

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4482

Appeal PA21-00346

Ministry of the Solicitor General

February 9, 2024

Summary: The Ministry of the Solicitor General (the ministry) received a request under the *Act* for records related to the site selection for a new correctional facility in Kemptville, Ontario. The ministry issued an access decision denying access to portions of the records pursuant to sections 12(1) (Cabinet records), and 13(1) (advice or recommendations) of the *Act*.

The requester, now the appellant, appealed the ministry's decision to the IPC and raised the application of the public interest override at section 23 of the *Act*.

In this order, the adjudicator partially upholds the ministry's decision that portions of the responsive records are exempt by reason of sections 12(1) and 13(1). She finds that the public interest override in section 23 does not apply to override the section 13(1) exemption.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 12(1), 12(1)(b), 12(1)(e), 13(1), 13(2)(a) and (g), and 23.

Orders Considered: Orders PO-3111, PO-3935, and PO-4139.

OVERVIEW:

[1] This order considers the application of the Cabinet records and the advice or recommendations exemptions to records related to the site selection for a new correctional facility.

[2] The Ministry of the Solicitor General (the ministry) received a request for the

following information under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*):

Any and all documentation including review, reports, analysis, emails, messages, briefing notes, presentation decks, etc. related to the site selection for new Ontario correctional facility to be located in Kemptville, Ontario. Time period: From 2018/07/01 - 2020/11/27.¹

[3] The ministry identified the responsive records and issued a decision granting partial access to them with severances pursuant to sections 12(1) (Cabinet records), 13(1) (advice or recommendations), 17(1) (third party information), and 18(1) (economic and other interests) of the *Act*.

[4] The requester, now the appellant, appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was appointed to attempt a resolution of this appeal.

[5] During mediation, the ministry issued a revised decision to the appellant disclosing a number of records.² These records are no longer at issue in this appeal. The ministry also confirmed it was no longer relying on sections 17(1) and 18(1) to withhold information in any of the responsive records.

[6] Upon receipt of the revised decision, the appellant stated that she believes further records exist, specifically, communications, such as emails, about the correctional facility in question.

[7] The ministry agreed to conduct another search for these records and located additional responsive records. It issued a supplemental decision denying access to the newly located records located pursuant to sections 12(1), 13(1), and 17(1) of the *Act*.

[8] Upon receipt of the supplemental decision, the appellant told the mediator that she wished to pursue the appeal at adjudication on the basis that she objects to information being withheld under all of the exemptions claimed by the ministry: sections 12(1), 13(1), and 17(1). She confirmed that she did not wish to pursue the reasonable search issue.

[9] Subsequently, the appellant raised the issue of the public interest in disclosure of the records at issue, and as a result, the public interest override found in section 23 of the *Act* is also at issue in this appeal.

[10] As mediation did not resolve this appeal, it was transferred to adjudication where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and I sought the

¹ Although the time period in the request was until November 2020, as set out below the records identified as responsive by the ministry and now at issue included records dated 2021.

² The ministry disclosed pages 39-46, 49-50, 55, 64, 74, 76-80, 86-145, 149-150, and 153-154.

representations from the parties, which were shared between them in accordance with the IPC's *Practice Direction 7*.

[11] The ministry withdrew the application of the section 17(1) exemption previously claimed for the records located during its additional search; therefore, this exemption is no longer at issue. It also determined that certain pages were not exempt from disclosure and issued a revised access decision³ disclosing these pages to the appellant. These pages are no longer at issue in this appeal.

[12] In this order, I partially uphold the ministry's decision that the responsive records are exempt from disclosure by reason of sections 12(1) and 13(1). I do not find that the public interest override in section 23 applies to override the section 13(1) exemption.

RECORDS:

[13] The records that were identified as responsive to the request are 411 pages relating to the Ontario Government's site selection for a new correctional facility in Kemptville (the Kemptville site). The following records remain at issue:

[14] The ministry claims section 12(1) applies to:

- Submission sent to Treasury Board: at pages 1-33;
- Business case: at pages 81-85;⁴ and,
- Briefing slide deck (part of a communications plan): at pages 224-227.

[15] The ministry claims section 13(1) applies to:

- Email chains: at pages 157, 162-177, 181-182, 192, 200, 205-222, 230-233, 237-241, 253-266, 278-283, 291-306, 327-329, 331-339, 341-354, 356-372, and 383-410.
- Briefing slide decks: at pages 193-199, and 224-227;
- Recommendations for potential sites of the correctional facility: at pages 34-38, 47-48, 51-54, 56-63, 65-73, 75, 146-148, 151-152, 155-156, 185-191, 242-252, 268-277, and 307-317;⁵

³ Disclosing pages 178-180, 223, 229, 234, 288, 318 and 330.

⁴ Duplicates of pages 81-85 are found at pages 158-161, pages 202-204 and pages 235-236. My finding below with respect to pages 81-85, also applies to their duplicates.

⁵ Record commences on page 307, not 308 as claimed by the ministry. Pages 307-317 partly duplicate pages 242-252.

- Information or Briefing Notes: at pages 183-184, 284-290, 319-326, and 373-382; and,
- Other pages: pages 201, 228, 340, 355, and 411.⁶

ISSUES:

- A. Does the mandatory exemption at section 12(1) relating to Cabinet deliberations apply to the records?
- B. Does the discretionary exemption at section 13(1) for advice or recommendations given to an institution apply to the records?
- C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13(1) exemption?

DISCUSSION:

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

[16] Section 12(1) protects certain records relating to meetings of Cabinet or its committees. The ministry relies on the introductory wording of section 12(1) and sections 12(1)(b) and (e) to withhold portions of the records. Those sections read:

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,

(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

(e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy.

[17] The ministry claims section 12(1) applies to three records, a submission, a business case, and a briefing slide deck, because they either contain submissions that were prepared and placed before Treasury Board or would reveal the substance of

⁶ The ministry did not refer to these pages in its representations, however, when asked it confirmed that it takes the position that section 13(1) applies to them. I have considered them below.

deliberations before Treasury Board and Cabinet, namely the ministry's multi-year planning process for making strategic investments in correctional facilities, including the Kemptville correctional facility.

Section 12(1): introductory wording

[18] 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.

[19] 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).⁷

[20] 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.⁸

[21] The institution must provide sufficient evidence to show a link between the content of the record and the actual substance of Cabinet deliberations.⁹

Representations

[22] The ministry claims that based on the introductory wording of section 12(1), the briefing slide deck at pages 224-227, which is identified as 'Cabinet confidential', is exempt from disclosure. It states that this record is part of a communications plan that was part of a recommended approach directed to the project governance team, and ultimately the Minister. It submits that the slide deck reflects the substance of deliberations at Cabinet.¹⁰

[23] The appellant's representations on the possible application of the introductory wording of section 12(1) and sections 12(1)(b) and 12(1)(e) are the same. The appellant states that from the content of the records that were disclosed to her, she already knows the outcome of the deliberations, as well as the criteria that was used to make decisions regarding the site selection for the new correctional facility. She submits that there is nothing for her to infer. She submits that the records at issue will clearly show why the site was chosen despite the disclosed records indicating that this site does not meet the criteria set by the subject matter experts.

Findings regarding the introductory wording of section 12(1)

[24] The briefing slide deck at pages 224-227 contains options regarding internal and

⁷ Orders P-22, P-1570 and PO-2320.

⁸ Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

⁹ Order PO-2320.

¹⁰ Alternatively, it submits that these pages are also protected under section 13(1).

external communications about the site selection. I do not agree with the ministry that the evidence that it has provided establishes that disclosure of this record would reveal the substance of deliberations of Cabinet or one of its committees.

[25] In its representations, the ministry did not submit that the slide deck was submitted to Cabinet or one of its committees or explain how disclosure would reveal, or permit accurate inference to be made about, the substance of the deliberations of Cabinet or one of its committees.

[26] Although the record is marked as "Cabinet Confidential", the ministry's submissions do not establish that the slide deck was either submitted to Cabinet or one of its committees or would reveal or permit the accurate inference to be made about the substance of deliberations of Cabinet or one of its committees. However, as I have found these pages exempt under section 13(1) below, I do not have to determine whether these pages are also exempt under the introductory wording of section 12(1), and I decline to do so.

Section 12(1)(b): policy options or recommendations

[27] To qualify for exemption under section 12(1)(b), a record must contain policy options or recommendations, and must have been either submitted to Cabinet or at least prepared for that purpose. Such records remain exempt after Cabinet makes a decision.¹¹

Representations

[28] The ministry states that it has exempted pages 1-33 under section 12(1)(b) because they contain a submission that was sent to, and later approved by, Treasury Board, a committee of Cabinet. It states that this submission contains policy options and recommendations prepared for Treasury Board as part of the ministry's 2020-2021 multi-year planning process for infrastructure investment.¹²

Findings regarding section 12(1)(b)

[29] The record at issue for which section 12(1)(b) has been claimed is a 33-page submission to prepared by the ministry for the Treasury Board, a committee of Cabinet. I agree with the ministry that it contains policy options and recommendations and was prepared for Treasury Board as part of the ministry's 2020-2021 multi-year planning process.

[30] As the submission at pages 1-33 contains policy options or recommendations and

¹¹ Orders PO-2320, PO-2554, PO-2677 and PO-2725.

¹² The ministry relies on Order PO-3977 (at paragraph 37), where it was held that "...disclosure of the analysis and recommendations put before Treasury Board would allow the appellant to infer whether the recommendations were accepted, rejected, or accepted with modifications by Treasury Board and the substance of the deliberations leading to those decisions."

was submitted to a committee of Cabinet, I find that it is exempt under section 12(1)(b).

Section 12(1)(e): record prepared to brief a minister

[31] Section 12(1)(e) applies to certain records prepared in advance of Cabinet meetings. It is prospective in nature and does not apply to records that have already been dealt with by Cabinet or its committees.¹³

Representations

[32] The ministry has claimed section 12(1)(e) for pages 81-85,¹⁴ a business case that was used to brief the Minister (the Solicitor General) on matters that are proposed to be brought before Treasury Board. It states that this record was prepared specifically for the Minister (the Solicitor General) and the Minister of Agriculture, Food and Rural Relations. It points out that under the header of 'Timeline' in this record, there is specific reference to returning to Treasury Board for infrastructure investment approval in relation to the acquisition of the Kemptville site.

Findings regarding section 12(1)(e)

[33] I agree with the ministry that the business case at pages 81-85 is exempt by reason of section 12(1)(e) as it was clearly prepared to brief a minister (the Solicitor General) in relation to matters that were proposed to be brought before Treasury Board. On its face, it is clear that this record was sent to and approved by both the Solicitor General and the Minister of Agriculture, Food and Rural Relations and, as indicated by the ministry, it provides that it will be sent to Treasury Board.

[34] As the business case was prepared to brief a minister of the Crown in relation to matters that proposed to be brought before a committee of Cabinet, I find that it is exempt by reason of section 12(1)(e).

Section 12(2): exceptions to the exemption

[35] Section 12(2) establishes circumstances under which the section 12(1) exemption does not apply. It reads:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

(a) the record is more than twenty years old; or

(b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

¹³ Orders P-1182, PO-2554, PO-2677, and PO-2725.

¹⁴ Duplicates of this record are contained on pages 158-161, 202-204, and 235-236.

[36] The ministry submits that neither of the exceptions to the exemption in section 12 apply. The ministry states that it did not seek the consent of Cabinet Office to disclose Cabinet privileged records. Its position is that if these records were not protected under section 12(1), they would be protected under other exemptions, notably section 13(1) and it did not believe it was worthwhile to seek Cabinet direction in respect of disclosure, as it would have likely protected the records pursuant to one or more other exemptions.

[37] The appellant submits that section 12(1) does not apply, and that the ministry should have sought Cabinet consent.

Findings regarding section 12(2)

[38] 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

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

[40] I find that neither of the exceptions in section 12(2) apply to the records I have found exempt under the introductory wording of section 12(1) and sections 12(1)(b) or (e).

[41] First, the records are not more than 20 years old. Second, I find that even if the ministry did not seek Cabinet consent, based on my review of its representations, the head turned their mind to so doing. The ministry clearly explained the factors it considered in exercising its discretion not to ask Cabinet whether it consents to disclosure of the records.

Conclusion regarding section 12(1)

[42] I have found that the following information is exempt under section 12(1), and I uphold the ministry's decision not to disclose it:

- the submission sent to Treasury Board at pages 1-33; and,
- the business case used to brief the Minister at pages 81-85, duplicated at pages 158-161, 202-204, and 235-236.

[43] I have not made a finding about whether the briefing slide deck at pages 224-227 is exempt under section 12(1). However, the ministry has also claimed section 13(1) applies to this slide deck and as set out below, I have considered and applied

¹⁵ Orders P-771, P-1146 and PO-2554.

¹⁶ Order PO-2422.

section 13(1) to this record.

Issue B: Does the discretionary exemption at section 13(1) for advice or recommendations given to an institution apply to the records?

[44] 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 policymaking.¹⁷

[45] Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[46] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be express or inferred.

[47] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are the public servant or consultant's identification of alternative possible courses of action. "Advice" includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.¹⁸

[48] "Advice" involves an evaluative analysis of information. Neither "advice" nor "recommendations" include "objective information" or factual material.

[49] 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.¹⁹

[50] 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

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

¹⁸ See above at paras. 26 and 47.

¹⁹ Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

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.²⁰

[51] The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).²¹ This is the case even if the content of the draft is not included in the final version.

[52] Examples of the types of information that have been found not to qualify as advice or recommendations include:

- factual or background information,²²
- a supervisor's direction to staff on how to conduct an investigation,²³ and
- information prepared for public dissemination.²⁴

Representations

[53] The ministry's position is that section 13(1) applies to the records in pages 34-38, 47-48, 51-54, 56-63, 65-73, 75, 146-148, 151-152, 155-157, 162-177, 181-201, 205-222, 224-228, 230-233, 237-266, 268-317, 319-329, and 331-411 which include emails, briefing notes, and slide decks. The ministry submits that these records contain the advice or recommendations of ministry and Infrastructure Ontario (IO) staff or third party consultants acting on behalf of IO. It submits that they were created as part of the deliberative process to identify and procure the Kemptville site.

[54] The ministry states that the decision to acquire the site for the Kemptville correctional facility, which was endorsed by the ministry and then Treasury Board and Cabinet, required public servants from the ministry and IO, as well as third-party consultants acting on their behalf, to work collaboratively to prepare the following:

- (a) Records assessing the suitability of building a correctional facility in various locations in Eastern Ontario including the Kemptville location, and these assessments were used to brief ministry decision makers; and,
- (b) Records containing proposed communication materials, which included public and stakeholder communications.

[55] The ministry states that the advice and recommendations flowed primarily

²⁰ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

²¹ *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

²² Order PO-3315.

²³ 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.).

²⁴ Order PO-2677.

between staff at the ministry, the IO and consultants acting on the ministry's behalf. It states that this advice and recommendations were eventually directed to senior levels of management in the ministry, individuals who either accepted or rejected the advice or recommendations.

[56] The ministry further states that senior levels of management provided direction to staff on the basis of the advice or recommendations they received, and this led, in response, to additional advice and recommendations being created and provided. This process led towards a final decision being made to acquire the Kemptville location.

[57] The ministry relies on Orders PO-3935 and PO-4139, which it submits have upheld that section 13(1) applies to similar types of records including:

- emails because they contain a summary of advice and discussion exchanged regarding a future decision;
- slide decks because they identify the issues and principles to be considered by a minister and contain advice regarding an approach; and,
- briefing notes that contain advice or recommendations on consultations because they are "part of the deliberative process that is leading to a final decision.

[58] The ministry specifically addresses how section 13(1) applies to each type of record for which it has been claimed, as follows:

(a) Email chains: Pages 157, 162-177, 181-182, 192, 200, 205-222, 230-233, 237-241, 253-266, 278-283, 291-306, 327-329, 331-339, 341-354, 356-372, and 383-410 are chains of emails circulated mostly between staff at the ministry and IO, which contain requests for advice and recommendations and the actual advice and recommendations provided in relation to the identification of potential site locations for a correctional facility. These pages would, in addition, if disclosed permit the drawing of accurate inferences as to the contents of advice or recommendations.

(b) Briefing Slide Decks: Pages 193-199, and 224-227 consist of two slide decks, both of which are classified as being confidential. The slide deck on pages 193-199 is listed as having been presented to the Office of the Solicitor General, while the slide deck on pages 224-227 is identified as being Cabinet Confidential.

(c) Recommendations for potential sites of the correctional facility: Pages 34-38, 47-48, 51-54, 56-63, 65-73, 75, 146-148, 151-152, 155-156, 185-191, 242-252, 268-277, and 307-317 (which partly duplicates pages 242-252), contain potential sites for correctional infrastructure development complete with recommendations and advice as to whether these sites

would be compatible with use as a correctional facility, and what considerations would apply to any decision being made ... ; and,

(d) Information or Briefing Notes: Pages 183-184,²⁵ 284-290, 319-326, and 373-382 contain information or briefing notes. We submit that the disclosure of these records would permit the drawing of accurate inferences as to the nature of actual advice or recommendations.

[59] The appellant submits that it is unreasonable for the ministry to posit that there is not one single responsive email available to her about this project, or to suggest that preservation of an effective public service is at risk by releasing communications that do not identify who wrote them. She states:

Simply saying that disclosure would cause significant harm is not proof that it will in fact cause harm. The government has not provided sufficient evidence to support their claim that disclosure of the records would cause significant harm to the development process. I have already stated that names can be redacted from communications. And frankly, if employees are self-censoring how they communicate with each other on any particular file, that speaks to a much bigger problem in how this government does its job. If everything is above board, why would there be a need to self-censor?

[60] In reply, the ministry maintains that records that contain recommendations for potential sites for a correctional facility have been properly exempted under section 13(1).

[61] In sur-reply, the appellant states that she has requested documents related to the site selection review, a major component of every project that is a detailed evaluation of infrastructure needs measured against chosen criteria for potential locations. She submits that the records are subject to the exceptions to section 13(1) in sections 13(2)(a), (c), (d), and (g).

[62] She submits that information in a site plan review is factual information about the top locations chosen, as well as a detailed summary about the pros and cons of each using pre-set criteria, resulting in a list by order of suitability. She states that the feasibility of the site chosen is the key information that is not being disclosed.

Findings

[63] For clarity, I reiterate that the ministry claims section 13(1) applies to:

²⁵ Record is at pages 183-184, not pages 182-183 as referred to by the ministry.

- Email chains: at pages 157, 162-177, 181-182, 192, 200, 205-222, 230-233, 237-241, 253-266, 278-283, 291-306, 327-329, 331-339, 341-354, 356-372, 383-410;
- Briefing slide decks: at pages 193-199, 224-227;
- Potential sites of the correctional facility: at pages 34-38, 47-48, 51-54, 56-63, 65-73, 75, 146-148, 151-152, 155-156, 185-191, 242-252, 268-277, 308-317;
- Information or Briefing Notes: at pages 183-184,²⁶ 284-290, 319-326, 373-382;
- Recommendations for potential sites of the correctional facility: Pages 34-38, 47-48, 51-54, 56-63, 65-73, 75, 146-148, 151-152, 155-156, 185-191, 242-252, 268-277 and 308-317 (which partly duplicates pages 242-252); and,
- Other pages 201, 228, 307, 340, 355, and 411.

[64] In making my findings as to the application of section 13(1), I have considered the two orders relied upon by the ministry, Orders PO-3935 and PO-4139, where the adjudicators upheld the application of section 13(1) to records that were similar to those at issue in this appeal. I agree with the approach taken in these orders and have applied it below.

[65] In determining the application of section 13(1), I have considered each record individually.²⁷

[66] Pages 34-75 is a 42-page document describing 35 potential sites for the correctional facility. Of these pages, the ministry has disclosed pages 39-46, 49-50, 55, 64, 74, relating to 20 potential sites. It has claimed section 13(1) for the information about the remaining 15 sites at pages 34-38, 47-48, 51-54, 56-63, 65-73, and 75.

[67] This record contains a disclosed map and cover pages listing the category of each group of sites. It also contains a page for each proposed site for the correctional facility. Each proposed site (whether on a disclosed page or an undisclosed page) is analyzed in a one-page completed form on the basis of the same criteria and follow the same format.

[68] The ministry has not provided an explanation as to why the information about certain potential sites have been disclosed while information about other sites have has been withheld under section 13(1). Over half of this record has been disclosed and, in my view, there is no apparent difference to the type of information disclosed and not disclosed. The ministry has not provided sufficient evidence to establish that the

²⁶ The briefing note was misnumbered by the ministry as being at pages 182-183

²⁷ I will begin with the record starting at page 34 as have found the record at pages 1-33 exempt under section 12.

information that it has withheld is advice or recommendations within the meaning of section 13(1) or would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations. As well, the ministry has not established that disclosure of the exempted records would reveal the advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by it.

[69] Therefore, I find that the section 13(1) exemption does not apply to the non-disclosed pages in this record, pages 34-38, 47-48, 51-54, 56-63, 65-73, and 75. As no other exemptions have been claimed for these pages and none appear to apply, I will order these pages disclosed.

[70] Pages 142-156 is a record that describes the status of specific sites. The ministry has withheld pages 146-148, 151-152, and 155-156 under section 13(1). However, it has disclosed the remaining pages, pages 142-145, 149, 150, 153, and 154. As was the case with the record at pages 34-75, in my view, there is no apparent difference to the type of information that the ministry disclosed and that which it did not disclose. For the same reasons as those set out in my discussion of the record at pages 34-75, I find that the ministry has not provided sufficient evidence to establish that the non-disclosed pages including 146-148, 151-152, and 155-156, contain information that is exempt from disclosure under section 13(1). As no other exemptions apply to this information, I will order them disclosed.

[71] From my review, I accept the ministry's position that pages 157, 162-177, 181, 182, 192, 200, 201, 205-222, 230-233, 237-241, 253-266, 278-283, 291-306, 327-329, 331-339, 340,²⁸ 341-346, 349-350, 353-354, 355,²⁹ 356-372, 383-410, and 411 are exempt under section 13(1).³⁰ These records are all emails that contain advice or recommendations within the meaning of section 13(1). I find that these pages are exempt under that section and I uphold the ministry's decision not to disclose them.³¹

[72] From my review, pages 228, 347-348, and 352 are all emails that contain only factual or background information and as such cannot be exempt under section 13(1) because they are excepted from exemption under section 13(2)(a). Factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.³² Where the factual information is inextricably intertwined with the advice or recommendations, section 13(2)(a) may not apply,³³ which is not the case with these emails. Therefore, I do not accept that these pages contain advice or recommendations and I will order the ministry to disclose them.

²⁸ Page 340 is an attachment to an email at pages 338-339.

²⁹ Page 355 is the attachment to the email at pages 353-354.

³⁰ Page 411 is the attachment to the email at page 410.

³¹ In finding that records are exempt under section 13(1), I have considered the ministry's exercise of discretion, which I will discuss further below.

³² Order P-24.

³³ Order PO-2097.

[73] Pages 183-184, 284-290, 319-326, 373-382 are information notes or briefing notes. Pages 193-199 and 224-227 are briefing slide decks. I agree with the ministry that these records contain advice or recommendations within the meaning of section 13(1). I uphold the ministry's decision not to disclose them.

[74] Pages 185-191 each contain a map with comments about an individual property site. Other than page 191, these pages are duplicates of pages have already been disclosed to the appellant at pages 88, 89, 91, 105, and 107. Although page 191 has not been disclosed, the ministry has disclosed similar information as that which is contained in this page as a result of its disclosure of pages 86-141, which is a record detailing a real estate market survey about individual properties. All of the pages except one have already been disclosed and the remaining page (page 191) contains information substantially similar to information to that which has been disclosed.

[75] As well, I find that the ministry has not provided sufficient evidence to establish that disclosure of the withheld information would reveal the advice or recommendations of a public servant or any other person employed by the ministry. For these reasons, I do not accept that section 13(1) applies to pages 185-191. As no other exemptions have been claimed to this information and none appear to apply, I will order the ministry to disclose these pages to the appellant.

[76] Pages 242-252, 268-277 and 307-317³⁴ are recommendations for potential sites of the correctional facility. These records are confidential presentations about potential sites for the correctional facility and contain advice or recommendations. I uphold the ministry decision to withhold these records under section 13(1).

[77] Page 267 is a map. In its representations, the ministry did not explain why it claims it is exempt under section 13(1). in its representations. It is identical to page 146, which I found not exempt above. The ministry has not marked any exemptions on page 267. As with its duplicate, page 146, I find that section 13(1) does not apply to page 267, and I will order it disclosed.

[78] In finding that certain records are exempt under section 13(1), I have considered especially the exceptions referred to by the appellant in sections 13(2)(a), (c), (d), and (g), which read:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material.

(c) a report by a valuator, whether or not the valuator is an officer of the institution;

³⁴ Pages 307-317 partially duplicates pages 242-252. This record was referred to by the ministry as commencing on page 308, but this record commences on page 307.

(d) an environmental impact statement or similar record;

(g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project.

[79] The appellant provided specific representations on the application of sections 13(2)(a) (factual information) and 13(2)(g) (feasibility or other technical study) arguing that the records contain a site plan review, which she describes as factual information about the top locations chosen for the correctional facility, as well as a detailed summary about the pros and cons of each using pre-set criteria, resulting in a list by order of suitability.

[80] However, from my review of the records I have found exempt under section 13(1), these withheld records do not contain merely factual information nor are they a feasibility study or other technical study under section 13(2)(g). Instead, they contain advice or recommendations in emails and presentations regarding certain specific sites.

[81] In making this finding I have considered Order PO-3111, where the adjudicator found that the study referred to in section 13(2)(g) must also include a formal accounting of the results of the investigation or assessment undertaken. The adjudicator also found that that this may include information about the process, such as the purpose, methodology, raw data, and analysis, along with a conclusion. None of the records for which I have found exempt under section 13(1) are such a study as referred to in Order PO-3111. Instead, they are emails, briefing information notes, slide decks and other documents containing the advice or recommendations of public servant or a consultant employed by the ministry as part of the deliberative process in reviewing potential sites for the correctional facility.

[82] Accordingly, I find that none of the exceptions in section 13(2) apply to the information I have found exempt under section 13(1), including those referred to by the appellant.³⁵

[83] I have also considered the ministry's submissions on its exercise of discretion. In these submissions, it states that it considered that this exemption protects the deliberative and collaborative process that occurs between public servants and that leads to important decisions being made, including with respect to the creation of strategic investments in public infrastructure.³⁶

[84] Based on my review of the parties' representations and the information in the withheld pages under section 13(1), I find that the ministry exercised its discretion in a proper manner in withholding this information. I find that the ministry did not exercise

³⁵ As well, the exception in section 13(3) does not apply as the records are not more than twenty years old nor has the head publicly cited these records as the basis for making a decision or formulating a policy.

³⁶ The appellant did not address the ministry's exercise of discretion directly.

its discretion to withhold this information for any improper purpose or in bad faith, and that there is no evidence that it failed to take into account relevant factors or that it considered irrelevant ones. As well, I find that the appellant has no sympathetic or compelling need to receive this confidential information that contains advice or recommendations.

[85] Based on my review of the records and the parties' representations overall, I find that the ministry exercised its discretion under section 13(1) in a proper manner and I uphold its exercise of discretion.

Conclusion regarding section 13(1)

[86] Of the records that remain at issue, I have found that the following information is exempt from disclosure under section 13(1),

- The emails at pages 157, 162-177, 181, 182, 192, 200, 201, 205-222, 230-233, 237-241, 253-266, 278-283, 291-306, 327-329, 331-339, 340, 341-346, 349-350, 353-354, 355, 356-372, 383-410, and 411;
- The information or briefing notes at pages 183-184, 284-290, 319-326, and 373-382;
- The briefing slide decks at pages 193-199 and 224-227; and,
- The recommendations for potential sites at pages 242-252, 268-277 and 307-317.

[87] I have found that the remaining pages for which section 13(1) has been claimed are not exempt under that section and I will order the ministry to disclose them to the appellant.³⁷

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

[88] The appellant has raised the possible application of the public interest override to the information that the ministry has withheld. Section 23 does not apply to information that is exempt from disclosure under section 12(1), however, I will consider whether the public interest override applies to the information that I have found to be exempt under section 13(1).

[89] Section 23 of the *Act*, the "public interest override," provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It states:

³⁷ Some of these pages have already been disclosed to the appellant either before or during adjudication, namely, pages 39-46, 49-50, 55, 64, 74, 76-80, 86-145, 149-150, and 153-154, 178-180, 223, 229, 234, 288, 318, and 330.

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

[90] For section 23 to apply, two requirements must be met:

- there must be a compelling public interest in disclosure of the records; and
- this interest must clearly outweigh the purpose of the exemption.

[91] The *Act* does not state who bears the onus to show that section 23 applies. The IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.³⁸

Representations

[92] The ministry acknowledges that there is a public interest in finding out about the ministry's selection and acquisition of the Kemptville site for a new correctional facility. However, it submits that to the extent that such a public interest exists, that interest has been met by extensive public communications and community engagement which have already occurred.

[93] For example, the ministry states that it has posted public notices on its or other local government websites³⁹ about the facility and has held a public engagement session recorded on YouTube, which included a question and answer forum.⁴⁰ Therefore, the ministry submits that section 23 does not apply as another public process or forum has been established to address public interest considerations in this appeal.

[94] The ministry also submits that the public interest does not outweigh the purpose of the exemption as disclosure of records containing advice and recommendations under section 13(1) will cause significant harm to the process by which infrastructure is developed in this province. It states that this process is collaborative and deliberative and would be harmed if public servants knew that their advice and recommendations was subject to disclosure in the manner contemplated by this appeal. It submits that disclosure under section 23 would lead, for example, to staff self-censoring how they communicate with one another, and this would harm the efficiency and effectiveness of government decision making.

[95] The appellant disagrees with the ministry that there has been "extensive public or community engagement" and submits that it is in fact, just the opposite. She submits

³⁸ Order P-244.

³⁹ The ministry provided links to these websites.

⁴⁰ The ministry provided a link to this session.

that the Minister has tried to silence local grassroots organizations by filing complaints with Elections Ontario.⁴¹ She submits that one “public engagement” was held after the site was announced, only after the government realized that residents were upset about the prison. She states that this public meeting was held long after the decision was made and was not in fact a “public engagement”, but a zoom meeting where IO and the ministry used “pre-packaged talking points to sell a decision made without consultation and did not provide adequate answers.”

[96] The appellant submits that simply releasing information on a website is not “public disclosure” and asks how anyone is supposed to know to look for it. She states:

The economic interests, public interest and community impacts are key factors in a site plan review, none of which have been revealed by the government for the prison complex and should be included in any site review and made available to the public to ensure accountability and to meet the test of public interest. There is a compelling case for public interest not only due to the nature of this proposed institution, but also the burden on local taxpayers for policing, healthcare, infrastructure, and environmental costs. These costs will be entirely offloaded to municipal property taxes ...

[97] In reply, the ministry states that in addition to information that it has already disclosed regarding the site selection process, its decision to build the correctional facility on that site is proceeding to judicial review. It submits that the judicial review process will be yet one more public process to address the public interest considerations that the appellant has raised in their representations.

[98] In sur-reply, the appellant submits that a judicial review is in no way a component of public engagement, instead it is a last resort by residents to hold the ministry to account for the decisions it made without any public engagement.

Finding regarding compelling public interest

[99] I must first determine whether there is a “compelling public interest” in disclosure of the records, i.e., whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.⁴²

[100] In previous orders, the IPC has 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

⁴¹ These complaints were subsequently dismissed.

⁴² Orders P-984 and PO-2607.

means of expressing public opinion or to make political choices.⁴³

[101] A “public interest” does not exist where the interests being advanced are essentially private in nature.⁴⁴ However, if a private interest raises issues of more general application, the IPC may find that there is a public interest in disclosure.⁴⁵

[102] The IPC has defined the word “compelling” as “rousing strong interest or attention”.⁴⁶

[103] The IPC must also consider any public interest in not disclosing the record.⁴⁷ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling.”⁴⁸

[104] A compelling public interest has been found not to exist where, for example:

- another public process or forum has been established to address public interest considerations;⁴⁹
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;⁵⁰
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding;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

[105] I agree that there is public interest in the proposed site for the correctional centre, however, I disagree that there is a compelling public interest in the disclosure of the records at issue in this appeal. I accept that another public process or forum has been established to address public interest considerations in this appeal, namely, the posting of information on the ministry or other local government websites about the facility and the holding of a public engagement session, available on YouTube and which include a question and answer forum for the public.

[106] I also note that the records contain advice or recommendations about the potential sites for the proposed correctional facility. After the decision about the

⁴³ Orders P-984 and PO-2556.

⁴⁴ Orders P-12, P-347 and P-1439.

⁴⁵ Order MO-1564.

⁴⁶ Order P-984.

⁴⁷ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

⁴⁸ Orders PO-2072-F, PO-2098-R and PO-3197.

⁴⁹ Orders P-123/124, P-391 and M-539.

⁵⁰ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

⁵¹ Orders M-249 and M-317.

⁵² Order P-613.

Kemptville site was made, the ministry publicly released a significant amount of information about this facility, which is still publicly available. For example:

- On June 29, 2021, the ministry released a Public Notice (found at page 229 of the records) about its forthcoming plans about the site of the facility.
- On November 17, 2021, the ministry held a two-and-a-half-hour public engagement presentation on the proposed correctional facility that included a question-and-answer session with the public.
- IO's website also contains information about the facility.
- Previously (and through disclosure from this order), a significant amount of information has already, or will be, disclosed and this is adequate to address any public interest considerations

[107] Therefore, although I accept that there is a public interest in the subject matter of the records responsive to the request, I find that there is not a compelling public interest in disclosure of the specific information that I have found exempt under section 13(1). The information I have found exempt consists of advice or recommendations in emails and briefing documents made during the deliberative process about the site. I do not accept that disclosure of the specific information that was withheld under that section would add in a meaningful way to the information that is already in the public domain or shed any further light on the matter.

[108] As I have found that there is not a compelling public interest in disclosure of the information that I have found exempt under section 13(1), I find that section 23 does not apply to override this exemption and permit its disclosure.

ORDER:

1. I uphold the ministry's decision to deny access under section 12(1) to:
 - The submission sent to Treasury Board at pages 1-33; and,
 - The business case used to brief the Minister at pages 81-85, duplicated at pages 158-161, 202-204, and 235-236.
2. I uphold the ministry's decision to deny access under section 13(1) to:
 - The emails at pages 157, 162-177, 181, 182, 192, 200, 201, 205-222, 230-233, 237-241, 253-266, 278-283, 291-306, 327-329, 331-339, 340, 341-346, 349-350, 353-354, 355, 356-372, 383-410, and 411;

- The information or briefing notes at pages 183-184, 284-290, 319-326, and 373-382;
- The briefing slide decks at pages 193-199 and 224-227; and,
- The recommendations for potential sites at pages 242-252, 268-277 and 307-317.

3. I order the ministry to disclose the remaining pages of records from the 411-page record package to the appellant by **March 12, 2024**.⁵³

Original Signed By: _____
Diane Smith
Adjudicator

February 9, 2024 _____

⁵³ Some of these pages have already been disclosed to the appellant either before or during adjudication, namely, pages 39-46, 49-50, 55, 64, 74, 76-80, 86-145, 149-150, and 153-154, 178-180, 223, 229, 234, 288, 318, and 330. The ministry is not required to disclose these pages again.