. Furthermore, the withheld information wold not "inform the citizenry about the activities of their government or its agencies" or add to the information the public "has to make effective use of the means of expressing public opinion or to make political choices."

[118] The ministry submits that a significant amount of information has already been disclosed, specifically, the finalized media products on *Immunization 2020* were released to the public. The ministry notes that the draft media products would not better inform the public about activities of government; all of the relevant information from the drafts is in the finalized version.

Analysis and Finding

[119] 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.[27] 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.[28]

[120] Based on my review of the information withheld under section 13(1) and the parties' representations, I find that section 23 does not apply. I accept the appellant and the ministry's position that there is a public interest in vaccines and immunization policies undertaken by the government. I further accept the appellant's position that there is a public interest in the government's decision to pursue immunization policies over other public health concerns. I accept that the choice of the government to pursue one policy over another is an issue of accountability for the citizens in this province. However, I find that the public interests identified by the appellant are not compelling and the appellant has not established that the public interests she has identified are those that rouse strong interest or attention.[29]

[121] However, even if I found there was a compelling public interest, I agree with the ministry's position that the information withheld under section 13(1) would not serve the purpose of shedding light on the public interest identified by the appellant. The information withheld under section 13(1), relates to the comments and advice of ministry staff regarding draft documents. I find that disclosure of the withheld information would not serve the purpose of enlightening the appellant on the government's decision to pursue immunization policies over other public health matters.

[122] Accordingly, I find that section 23 does not apply to the information withheld under section 13(1).

Issue G: Did the ministry conduct a reasonable search for records?

[123] Where the appellant claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[30]

[124] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request. [31] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to

[27] Orders P-984 and PO-2607.
[28] Orders P-984 and PO-2556.
[29] Order P-984.
[30] Orders P-85, P-221 and PO-1954-I.
[31] Orders M-909, PO-2469 and PO-2592.

identify and locate all of the responsive records within its custody or control.[32]

[125] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[33] that is, records that are "reasonably related" to the request.[34]

[126] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[35]

The ministry's representations

[127] The ministry provided representations in support of its search.

[128] The ministry submits that it searched multiple holdings including network shared drives, Microsoft Outlook e-mail folders, and physical hard copy files. Due to the batching of the appellant's requests, records were separated into three categories and identified as responsive to one of the three batches. The ministry submits that many of the records were responsive to more than one of the requests.

[129] The ministry states that for electronic records, searches were conducting using the following broad search terms. The ministry notes that its search terms were not limited to the following:

- Immunization [*][?]
- "Immunization of School Pupils Act"
- "ISPA"
- Immunization rate[s]
- Ontario immunization rate[s]
- Vaccination coverage rate[s]
- Reduce vaccine hesitancy
- Vaccine hesitan[*][?]
- Strength AND "ISPA"

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[32] Order MO-2185.
[33] Orders P-624 and PO-2559.
[34] Order PO-2554.
[35] Order MO-2246.

- Weakness AND "ISPA"
- ISPA amendment[s]
- ISPA education[?]
- Education session[*][?]
- Education module[*][?]
- "Public health unit" education module AND vaccine[*][?]

[130] The ministry clarified that where appropriate, wildcard searches were used for Shared Drive searches in Windows Explorer (e.g. immuniz? And immuniz*). And where appropriate, partial string searches were used for MS Outlook searches under the *Field*, *Condition*, and *Value* tabs (e.g. including *ISPA* under the *Value* heading).

[131] The ministry submits that the Assistant Deputy Minister's office identified the following program areas and staff whose records were searched for responsive records:

- Director, Health Protection and Surveillance Policy and Programs Branch (HPSPPB)
- Manager, Assistant Deputy Minister's Office, HPSPPB, Population and Public Health Division
- Immunization Policy and Programs Unit
    - Senior Program/Policy Advisor
    - Senior Nurse Consultant (three staff members)

The appellant's representations

[132] The appellant submits that she was not contacted to clarify her request and while the ministry made two suggestions to narrow the request, she did not accept those suggestions. The appellant states that the ministry interpreted her request literally and partially and that there were certain deficiencies in search terms and the staff members whose record holdings were searched.

[133] Regarding item 1 in this batch of her request, the appellant submits that the ministry responded literally and states:

> For example, the first issue covered by batch 00081 is my request for records which discuss "solutions employed by or considered by other jurisdictions" to increase immunization rates or reduce hesitancy. I know that, prior to choosing a solution such as the Education Session, the

> Government typically conducts research into solutions employed by other jurisdictions. I assume that, prior to choosing the Education Session solution, the ministry had researched solutions in other Canadian provinces, in various U.S. states and in other western countries. I expected to see records that discuss rules in other Canadian provinces. I also expected to find records discussion the details of solutions employed by the state of Oregon and the state of Washington (States that have their own education session) Mississippi, California, West Virginia (states that have stringent immunization exemptions), New York and Australia, to name a few. The ministry knows what jurisdictions it has researched in preparation for ISPA amendments and should have been able to search the specific names of all the jurisdictions (provinces, states and countries) that it had looked into.

[134] The appellant suggests the following searches that should have been used to locate the information she was looking for:

- A search that combines the term "education session" and names of specific jurisdictions (Oregon, Washington, New York, etc.) which the Assistant Deputy Minister and/or her senior staff knew that they researched.

- Also a search that combines names of specific jurisdictions researched together with terms re "increase vaccination" or "increase immunization" or "reduce hesitancy"

[135] The appellant submits that these searches were not conducted and notes that the records she received included very few references to some of these jurisdictions. The appellant submits she was looking to get records containing a detailed discussion and comparison but these records were not provided. The appellant submits that given the way the ministry conducted its searches she is not surprised that responsive records were not located.

[136] The appellant submits that when she asked for records "which consider the strengths and weaknesses of proposed amendments to *ISPA*", the ministry should have included the following phrase *strengths or weaknesses* together with a term that relates to reporting to the medical health officer (or to Public Health). The appellant submits that in not including any terms that discuss this issue, the ministry unilaterally narrowed the scope of her request.

[137] The appellant submits that the search terms used by the ministry to conduct its computer searches was deficient and states:

- It appears that the terms *immunization* and *vaccination* were not used interchangeably. For example, there was a search of "vaccination coverage

rates" but no equivalent search of "immunization coverage rates". (only Ontario immunization rates was search[ed])

- It does not appear that a search for *increase* and *vaccination rates* was conducted. Only a search for "reduce vaccine hesitancy" was performed.
- I would expect the search of the root-word: immuniz* and vaccine* (instead of only immunization)
- Also would expect to see search terms re "Bill 87", "Bill 198".

[138] The appellant notes that only the record holdings of six staff members were searched and others should have been asked to search their records as well other individuals noted in records the appellant received. The appellant submits that because the ministry did not provide its representations by affidavit (something requested in the Notice of Inquiry) it has failed to establish that it conducted a reasonable search.

The reply and sur-reply representations

[139] In reply to the appellant's representations, the ministry submits that instead of interpreting the appellant's request "too literally" it conducted a search based on the actual wording of her request as it is required to do.

[140] Regarding the "jurisdictional scan records", the ministry states:

> …the appellant is suggesting the ministry's jurisdictional research, rather than its search for records, was inadequate. The ministry submits that it is not required to explain why it relied on certain records to inform its decision to amend the *ISPA*, and the appellant's "assumptions" and "expectations" about what records/information should have been considered are not a valid basis for arguing that our search was not reasonable.

[141] The ministry also submits that it did locate records responsive to this aspect of the appellant's request (i.e. "records which discuss solutions employed or considered by other jurisdictions in order to increase immunization/vaccine coverage") but those records were submitted to Cabinet as they formed part of the Cabinet submission that accompanied the proposed amendments to the *ISPA*. Consequently, they were not disclosed to the appellant under section 12(1) of the *Act*.

[142] The ministry submits that regarding the search terms set out by the appellant in her representations, they rely on their earlier submissions regarding the search terms they used.

[143] The appellant was given a final opportunity to respond to the ministry. The appellant states:

> …the ministry admits that it has records discussing solutions employed by other jurisdictions but somehow these records discussing other jurisdictions "formed part of the Cabinet submission." Is there truly no independent report that simply reviews the results of research into solutions by other jurisdictions. Are there no records obtained from other jurisdictions which outline their solutions? I find that unlikely.

[144] The appellant submits that a few of the records disclosed to her contain brief references to solutions in other jurisdictions including California. The appellant argues that this is shows that the ministry was aware of the solutions employed by other jurisdictions and that this knowledge likely came from researching the issue. The appellant submits that this is evidence that better, more detailed records of solutions from other jurisdictions must exist in the ministry's record holdings and have not been disclosed to her.

[145] Finally, the appellant submits that she has a general knowledge of the way our government works when it develops new legislation. As part of this knowledge, the appellant submits that she is aware of the practice that, prior to developing new legislations, a ministry would research solutions employed by other jurisdictions. This is exactly why the appellant asked for records discussing possible solutions in other jurisdictions. The appellant reiterated her position that the ministry failed to meet its burden that it conducted a reasonable search because it failed to provide its search representations in affidavit form.

Analysis and finding

[146] Based on my review of the parties' representations, I find that the ministry's search for responsive records was reasonable.

[147] The appellant is correct that I specified in the Notice of Inquiry that the ministry's representations should be provided in an affidavit form and the affidavit should have been signed by the person or persons who conducted the actual search. However, on the basis of the ministry's representations and the substance and number of records at issue in this appeal, I am prepared to accept the ministry's representations as sufficient evidence to establish the reasonableness of its search. In Order MO-1450, the adjudicator addressed the necessity of evidence being provided in affidavit form and stated the following:

> As the parties are aware, the adjudicative process of this office ordinarily involves the review of written submissions rather than an oral hearing. Generally, parties to an appeal are not required to and do not submit affidavit evidence with their submissions. There may be cases where the submission of affidavit evidence is preferable and even essential to the fact-finding process, but in many appeals, including those in which section 10(1) of the *Act* is raised, written representations have been found to

> contain the evidence required to support the application of the exemption under consideration.

[148] I agree with this approach and will apply it in this appeal. In certain circumstances, affidavit evidence may be preferable; however, in consideration of the evidence that was provided by the ministry and the hundreds of pages of records that were located as a result of its searches, this is not one of those cases. I have no reasonable basis to disregard the detailed and comprehensive representations made by the ministry about its search.

[149] The appellant has provided two main reasons for believing additional responsive records may exist: the fact that the search did not yield more detailed records from other jurisdictions and her belief that the search terms used by the ministry to conduct its search were deficient. I find that neither of these reasons establish that additional responsive records should exist.

[150] I agree with the ministry that the appellant takes issue with the ministry's lack of research relating to other jurisdictions and that this does not form a reasonable basis that other responsive records should exist. I confirm, for the appellant's information, that records I reviewed under section 12(1) contained references to other jurisdictions. The fact that the records disclosed to the appellant do not contain information from other jurisdictions is not a basis for my finding that the ministry's search was unreasonable. To be clear, the appellant's general assumptions about the work the ministry should have done, including researching immunization practices in other jurisdictions, is not a reasonable basis for a finding that the ministry's search was unreasonable.

[151] Lastly, I find the ministry's search terms to be adequate and reasonable in the circumstances. I find that there is little difference between the search terms suggested by the appellant and the search terms actually used by the ministry. Given the hundreds of pages identified by the ministry as responsive, I am satisfied that the ministry's search terms were appropriate and sufficient to identify records responsive to the appellant's request.

[152] Accordingly, I find the ministry's search to be reasonable.

ORDER:

1. I order the ministry to disclose the emails in records 27 and 164 and the withheld information in records 185, 189 and 191 by providing the appellant with a copy of these emails by **September 19, 2022**.

2. I uphold the ministry's decision with respect to the remaining records.

3. I uphold the ministry's search as reasonable.

4. In order to verify compliance with order provision 1, I reserve the right to require the ministry to provide me with a copy of those records order disclosed to the appellant.

Original Signed by: August 17, 2022
Stephanie Haly
Adjudicator

APPENDIX

Record Number	Page number	Description	Exemption claimed
1	20	Email	19(a)
5	18	Cabinet record – email with attached LRC[36] submission (email summarizes submission and update on revisions) – IPC	12(1)
6	18	Cabinet record – email with attached LRC submission (email summarizes submission)	12(1)
13	20	Cabinet record – email with attached slide deck (ISPA amendment) (email summarizes next steps) – IPC	12(1)
14	8	Cabinet record – email includes legal advice; email refers to updating LRC submission – IPC	12(1) and 19(a)
16	37	Cabinet record – email with attached LRC submission (email summarizes submission amendment) - IPC	12(1)
17	5	Cabinet record – email exchange with ministry employees regarding LRC form - IPC	12(1)
18	24	Cabinet record – email with attached slide deck (ISPA amendment) (email summarizes next steps) - IPC	12(1)

[36] Legislation and Regulations Committee of Cabinet (LRC)

20	12	Cabinet record – email with attached LRC briefing note (email summarizes attachment and next steps)	12(1)
21	17	Cabinet record – email with attached LRC approval form (email details attachment)	12(1)
26	20	Cabinet record (pages 7 – 20) – email containing legal advice and attachment	12(1) and 19(a)
27	13	Cabinet record – email with attached slide deck (technical briefing)	12(1) and 19(a)
28	3	Cabinet record – email exchange including legal advice	12(1) and 19(a)
29	24	Email exchange	19(a)
30	16	Cabinet record – email with attached slide deck (ISPA amendment)	12(1)
31	13	Cabinet record – email with attached slide deck (ISPA amendment)	12(1)
33	4	Cabinet record – email exchange regarding questions about LRC submission - IPC	12(1)
34	3	Cabinet record – email exchange between legal counsel and ministry staff regarding submission approval	12(1)
36	7	Email with attached information note – email contains legal advice	12(1) and 19(a)
39	19	Cabinet record – email with attached information note (email summarizes changes); also possible request for legal advice	12(1)
46	26	Cabinet record – email with attached LRC approval form (email discusses changes)	12(1)
48	17	Cabinet record – email with attached LRC approval package (email provides summary, instructions, and direction)	12(1)

67	25	Cabinet record – email with attached LRC approval and briefing note (email provides summary and update)	12(1) and 19(a)
68	43	Email and attached briefing note, slide deck, option chart – IPC	12(1) and 13(1)[37]
70	36	Email and attached LRA approval form	12(1)
95	24	Email	Not responsive
96	6	Email with attached questions and responses	12(1)
120	14	Email with attached briefing note	12(1)
122	7	Email and attachment	13(1)
123	18	Email and attachment	13(1)
126	19	Email and attachment	13(1)
128	11	Email and attachment	13(1)
129	46	Email and attached slide deck	12(1)
130	23	Email and attached document	12(1)
131	33	Email and attached slide deck	12(1)
133	15	Email and attached document	12(1)
134	11	Email and attached document	12(1)
135	4	Email and attached revised minutes	12(1)
138	80	Email with slide deck and Cabinet submission	12(1)
139	8	Cabinet record; not reviewed as IPC not provided with a copy of the record; not referred to in the order	12(1)

[37] Records are exempt under both section 12(1) and 13(1).

140	15	Email with attached Deputy Minister's briefing slide deck	12(1)
141	5	Email with attached Minister's speaking notes for committee meeting	12(1)
142	20	Email with attached Committee submission	12(1)
143	12	Email with attached Minister's Questions and Answers for Cabinet Submission	12(1)
144	30	Email with attached documents for review	12(1) and 13(1)
145	94	Email with attached project plan	12(1)
146	21	Cabinet record; not reviewed as IPC not provided with a copy of the record; not referred to in the order	12(1)
147	99	Email with attached Cabinet Submission for committee	12(1)
148	15	Email with attached questions and answers	12(1)
149	21	Email with attached document for Cabinet submission	12(1)
150	21	Email with attached communication plan for Cabinet submission	12(1)
151	20	Email with attached plan	12(1)
152	5	Email with attached questions and answers	13(1)
154	22	Email with attached documents	12(1)
155	19	Email with attached documents	13(1)
156	17	Email with attached document	13(1)
157	30	Email with attached slide deck for committee presentation	12(1)

158	3	Email with attached meeting minute	12(1)
160	24	Email with attached information note	12(1)
161	8	Email with attached briefing note for Cabinet Submission	12(1)
162	32	Email with attached slide deck	12(1)
163	13	Email	Not responsive
164	47	Email with attached technical briefing slide deck	12(1)
166	4	Email with attached Information note	12(1)
167	10	Email with attached briefing note	12(1)
168	13	Email with attached document	12(1)
169	23	Email with attached briefing note for committee meeting	12(1)
170	8	Email with attached information note	12(1)
173	22	Email with attached briefing note	12(1)
183	19	Email with attached document	12(1)
184	11	Email with attached technical briefing slide deck	12(1)
185	7	Email chain	14(1)(i)
187	11	Email with attached letter of agreement	21(1)
189	3	Email with attached document	14(1)(i)
190	25	Email	Not responsive
191	13	Email with attached document	14(1)(i)
192	14	Email with attached document (brief)	12(1)

193	9	Email with attached document	12(1)
195	236	Email with attachment document	14(1)(i)
200	7	Email chain	13(1)
202	3	Email	Not responsive
204	18	Email with attached committee submission	12(1)
205	8	Email with attached briefing note	12(1) and 19(a)
208	8	Email with attached letter of agreement	21(1)
210	7	Email with attached document	13(1)
211	7	Email with attached document	13(1)
212	2	Email chain	12(1)
213	89	Email with attached document	19(a) and 21(1)
214	9	Email with attached document	13(1)
216	21	Email with attached committee approval form and draft amendment	12(1)
217	3	Email chain	12(1)
227	30	Email and attached package	12(1)
230	6	Email with attachment	Not responsive
236	6	Email with attached document	12(1)
239	20	Email with attached document	12(1)
243	35	Email with attached Cabinet submission	12(1)
244	2	Email with attached document	12(1)
245	11	Email with attached document	12(1)

246	3	Email	Not responsive
251	3	Email with attached document	12(1)
254	37	Email with attached draft briefing, draft assessment form and draft amendment	12(1)
255	21	Email with attached slide deck	12(1)
256	15	Email with attached draft amendment	12(1)
257	20	Email with attached draft amendment	12(1)