

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4508

Appeal PA22-00558

Ministry of Health

April 16, 2024

**Summary:** The ministry received a request from the media for information from the Minister of Health's transition binder including records regarding human health resources in provincial hospitals. The ministry located responsive records and ultimately withheld information in part of one record relating to the specific numbers of the current and estimated future shortages of personnel in the health workforce in 2022, 2023 and 2024 and the estimated gaps in these areas of the health workforce at both 5 and 10 years in the future. The ministry claimed that disclosing the withheld information would prejudice its economic interests under section 18(1)(c) and would be injurious to the financial interests of the Government or the ability of the Government to manage the economy under section 18(1)(d) of the *Act*. The appellant appealed the ministry's decision and claimed that the public interest override applied to the withheld information. In this order, the adjudicator finds that section 18(1)(c) and 18(1)(d) apply to the withheld information and finds that, while there is a compelling public interest in disclosure of the information at issue, this public interest does not clearly outweigh the purpose of the exemptions.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 18(1)(c), 18(1)(d) and 23.

**Orders and Investigation Reports Considered:** Orders P-441, P-532 and P-1398.

**Cases Considered:** *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, [2014] 1 S.C.R. 674 and *Participating Hospitals v. Ontario Nurses Association*, 2023 CanLII 33967 (ON LA).

## **OVERVIEW:**

[1] The Ministry of Health (the ministry) received the following request under the Freedom of Information and Protection of Privacy Act (the Act):

This is a request for records contained within the Ministry of Health Transition Binder 2022 (June 24, 2022). I would like to receive the following subsections from Section 6 (Strategic Information): A. i. Health Human Resources (within the Strategic Opportunities Decks), B. COVID-19 Impacts.

Time Period: [specified two month period]

[2] The ministry issued a decision granting partial access to the responsive records. The ministry withheld some information pursuant to sections 12(1) (cabinet records) and 18(1) (economic and other interests) of the *Act*.

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

[4] During mediation, the appellant indicated that he was not pursuing the information withheld pursuant to section 12(1) of the *Act*. The appellant also took the position that the public interest override at section 23 of the *Act* applies to this information.

[5] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process, and as the adjudicator assigned to this appeal, I conducted an inquiry. Representations were received and shared in accordance with IPC's *Code of Procedure*.

[6] In this appeal, I find that section 18(1)(c) and 18(1)(d) apply to exempt the withheld information from disclosure. I also find that, while there is a compelling public interest in disclosure of the withheld information, such public interest does not clearly outweigh the purpose of the section 18(1)(c) and (d) exemptions.

## **RECORDS:**

[7] The information withheld pursuant to section 18(1) of the *Act* is in one record entitled "Health Human Resources Overview" (9 pages, partially withheld).

[8] The redacted information in the record contains specific numbers of the current and estimated future shortages of personnel in the health workforce, among nurses, personal support workers and physicians and discusses estimated gaps in these areas.

## ISSUES:

- A. Does the discretionary exemption at section 18(1) for economic and other interests of the ministry/government apply to the records?
- B. Did the ministry exercise its discretion under section 18(1)? If so, should the IPC uphold the exercise of discretion?
- C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 18(1) exemption?

## DISCUSSION:

### **Issue A: Does the discretionary exemption at section 18 for economic and other interests of the ministry/government apply to the records?**

[9] The purpose of section 18(1) is to protect certain economic and other interests of institutions. It also recognizes that an institution's own commercially valuable information should be protected to the same extent as that of non-governmental organizations.<sup>1</sup>

[10] Section 18(1) states, in part:

A head may refuse to disclose a record that contains,

(c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information whose disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

[11] The purpose of section 18(1)(c) recognizes that institutions may have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse to disclose information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.<sup>2</sup>

[12] The purpose of section 18(1)(d) is to protect the financial interests of the Government of Ontario and the ability of the Government of Ontario to manage the economy of the province and to protect the broader economic interests of Ontarians.<sup>3</sup>

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<sup>1</sup> *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

<sup>2</sup> Orders P-1190 and MO-2233.

<sup>3</sup> Order PO-4277.

[13] The exemptions found in section 18(1)(c) and (d) apply where disclosure of the record “could reasonably be expected to” lead to one of the harms specified.

[14] Parties resisting disclosure of a record cannot simply assert that the harms under section 18(c) and (d) 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 18(1)(c) and (d) are self-evident and can be proven simply by repeating the description of harms in the *Act*.<sup>4</sup>

[15] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.<sup>5</sup> However, they do not have to prove that disclosure will in fact result in harm.

### ***Representations***

#### *The ministry’s representations*

[16] The ministry submits that both exemptions at section 18(1)(c) and 18(1)(d) apply to the withheld information because disclosure could reasonably be expected to prejudice the ministry’s economic interests and the financial interests of the Government of Ontario and be injurious to the Government’s ability to manage the economy.

[17] The ministry states that the redacted information contains specific numbers of the current and estimated future shortages of personnel in the health workforce, including nurses, personal support workers and physicians and discusses estimated gaps in these areas. The ministry notes that the withheld information points to specific shortages within these professions in 2022, 2023 and 2024 and also includes estimated gaps in these areas of the health workforce at both 5 and 10 years in the future. The ministry submits that these numbers are generated using its own analytics which are not available publicly.

[18] The ministry explains that pursuant to the *Health Insurance Act*,<sup>6</sup> it funds physicians in Ontario through the setting of the insurance payment schedules under the Ontario Health Insurance Plan (OHIP). The ministry submits that the disclosure of the withheld information would very likely be used by the Ontario Medical Association (OMA) in upcoming negotiations to negotiate increases in physician billings through higher payment rates under OHIP, based on the economic principles of supply and demand.

[19] The ministry submits that increases in physician compensation have been used as a comparator or precedent for other professions who are publicly funded to negotiate increased rates. It notes that midwives have used physician compensation as a comparator in negotiations with the ministry and in recent human rights complaints

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<sup>4</sup> Orders MO-2363 and PO-2435.

<sup>5</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>6</sup> R.S.O. 1990, c.H.6.

regarding perceived disparities in compensation.

[20] The ministry also submits that pursuant to the *Connecting Care Act*,<sup>7</sup> it funds, through Ontario Health, hospitals, home and community care support services organizations and long-term care homes. The ministry notes that these organizations, which employ nurses and personal support workers (PSWs), are funded by the ministry, and any increases to their costs to provide health care services would ultimately fall back on the ministry to increase their transfer payments accordingly.

[21] The ministry submits that if the withheld information was disclosed, the organizations it funds would likely face increased costing pressures as employers because the withheld information would likely be used by their employees and/or their associations to achieve higher wages from those hospitals and long-term care homes, either through the collective bargaining or arbitration processes.

[22] The ministry refers to the previous central hospital collective agreement between the Ontario Hospital Association (OHA) and the Ontario Nurses' Association (ONA) noting that the ONA has publicly stated in relation to negotiations on a new agreement that their top two bargaining issues are staffing shortages and wages.

[23] Further, it notes that while the previous ONA-OHA central agreement provided annual 1% salary increases in accordance with the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* (Bill 124), now that the legislation has been found unconstitutional by the Ontario Superior Court of Justice<sup>8</sup>, it is possible that parties will leverage the reopener clauses within their agreements to obtain arbitration awards for higher wages, such as in a recent case involving the ONA and 131 hospitals. The ministry notes that in the case of the ONA-OHA central agreement, recent arbitration awards topped up the 1% salary increase by 0.75% in 2020, 1% in 2021 and 2% in 2022. Additionally, it notes that a wage reopener clause in the Unifor-Ornge collective agreement enabled an arbitrator in January 2023 to direct top up wage increases of 1% in 2020, 2021 and 2022.

[24] Therefore, the ministry submits that disclosing the withheld information could negatively impact salary negotiations the ministry is currently engaged in, as well as collective bargaining negotiations and/or arbitration hearings that other bargaining agents are presently engaged in.

[25] The ministry refers to Orders P-1190 and PO-2758 as support for the proposition that the section 18(1)(c) exemption applies where sufficient evidence has been submitted that ongoing or upcoming negotiations could be negatively impacted by a disclosure of certain records (as opposed to contracts from negotiations that have concluded.)

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<sup>7</sup> 2019, S.O. 2019, c. 5, Sched. 1.

<sup>8</sup> *Ontario English Catholic Teachers Assoc. v. His Majesty*, 2022, ONSC 6658, recently upheld by the Court of Appeal in *Ontario English Catholic Teachers' Association v. Ontario (Attorney General)*, 2024 ONCA 101.

[26] The ministry distinguishes Orders P-229 and P-441 where it was found that the relations of an institution with its employees, in and of itself, does not relate to the institution's legitimate economic interests when examining section 18(1)(c). In these cases, the adjudicators found that the exemption did not apply because the ministries did not provide sufficient evidence to meet the harm test. Specifically, the representations regarding the withheld information did not "bridge the evidentiary gap" to establish how the disclosure could reasonably be expected to prejudice the ministry's economic interests.<sup>9</sup>

[27] The ministry submits that the withheld information in this appeal relates to a key economic principle employed during collective bargaining and arbitration (supply and demand), and given the evidence provided, it has shown that the harm test under both section 18(1)(c) and section 18(1)(d) is met.

[28] The ministry submits that its position that disclosure could reasonably be expected to prejudice its economic interests is well-founded and supported by the evidence. It points to several arbitration decisions where evidence of issues with recruitment and retention were taken into account by arbitrators in deciding to award wage increases, particularly in relation to the healthcare sector.<sup>10</sup> The ministry submits that these precedents demonstrate that unions may use the withheld information relating to labour shortages to support their position that there is a recruitment and retention issue. It suggests that this position is further supported by a recent news article stating that unions relied on polling data relating to recruitment and retention of registered practical nurses in order to advocate for increased wages.<sup>11</sup>

[29] The ministry also submits that disclosure of the information could be injurious to the government's ability to manage the economy since some of these health care services are procured from the private sector. It argues that due to long-standing pressures on hospital resources, which were significantly exacerbated by the COVID-19 pandemic, many hospitals have been filling acute human resource needs by turning to private, for-profit agencies that contract out nurses and PSWs at a much higher rate.<sup>12</sup> The ministry

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<sup>9</sup> Order P-441.

<sup>10</sup> The ministry refers to *Participating Hospitals v Ontario Nurses Association*, 2023 CanLII 33967 (ON LA), *Errinrung Thornbury Inc. v CLAC, Local 304*, 2015 CanLII 10861 (ON LA), *Homewood Health Centre Inc. v United Food and Commercial Workers, Local 75*, 2022 CanLII 46392 (ON LA), *Chartwell Oakville Retirement v Christian Labour Association of Canada*, 2015 CanLII 32028 (ON LA), and *Muskoka Landing (Huntsville Long-term Care Centre Inc.) v Canadian Union of Public Employees, Local 4645-00*, 2022 CanLII 85712 (ON LA). It also notes that these arbitrations were subject to the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14 . Section 9(1.1)(5.) of that Act requires boards of arbitration to consider an employer's ability to attract and retain qualified employees in making a decision or award.

<sup>11</sup> "Union survey suggests more than half of Ontario registered practical nurses considering leaving over pay". April 27, 2023. The Globe and Mail.

<sup>12</sup> "It's corrosive. They're price gouging:' Agency staffing is costing hospitals, LTC homes, critics say," August 18, 2022. Ottawa Citizen; "Ontario Liberal MPP introduces bill to address 'price gouging' by temporary nursing agencies," February 23, 2023. CBC News; "Temporary staffing agencies overcharging Ontario long-term care homes: association," February 14, 2023. The Canadian Press; "'Laura' spoke on

states that hospitals have already raised concerns about the cost of these private sector nursing fees and have requested additional funding to cover these higher rates. The ministry submits that if these private sector agencies have access to the withheld information, which shows current and future human resource gaps, such information would likely be used by them to negotiate even higher rates for their services, resulting in the affected organizations' need for more funding.

*The appellant's representations*

[30] The appellant submits that the ministry has failed to raise a specific case for how general projections of workforce needs could specifically harm the government's ability to "earn money in the marketplace" or "compete for business with other public or private sector entities." He submits that the ministry's argument of economic harm is incongruent with the government's public position on workforce deficiencies in health care.

[31] The appellant notes that in January 2023, the Ontario Government announced legislative changes to incentivize health care workers from other Canadian provinces to launch a career in Ontario by waiving the need to immediately register with a professional college. He notes that at the time the Premier stated in the Legislature: "We need a lot more. We're going to continue asking the College of Nurses to speed up the process to bring all these qualified nurses right here to Ontario."<sup>13</sup>

[32] The appellant submits that the government itself has clearly, consistently and publicly expressed a need for additional health care workers, and that "need," will have already influenced the ongoing negotiations with nursing unions and will have already impacted nursing agency rates. The appellant suggests that if the premier's characterization of the current workforce deficiencies did not constitute economic harm, then releasing the government's figures that quantify the "need" would also do little to injure Ontario's economic interests.

[33] The appellant acknowledges that the withheld information was calculated using the ministry's own analytics and are therefore not publicly available. However, he suggests that it is possible for anyone, including private sector agencies, to make similar calculations using publicly available information such as job postings, vacancy statistics and turnover statistics from organizations including the College of Nurses of Ontario, which publishes extremely specific and detailed data breakdowns. The appellant states that while the private sector may not have the same projections as the government line by line, it is reasonable to assume that private sector agencies that specialize in recruitment and provision of temporary labour have detailed and sophisticated methods to make these calculations.

[34] The appellant submits that releasing the withheld information would provide only

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condition of anonymity. Her story of what's happening in nursing is a warning to us all". June 15, 2022. The Toronto Star.

<sup>13</sup> Hansard Issue: L005A. June 10, 2023.

high-level vacancy statistics overall and not the needs of each hospital, health network or city. He submits that different health networks have different needs for the provision of private-sector staff and, therefore, disclosing the withheld information will not help an agency that offers nurses to work in Toronto or Timmins, for example, because it will only give a very macro-overview of Ontario's needs for nurses, PSWs and physicians.

[35] The appellant suggests this same logic applies to the numbers of physicians noting that the lack of physicians in certain areas is already a well-established fact and something the Ontario College of Family Physicians (and the OMA) has published from its own research. The appellant suggests that physicians working in especially under-served areas already know who they are. Others in big cities where there is a greater supply are also aware of this, as are those bargaining on behalf of all doctors and data calculated by the province over the next several years is unlikely to change this.

[36] The appellant notes that according to the ministry's submission, the withheld information points to shortages in 2022, 2023 and 2024 and "estimated gaps ... at both 5 and 10 years in the future." He suggests that since two of these years have effectively already passed, the projections bear significantly less relevance since the actuals will soon be recorded.

[37] The appellant disagrees with the ministry's position that disclosure of the withheld information would "very likely be used by their employees and/or their associations to achieve higher wages from those hospitals and long-term care homes." He submits that shortages of health-care workers are widely known. The appellant notes that in August 2023, the Health Minister told the *Toronto Star* there was a "national and internal shortage" of health-care workers.<sup>14</sup> He refers to news articles (including those referenced by the ministry) that cite hospital closures due to staffing issues and suggests that they provide more information for bargaining as they include site-specific examples of shortages.<sup>15</sup> He submits that the overall numbers for the province would not be useful in the same way, nor would they materially change what unions or nursing agencies already know.

[38] The appellant submits that the ministry's arguments about the ONA agreement indicate that unions are already aware of shortages and have gathered their own evidence for negotiations. The appellant submits that high-level estimates in the withheld

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<sup>14</sup> "Ontario Health Minister Says No Easy Way to Stop ER and ICU Closures." 2022. Thestar.com. August 2, 2022.

<sup>15</sup> The appellant notes that throughout the summer of 2022, emergency rooms in Ontario closed, citing staffing shortages for example, in July of that year, Red Lake Hospital closed its emergency room saying it was "unable to staff 12 hours of the July 7th to 8th Emergency Room Department Physician shift." "Anticipated Interruptions to Emergency Department Services" Red Lake Margaret Cochenour Memorial Hospital - Newsroom. Accessed June 4, 2023. The appellant notes that that same month, the Huron Perth Healthcare Alliance closed its hospitals, citing "health human resources shortages." Blue Lemon Media Inc. "Temporary Reduction in Hours/Closure of HPHA Emergency Departments," n.d. <https://www.hpha.ca/newsroom?newsid=11223>.

information will not substantially change that.

[39] The appellant notes that the Ontario government has already had to pay out almost \$900 million in retroactive pay for Bill 124. He also notes that without relying on the withheld information, Ontario's Financial Accountability Office (the FAO) predicts that "if the government is unsuccessful in its appeal and all hospital employees are awarded retroactive compensation, the FAO estimates that hospital spending could increase by an additional \$2.7 billion from 2022-23 to 2027-28, compared to the FAO's current spending forecast."<sup>16</sup> The appellant submits that disclosure of the record will not make a material difference in what could be costly renegotiations for the Ministry of Health regardless of whether this information is released.

[40] The appellant disagrees with the ministry's submission that the withheld information relates to a key principle employed during bargaining (supply and demand) and therefore meets the harms test under the exemptions. He submits that the withheld information appears to be a high-level estimate which includes some information already relegated to the past as a projection that will be replaced by actuals. He suggests that disclosure would not change the view unions already have. He agrees that the information may add a level of specificity but argues that the substance of this information is already known through things such as hospital closures, the ministry's own words and analysis released by associations advocating for physicians.

#### *Reply representations*

[41] The ministry submits that the numbers generated using its own modeling methods are very different from a high-level political statement made in the public sphere about the government's priorities for human resourcing in health positions. It notes that the information at issue substantiates the ministry's and external stakeholder's claims that there is a labour shortage and reveals exactly how much of a shortage is anticipated.

[42] The ministry notes that while private sector agencies could calculate labour shortage data using publicly available information, external stakeholders would not be privy to the same information or data sources and analytical methods it has to calculate its numbers. The ministry submits that it is able to produce more accurate data, since the information it collects is updated regularly, and it can link data from the restricted access databases to obtain custom data sets for specific analyses. The ministry can then utilize custom scenarios (for example, based on sector investments, or population-based needs) and recalibrate them as needed to run modelling forecasts.

[43] The ministry notes that both the ONA and the OMA negotiate on behalf of their entire membership of nurses and physicians, who work across Ontario. As such, it submits that its data could be leveraged by these organizations in negotiations for increases in

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<sup>16</sup> <https://www.fao-on.org>. "Ontario Health Sector: 2023 Budget Spending Plan Review." Financial Accountability Office of Ontario (FAO), n.d. <https://www.fao-on.org/en/Blog/Publications/health-update-2023>.

the wages of all nurses or physicians within the membership, and not just for a particular geographic area.

[44] Referring to the appellant's suggestion that "actuals" would be released in any event, the ministry states that it does not publish data relating to health human resourcing labour shortages, including retrospective data on past years. The ministry submits that even if the projections at issue were published after their relevant time periods have passed the projections could still have bearing on labour negotiations and arbitrations for wages from previous years, particularly so in the context of wage reopener clauses that may be exercised considering the Ontario Superior Court of Justice's finding that Bill 124 is unconstitutional.

### ***Analysis and finding***

[45] For the section 18(1)(c) exemption to apply to the withheld information, there must be a reasonable expectation that disclosure of the information could reasonably be expected to prejudice the economic interests of the ministry or its competitive position. For the section 18(1)(d) exemption to apply, there must be a reasonable expectation that disclosure of the information could reasonably be expected to be injurious to the financial interest of the Government of Ontario or the ability of the Government to manage the economy of the province.

[46] As set out above, the law on the standard of proof is clear. In Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),<sup>17</sup> the Supreme Court of Canada addressed the meaning of the phrase "could reasonably be expected to" in two exemptions under the Act and found that it requires a reasonable expectation of probable harm. In addition, the Court observed that "the reasonable expectation of probable harm formulation should be used whenever the 'could reasonably be expected to' language is used in access to information statutes."

[47] In order to meet that standard, the Court explained that:

As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence well beyond or considerably above a mere possibility of harm in order to reach that middle ground; ... This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and inherent probabilities or improbabilities or the seriousness of the allegations or consequences...

[48] I agree with and adopt this approach for the purposes of this appeal.

[49] In the circumstances of this appeal, based on my review of the withheld

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<sup>17</sup> 2014 SCC 31, [2014] 1 S.C.R. 674.

information in the record at issue and the parties' representations, I find that the exemption at section 18(1)(c) applies to the information at issue. In my view, there is a reasonable basis to find that disclosure of the information could reasonably be expected to prejudice the economic interests of the ministry or its competitive position. I also find that disclosure of the withheld information could reasonably be expected to be injurious to the financial interests of the government of Ontario or its ability to manage the economy of Ontario under section 18(1)(d).

[50] It is not disputed, and I accept that under the *Health Insurance Act*, the ministry is the source of funding for physicians as it sets the insurance payment schedules under OHIP. Also, under the *Connecting Care Act*, the ministry is the source of funding for hospitals, home and community care support organizations and long-term care homes which employ nurses and PSWs.

[51] The ministry's submissions on the potential harms from disclosure of the withheld information are persuasive. Any resulting increase to the health and human resource costs of other affected organizations would revert to the ministry as funder for the health care system through increased OHIP rates for physicians, or the funding obligations to organizations that employ these health care professionals or procure private nursing and personal support worker (PSWs) services. Therefore, I find that disclosure of the withheld information could reasonably be expected to negatively impact the government's ability to manage the costs of providing health care and the overall budget on behalf of taxpayers.

[52] As noted by the ministry, the withheld information includes specific numbers of the current and estimated future shortages of health care workers by nurses, PSWs and physicians. The withheld information points to specific shortages in 2022, 2023 and 2024 and also estimates gaps in these areas at five and ten years in the future. If the withheld information was disclosed, bargaining units would be in possession of the ministry's specific numbers, and I agree that it is reasonable to expect that they would be used in negotiations to affect overall compensation. I also find that the information could be used by the private sector companies that are providing services to the health-care sector in their negotiations with the hospitals or long-term care homes to advocate for higher rates for its services resulting in the organizations' need for more ministry funding.

[53] I accept that if the withheld information relating to physicians is released it would be reasonable to expect it to be used by the OMA in upcoming negotiations to attempt to increase physician billing based on the economic principle of supply and demand. In my view, the ministry's own numbers would be more persuasive than any other third-party numbers given the data available to it. Further, I accept that physician compensation is used as a comparator or precedent for other publicly funded professions which makes this information more likely to be relied upon if disclosed.

[54] Regarding the same principle of supply and demand, I accept that the organizations under the *Connecting Care Act*, that employ nurses and PSWs and are

funded by the ministry, could face increased costing pressures as employers if the withheld information is disclosed, directly affecting the ministry.

[55] After reviewing arbitration decisions dealing with reopener clauses used in relation to the recent striking down of Bill 124 as unconstitutional, referenced by the ministry, it is clear that staff retention and recruitment are serious factors that are considered in making an award. For example, the Chair in *Participating Hospitals v Ontario Nurses Association, 2023*<sup>18</sup> stated:

The evidence in this hearing clearly demonstrated that difficulties with staffing have undermined the provision of healthcare services. Both of these criteria weigh strongly in favour of significant increases in compensation.

[56] Although the Chair acknowledges the “staffing shortage crisis” already apparent in 2021, there is no reference to any actual numbers relating to shortages or projections of same. In my view, the arbitration decisions support the ministry’s argument that if the withheld information was disclosed, bargaining units could use the ministry’s information concerning labour shortages to further support their position, impacting negotiations and would also be impactful with a decision maker.

[57] In response to the appellant’s submission that the actual numbers are recorded eventually making the withheld information redundant thereafter, the ministry clarified that it does not publish data relating to health human resourcing labour shortages, including retrospective data. I agree with the ministry that the withheld information can be used prospectively and retroactively in negotiations and therefore is always at risk to affect negotiations. I note this is one of the reasons that the ministry claims that it never discloses this kind of information (addressed in more detail under Issue B).

[58] The appellant suggests that even without the withheld information, the government has had to pay out close to \$900 million in retroactive pay and the FAO predicts a potential increase of an additional \$2.7 billion from 2022-2028 all relating to Bill 124. He suggests that disclosure of the withheld information would not make a material difference in what could be costly negotiations for the ministry. However, as pointed out by the ministry, the withheld information reveals the exact anticipated shortage and I find that it is reasonable to expect that this information could be used by bargaining units to strengthen their position in wage negotiations with the ministry. Specifically, aggregate data that reveal the ministry’s bargaining position could be leveraged by agencies and unions that negotiate for nurses or physicians across the province. I accept that labour negotiations are often unpredictable, and that the withheld information could prove useful to bargaining agents aiming to support their bargaining objectives in negotiations with the ministry.

[59] The appellant suggests that it is possible for anyone, including private sector

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<sup>18</sup> Cited above.

agencies, to calculate labour shortage data using publicly available information such as job postings, vacancy statistics and turnover statistics. While other organizations may have their own calculations (such as bargaining units, the FAO and/or private sector providers), I accept that the ministry's numbers are generated using its own analytics that are not publicly available and therefore the projections are specific to the ministry. Also, while external stakeholders may generate their own numbers, the ministry's data points to its own perceptions of the exact labour shortages and therefore reveals the ministry's bottom line. In my view, disclosure of this information could give external organizations an advantage not otherwise available to them when seeking increased wages and increased health care costs.

[60] I have also reviewed the news articles referenced by the parties including one article referenced by the ministry that refers to a poll released by two health care unions that suggested that more than 60 percent of registered practical nurses in Ontario are considering leaving the profession over pay.<sup>19</sup> This article notes that the unions are using the survey results to "press the province to increase wages." Another news article referenced by the ministry discusses a private member's bill to address issues with hospitals, long term care homes and other health-care facilities that have relied on private, for-profit agencies to provide nurses, PSW's and other staff.<sup>20</sup> The article notes that critics of this model say it is unfair and lures workers away from permanent jobs. The article suggests that because of the severe shortage, the system has relied upon private agencies to a greater degree. The 1st vice president of the ONA is quoted saying that with 25,000 vacant nursing positions, they have seen some price-gouging from the private sector; "If they know it's a weekend and they desperately need someone, the price automatically drives up."

[61] As stated, I find that the evidence supports a finding that disclosure of the withheld information would reveal specific labour gaps currently and anticipated by the government with respect to nurses, PSWs and physicians. It is reasonable that this information could be used by employees in government funded positions and/or their associations to achieve higher wages from the ministry, based on the economic principles of supply and demand, either through the collective bargaining or arbitration processes. This can reasonably be expected to increase the human resource costs in the provision of health care, which are ultimately funded by the ministry.

[62] As a result, I uphold the ministry's claim that the exemptions at section 18(1)(c) and section 18(1)(d) apply to exempt the withheld information, subject to my review of the ministry's exercise of discretion and the public interest override.

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<sup>19</sup> "Union survey suggests more than half of Ontario registered practical nurses considering leaving over pay," cited above.

<sup>20</sup> "Ontario Liberal MPP introduces bill to address 'price gouging' by temporary nursing agencies," cited above.

**Issue B: Did the ministry exercise its discretion under section 18(1)? If so, should the IPC uphold the exercise of discretion?**

[63] The section 18(1) exemption is discretionary, meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so 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.

[64] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>21</sup> The IPC cannot, however, substitute its own discretion for that of the institution.<sup>22</sup>

[65] The ministry submits that it exercised its discretion in good faith, for the purpose of achieving best value for money with respect to public funds. The ministry submits that it took into account only relevant factors when exercising its discretion, including:

- The wording of the exemption and the interests it seeks to protect: The ministry submits that disclosure of the withheld information could reasonably be expected to negatively impact the government's ability to manage the costs of providing health care and the overall budget on behalf of taxpayers, which is at the very core of the interest ("ability to manage the economy of Ontario") meant to be protected under sections 18(1)(c) and 18(1)(d).
- Whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable: The ministry notes that almost all of the HHR Slides were disclosed to the appellant with only very targeted, minor redactions remaining.
- The nature of the information and the extent to which it is significant and/or sensitive to the institution, the appellant or any affected person: The ministry submits that the pertinent information about the facts of systemic human resource shortages in health positions is already disclosed as per the ministry's decision, therefore the redacted information would not be very significant to the appellant. On the other hand, the information at issue is highly sensitive to the ministry. The redacted numbers are generated using the ministry's own modeling methods and are used by the ministry for planning purposes. Disclosing this redacted

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<sup>21</sup> Order MO-1573.

<sup>22</sup> Section 54(2).

information would affect the ministry's ability in the future to freely consider sensitive information that is relevant to its decision making.

- The historic practice of the ministry with respect to the release of similar types of documents: The ministry notes that there is no past practice of disclosing this type of data, except in rare circumstances and with the understanding that the data be kept confidential. The ministry also has a history of keeping similar types of numerical information confidential.

[66] The appellant does not address the ministry's exercise of discretion.

[67] After reviewing the factors the ministry considered when making its decision, I am satisfied that it did not exercise its discretion in bad faith or for an improper purpose. I am satisfied that it considered relevant factors and did not consider irrelevant factors in the exercise of its discretion. The ministry considered the purposes of the *Act* and has given due regard to the nature and sensitivity of the information in the specific circumstances of this appeal.

[68] It is evident that the ministry disclosed as much responsive information as it could without disclosing the actual numbers that show specific shortages in healthcare workers and certain comments on the estimated gaps. It is evident from the submissions that the ministry does not ordinarily release this kind of information and I agree that its historical practice to keep this type of information confidential is a relevant factor, especially when considering the type of exemptions claimed for this information.

[69] Based on my review of the information at issue, I find the ministry's exercise of discretion was not improper and I am satisfied that the ministry properly considered the purpose of the exemption and the interests sought to be protected under section 18(1)(c) and 18(1)(d).

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

**Issue C: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 18(1) exemption?**

[71] 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:

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.

[72] 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.

[73] 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.<sup>23</sup>

### ***Representations***

[74] The ministry submits that, due to the extensive news coverage already documenting current and expected human resource shortages in health positions in Ontario, disclosure of the specific shortage numbers that are redacted from the HHR Slides would not further a compelling public interest.

[75] Alternatively, the ministry submits that any furtherance to the public interest that may result from a disclosure of the withheld information would be marginal, at best, as there already exists an abundance of public information about staffing shortages in the healthcare sector.<sup>24</sup>

[76] In the event that the IPC were to find that there is a compelling public interest in the disclosure of the records, the ministry submits that this interest does not clearly outweigh the purpose of the exemptions under section 18(1)(c) and 18(1)(d).

[77] The ministry refers to Order P-1398<sup>25</sup> where the adjudicator addressed the public interest override and the exercise of discretion under section 18(1)(d). The request at issue concerned documents pertaining to the economic, social and budgetary impacts of a potential vote for Quebec independence. The ministry notes that in upholding the decision to withhold a number of relevant records, the adjudicator explained that an important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.

[78] The ministry submits that disclosure of the information at issue could reasonably be expected to negatively impact the government's ability to manage the costs of providing health care and the overall budget on behalf of taxpayers and that this is at the very core of the interest meant to be protected by the discretionary exemptions under section 18(1)(c) and 18(1)(d).

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<sup>23</sup> Order P-244.

<sup>24</sup> The ministry refers to 30 items including news articles, Financial Accountability Office reports, various union news releases, addressing significant staffing shortages of nurses and PSWs, crisis in nursing, effect on public with nursing shortage, effects on home and community care, PSW shortage affecting people living with disabilities, salary issues, wage restraint, agency staffing costing hospitals, price gouging, Ontario's government debt.

<sup>25</sup> Upheld on judicial review in *Ontario v. Higgins*, 1999 CanLII 1104 (ONCA), 118 OAC 108.

*The appellant's representations*

[79] The appellant submits that the Government is in the midst of a series of major changes to how health care is delivered, including a more prominent role for the private sector. He refers to a news article that references the reason the government has given for its new policies, being the need to clear the backlog of surgeries that has accumulated since the pandemic.<sup>26</sup>

[80] The appellant submits that there is a public interest in the withheld information as disclosure would shed light on the operations of government. He suggests that the government is undertaking major changes to how health-care functions in Ontario due to issues such as the surgical backlog, which relate to health human resources shortages. He submits that these changes include:

- Increasing the role of for-profit clinics in routine surgeries and procedures to reduce the strain on hospitals<sup>27</sup>
- Changes to the scope of how health-care workers are categorized to allow them to take on new responsibilities to tackle backlogs and staffing shortages<sup>28</sup>
- Regulatory changes designed to allow more internationally trained nurses to work in Ontario<sup>29</sup>
- Introducing a new law that allows hospitals to charge patients who stay overnight when they could instead be accommodated in long- term care.<sup>30</sup>

[81] The appellant notes that critics have said that some of these changes will exacerbate staffing shortages. He refers to the ONA that has indicated that some recent health care changes could put patients at risk because they would "see nurses ... replaced by unregulated workers ... who do not have the same level of education."<sup>31</sup> The appellant notes that others have argued the increased use of private clinics will lead to worse staffing shortages in Ontario's hospitals.<sup>32</sup>

[82] The appellant submits that disclosure of the withheld information is squarely in the

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<sup>26</sup> "Ontario Says Private Clinics Will Cure the Surgery Backlog Issue." 2023. Sudbury.com. January 16, 2023.

<sup>27</sup> Ferguson, Rob, and Rob Ferguson. "Doug Ford Details Plan to Tackle Surgery Backlogs with Private Clinics: 'The Status Quo Is Not Working.'" Thestar.Com, January 17, 2023.

<sup>28</sup> "CityNews," March 10, 2023. <https://kitchener.citynews.ca/2023/03/10/ontario-to-allow-health-care-staff-to-work-outside-of-their-regularresponsibilities-amid-shortage-6678179/>.

<sup>29</sup> CBC. "Ontario Nursing College Now Allowed to Temporarily Register International Nurses," October 27, 2022.

<sup>30</sup> Crawley, Mike. "What Ontario's New Long-Term Care Rules Will (and Won't) Do for Hospitals." CBC, September 17, 2022.

<sup>31</sup> Ontario Nurses' Association. "Media Statement: Ontario Nurses' Association Says Ford Government's Plan for "Convenience" Is Missing Safety, Quality - and Nurses." Newswire, February 2, 2023.

<sup>32</sup> Jones, Allison. "Expansion of Private Clinic Procedures in Ontario Will Affect Hospital Nurse Bargaining: Union." Toronto, January 17, 2023.

public interest because it will explain the context in which the government is making these decisions to introduce significant changes to the public health care system. He suggests that disclosure will help the wider public understand whether reducing regulations for nurses and others and allowing health-care workers to widen their scope of practice, for example, is a necessary risk due to the level of staffing shortages faced.

[83] The appellant submits that the public interest in this appeal is compelling and overrides the concerns raised by the ministry. He notes that the health sector in Ontario accounts for 40 per cent of public spending and is the largest public expense at \$81 billion per year.<sup>33</sup> He also notes that there are more than 200,000 people waiting for surgical procedures in Ontario who are directly impacted by staffing levels.<sup>34</sup> The appellant submits that understanding the extent of the human resources crisis could help them make political decisions based on their own situations.

[84] The appellant refers to the extensive coverage of the issue referenced by the ministry and submits that this demonstrates precisely why it is in the public interest. He states that so far, the debate has included calculations made by interested parties such as unions, it has included anecdotal evidence and statements from the province. He suggests that what is missing from the public discourse are the precise numbers the government is using to come up with a baseline need for health resources in Ontario.

[85] The appellant suggests that the withheld information is vitally important for the public to know because it will contextualize how and why the government has made the health care decisions it has. He states that learning the information government staff are relying on to make critical decisions over the province's most expensive file will provide additional information to the public understanding of the information.

### ***Analysis and finding***

[86] I have considered the representations of the parties and have reviewed the information at issue in the context of the records and information already disclosed. In my view, and for the following reasons, I find that while there is a compelling public interest in disclosure of the information at issue, this public interest does not clearly outweigh the purpose of the exemptions at section 18(1)(c) and 18(1)(d).

[87] In considering whether there is a "public interest," 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.<sup>35</sup> 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

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<sup>33</sup> "Building a Strong Ontario - Ontario budget 2023," *Government of Ontario*, page 154.

<sup>34</sup> "Ontario Newsroom," no date, <https://news.ontario.ca/en/release/1002641/ontario-reducing-wait-times-for-surgeries-and-procedures>.

<sup>35</sup> Orders P-984 and PO-2607.

public has to make effective use of the means of expressing public opinion or to make political choices.<sup>36</sup>

[88] The IPC has defined the word “compelling” as “rousing strong interest or attention.”<sup>37</sup> In my view, there is a compelling public interest in information concerning the shortage of healthcare workers. This is supported by the news reports, the arbitration decisions, and the disclosed portion of the record at issue, which all confirm that there is a health staffing shortage. For example, the disclosed information in the record at issue states that there is a systemic shortage of nurses, attrition issues with PSWs and maldistribution issues regarding physicians. The disclosed information also acknowledges that the shortages have worsened and sets out the challenges discussing strategies and goals to address known gaps with healthcare providers.

[89] Although a compelling public interest has been found not to exist where a significant amount of information has already been disclosed,<sup>38</sup> in this appeal, I find that disclosure of the withheld information would contribute and add to the public discussion. Although the disclosed portions of the record discuss the shrinking gap in nursing and PSW staffing levels and address other issues that are the subject of public attention, it is my view that the withheld information, if disclosed would contribute additional and different information that is relevant to the ongoing public debate concerning healthcare workforce shortages. I agree that disclosure of the withheld information would provide the ministry’s own estimates of the actual shortages and gaps which is obviously in the public interest and would add new information, that is more than marginal, to this debate. After reviewing the representations, various news articles, and the withheld information itself, I find that there is a compelling public interest in disclosure of the withheld information.

[90] Although I have found that there is a compelling public interest in disclosure of the information, for section 23 to apply I must also be satisfied that the public interest clearly outweighs the purpose of the exemption. If a compelling public interest is established, it must be balanced against the purpose of any exemptions which have been found to apply. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.<sup>39</sup>

[91] In Order PO-2014-I the adjudicator explained that in certain circumstances the public interest in non-disclosure of records should be considered. He wrote:

This responsibility to adequately consider the public interest in both disclosure and non-disclosure of records in the context of a section 23 finding was also pointed out by the Divisional Court in *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636. Before upholding my decision to apply

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<sup>36</sup> Orders P-984 and PO-2556.

<sup>37</sup> Order P-984.

<sup>38</sup> Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

<sup>39</sup> See Order P-1398 discussed below.

the public interest override in section 23 and order the disclosure of certain peer review reports on the operation of Hydro facilities, the court in that case stated that it needed to first satisfy itself that "... in deciding as to the existence of a compelling public interest [I took] into account the public interest in protecting the confidentiality of the peer review process". Once satisfied that I had, the court upheld my section 23 finding.

In my view, the issue of whether there is a compelling public interest in disclosure of records is highly dependent on context. Certain key indicators of compellability can be identified, but each fact situation and each individual record must be independently considered and analysed on the basis of argument and evidence presented by the parties.

[92] In Order P-1398, an adjudicator found that certain information was exempt under section 18(1)(d) and also found that there was a compelling public interest in that same information. The records before the adjudicator dealt with the possible consequences of Quebec independence, or a "Yes" victory in the referendum on that subject. However, in determining if the compelling public interest clearly outweighed the purpose of the exemption, the adjudicator weighed the competing interests as follows:

In my view, the public interest in minimizing negative economic effects is more important than the importance of informed public discussion, and for this reason, I find that the compelling public interest in disclosure of the information I have just described above does **not** clearly outweigh the purpose of this exemption and section 23 does not apply to it.

[93] Like the adjudicator in Order P-1398, I find the ministry's submissions that the public interest in disclosing this information does not clearly outweigh the purposes of the exemption to be convincing. As elaborated on above in my discussion about section 18(1), disclosure of the withheld information would reveal specific current and anticipated labour gaps by the ministry with respect to nurses, PSWs and physicians which could reasonably be expected to lead to increased health and human resource costs to the ministry and the Government. Therefore, overriding this exemption could reasonably be expected to negatively impact the government's ability to manage the costs of providing health care and the overall budget on behalf of taxpayers.

[94] I considered the appellant's arguments that the public interest outweighs the purpose of the exemption because disclosure would help those directly impacted by staffing levels in Ontario to make political decisions. However, as noted above, the ministry has already disclosed a significant amount of information relating to staffing shortages without disclosing the actual estimates. Also, as described in more detail above, the interests protected by sections 18(1)(c) and (d) are significant. I found that disclosure of the specific shortfall estimate information could reasonably be expected to prejudice the economic interests of the ministry or its competitive position or be injurious to the financial interests of the government of Ontario or its ability to manage the economy. In

these circumstances, considering that the health sector in Ontario accounts for 40 per cent of public spending and is the largest public expense at \$81 billion per year,<sup>40</sup> I find that the interests protected by the exemptions are not clearly outweighed by the compelling public interest in disclosure.

[95] As a result, I find that while there is a compelling public interest in disclosure of the information at issue, this public interest does not clearly outweigh the purpose of the exemptions at section 18(1)(c) and 18(1)(d) and I uphold the ministry's decision.

**ORDER:**

The appeal is dismissed.

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

Alec Fadel  
Adjudicator

\_\_\_\_\_  
April 16, 2024

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<sup>40</sup> As referenced by the appellant in "Building a Strong Ontario - Ontario budget 2023," *Government of Ontario*.