Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4509

Appeal PA23-00026

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 a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) that was clarified as follows:

> Please provide the following items from the Minister of Health's Transition Binder, prepared to aid Minister Jones in taking on her responsibility as the new Health Minister.
>
> - An index, table of contents, or another similar document listing the titles of all the individual sections or records that are contained within the Transition Binder.
>
> - All the records in the Minister's Transition Binder regarding human resources in provincial hospitals.
>
> Please provide scanned copies of the responsive records from the actual binder that the Minister uses including any hand-written notes, annotations, and mark-ups that the Minister has made. Please provide the responsive records in an electronic format.
>
> Time Period: [specified]

[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), 13(1) (advice or recommendations) and 18(1) (economic and other interests) of the *Act*.

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

[4] During mediation, the ministry issued a revised decision granting access to additional information. The ministry continued to rely on section 18(1) of the *Act* to withhold some information in one record.

[5] The appellant advised that she wished to move to adjudication to pursue the information withheld pursuant to section 18(1) of the *Act*. The appellant takes the position that the exemptions do not apply to the withheld information and also that the public interest override at section 23 of the *Act* applies to this information if the exemptions are found to apply.

[6] 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*.

[7] 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:

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

[9] 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(1) for economic and other interests of the ministry/government apply to the records?

[10] 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.[1]

[11] Section 18(1) states:

> 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;

[1] *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.

> (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;

[12] 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.[2]

[13] The purpose of section 18(1)(d) of FIPPA 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.[3]

[14] 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.

[15] 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.*[4]

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

Representations

The ministry's representations

[17] 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.

[18] 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

---

[2] Orders P-1190 and MO-2233.
[3] Order PO-4277.
[4] Orders MO-2363 and PO-2435.
[5] *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.

these numbers are generated using its own analytics which are not available publicly.

[19] The ministry explains that pursuant to the *Health Insurance Act*,[6] 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.

[20] The ministry submits that increases in physician compensation has 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 regarding perceived disparities in compensation.

[21] The ministry also submits that pursuant to the *Connecting Care Act*,[7] 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.

[22] 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.

[23] 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.

[24] 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 that legislation has been found unconstitutional by the Ontario Superior Court of Justice, 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%

[6] R.S.O. 1990, c.H.6.
[7] 2019, S.O. 2019, c. 5, Sched. 1.

in 2020, 2021 and 2022.

[25] Therefore, the ministry submits that disclosing the withheld information could negatively impact salary increase 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.

[26] 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.)

[27] 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.[8]

[28] 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.

[29] 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.[9] 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

[8] Order P-441.

[9] 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.

in order to advocate for increased wages.[10]

[30] 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.[11] The ministry 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

[31] The appellant refers to the ministry's representations and suggests that it is unlikely that the nurses' union would use the withheld information, if disclosed, given that the Ontario Hospital Association (OHA) and the Ontario Nurses' Association (ONA) have already completed bargaining, mediation and are awaiting an arbitration decision.

[32] The appellant submits that it is speculative for the ministry to argue that the union would use the reopener clause of their contract over the information contained in the record and even if it did that it would result in increased wages.

[33] The appellant disagrees that the withheld information could be used as an argument to increase physician billings in upcoming negotiations with the OMA. She notes that the disclosed parts of the record state that there are no anticipated large gaps in the overall supply of physicians and only mentions maldistribution within regions and specialties.

[34] The appellant submits that the health worker shortage is already a known problem within the Ontario healthcare system. She suggests that even if unions do not have current and future government estimates, the issue is constantly brought forward.

[35] She refers to the Financial Accountability Office of Ontario (the FAO), which has published a report with the expected shortages for nurses and personnel support workers

---

[10] "Union survey suggests more than half of Ontario registered practical nurses considering leaving over pay". April 27, 2023. The Globe and Mail.

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

until 2027. The appellant suggests that additional details contained in the withheld information would shed new light but suggests that it would not be significant enough to make an impact on the bargaining outcome.

[36] The appellant refers to IPC decisions where section 18(1) of the *Act* was upheld, and contrasts them with the information at issue in the present appeal. She says that the information at issue in those appeals would have revealed strategic information, such as how much an institution was willing to pay for a service[12] or revealed unknown weaknesses that could be exploited by competing organisations.[13] The appellant submits that the withheld information in this appeal does not reveal the government's strategy during wage negotiations or expose an unknown weakness of the healthcare system. The appellant submits that it is public knowledge that there are shortages of nurses and other health care professionals.

Reply representations

[37] In reply,[14] the ministry submits that while the negotiation with OHA and ONA has concluded, there are other negotiations involving the ONA, the OMA, and other healthcare employers that are still ongoing or still to occur. It suggests that these negotiations can pertain to wages both prospectively and retroactively. The ministry notes that it anticipates that these organizations are also likely to share information amongst each other to facilitate their negotiations. As such, it continues to suggest that the redacted information can still prove useful to these associations when negotiating wage increases.

[38] The ministry notes that although the disclosed portions of the record states there are no anticipated large gaps in the overall supply of physicians, it only mentions maldistribution within regions and specialties. The ministry submits that maldistribution is still a relevant factor in negotiations with the OMA, which are complex and not simply premised on overall physician shortages. Furthermore, the ministry points out that maldistribution means that there still exist shortages.

[39] The ministry submits that a general awareness of health worker shortage is different from the specific data it has generated. It confirms that the redacted information reveals exactly how much of a shortage is anticipated and reveals the ministry's bottom line in negotiations, and disclosure of this strategic information would weaken the ministry's position in negotiations if disclosed.

[40] The ministry states that the FAO's analysis, referenced by the appellant, differs from its own noting that the FAO collected its own data and developed its own methods and assumptions for projecting nursing and PSWs supply and future needs. The ministry notes that it was given the opportunity to review, and fact check the draft FAO report and while it provided feedback highlighting any data errors or inaccurate assumptions,

[12] Orders PO-3572 and PO-4116.
[13] Orders P-1190, PO-3620, PO-4056 and PO-3943.
[14] The parties made reply and sur-reply representations much of which repeated their earlier submissions.

the ministry did not provide its own data or methods to alter the FAO's projections.

[41] In her sur-reply, the appellant notes that negotiations between the OHA and the ONA is already settled and nurses were already granted retroactive payment in light of Bill 124 being struck down. She submits that even if the ONA was able to re-open negotiations, the ministry has not demonstrated that it is reasonably foreseeable that the nurses would be successful in negotiating a higher salary if the withheld information is disclosed.

[42] The appellant also submits that the withheld information does not seem to include a detailed breakdown of the shortage by specialty or by region and is unlikely to be used by physicians to increase their billings by leveraging maldistribution as a factor.

Analysis and findings

[43] 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.

[44] 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),[15] 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."

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

> As the Court in *Merck Fross*t 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…

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

---

[15] 2014 SCC 31, [2014] 1 S.C.R. 674.

[47] In the circumstances of this appeal, based on my review of the withheld 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).

[48] 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.

[49] 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.

[50] 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.

[51] 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.

[52] 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.

[53] Both parties have referred to arbitration decisions dealing with the reopener clause that was used in relation to the recent striking down of Bill 124 as unconstitutional. After reviewing these decisions, 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[16] 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.

[54] 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.

[55] The appellant suggests that since the reopener clauses for nurses has been utilized and the issue was arbitrated, that information should be disclosed because it is no longer at stake to re-open negotiations. However, 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 ministry claims that it never discloses this kind of information (addressed in more detail under Issue B).

[56] I have also reviewed the news articles referenced by the ministry including one article that references 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.[17] This article notes that the unions are using the survey results to "press the province to increase wages." Another news article 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.[18] 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

---

[16] Cited above.
[17] "Union survey suggests more than half of Ontario registered practical nurses considering leaving over pay," cited above.
[18] "Ontario Liberal MPP introduces bill to address 'price gouging' by temporary nursing agencies," cited above.

need someone, the price automatically drives up."

[57] The FAO report referenced by the parties sets out its own projection of the shortages in the relevant fields. After reviewing the report and the withheld information, I agree with the ministry that its own analysis differs from the FAO given the unique information and data sources available to the ministry (for example, its record level data regarding nurses in the province, data regarding the utilization of healthcare and nursing services across sectors, and insights from program areas within the ministry to improve future estimates). Despite the appellant's suggestion that the FAO already published expected shortages of nurses and PSWs until 2027, I agree with the ministry that its data differs from the FAO analysis in a way that could impact bargaining outcomes. Further, after reviewing the FAO report, I note that it addresses key risks to the FAO spending projections noting that "given recent elevated inflation, there is the potential for above-average wage settlements, which would lead to higher than projected spending." It also notes that if the Government is unsuccessful in its appeal of Bill 124, "provincial spending on wages would be higher than projected in the FAO forecast."

[58] Despite the appellant's reference to the disclosed part of the record mentioning that there are no anticipated large gaps in the supply of physicians, only mentioning maldistribution within regions and specialties, after reviewing the withheld information, I agree that maldistribution would be a relevant factor in negotiations with the OMA. I also accept that these negotiations are complex and not simply premised on overall physician shortages.

[59] While other organizations may have their own calculations of these shortfalls (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.

[60] I have reviewed the various orders referenced by the appellant in her representations where section 18(1)(c) has been addressed and conclude that in each instance, the finding turns on whether the institution provided sufficient evidence to demonstrate that the harms set out could reasonably be expected to occur.

[61] In her sur-reply, the appellant argues that the adjudicator in Order P-441 dismissed the Ministry of Natural Resources' position that "disclosure of the record would result in the union being able to make use of the information during collective bargaining, rendering the employer less successful in negotiations, and causing higher settlements." However, the records at issue in Order P-441 concerned information dealing with the Ministry of Natural Resources own employees and the adjudicator found that section 18(1)(c) does not contemplate prejudice to any so-called "economic interests" of an institution in its relations with its employees; "rather, it provides institutions with a discretionary exemption which can be claimed for certain records if, in particular circumstances, disclosure could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in

managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests."

[62] In my view, the facts of this appeal differ from those in P-441, as here the ministry is claiming that if the withheld information is disclosed it will affect health care employers such as the ONA and the OMA who will in turn require additional funds from the ministry. Therefore, I distinguish Order P-441 from this appeal.

[63] 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.

[64] 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.

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

[65] 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.

[66] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[19] The IPC cannot, however, substitute its own discretion for that of the institution.[20]

Representations

[67] 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

[19] Order MO-1573.
[20] Section 54(2).

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 section 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 health human resource shortages 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 information would affect the ministry's ability in 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.

[68] The appellant submits that the ministry did not properly exercise its discretion when choosing to redact information in the record at issue. She submits that linking the redacted information to the ability to control the cost of healthcare and the overall budget on behalf of taxpayers is an exaggeration, given the problem is already known by the public.

[69] The appellant acknowledges that several pages of the record were disclosed but submits that the information at the heart of the record at issue are the numbers that were redacted. She submits that the ministry cannot argue this is a minor redaction just because it only represents a few lines in the record at issue as the redacted information is precisely what the appellant was seeking in her request.

[70] The appellant notes that the ministry based its decision on its historic practice to keep this type of record confidential and suggest this should not be a relevant factor. The

fact that the government usually chooses not to release this type of information does not justify denying the document when requested under the *Act*.

Finding

[71] 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.

[72] 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 some 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 safe is a relevant factor, especially when considering the type of exemptions claimed for this information.

[73] 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). The ministry considered the right factors and balanced them; it is not for me to substitute my discretion for the ministry's.

[74] 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?

[75] 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.

[76] 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.

[77] 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.[21]

Representations

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

[79] 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.[22]

[80] 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).

[81] The ministry refers to Order P-1398[23] 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.

[82] 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).

[83] The appellant submits that even if the exemptions claimed are upheld, the withheld information should be disclosed because it is in the public's best interest to know what information the government is using when making its decisions about the public health system. She submits that this is important for transparency and accountability noting that the quality of care in the Ontario health system affects the lives of all the residents in the

---

[21] Order P-244.

[22] 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.

[23] Upheld on judicial review in *Ontario v. Higgins*, 1999 CanLII 1104 (ONCA), 118 OAC 108.

province and its workers are a pillar of that system.

[84] The appellant submits that these considerations outweigh any risks to the government's economic interests because the human resources shortage is a challenge that will be felt for years to come and will have an important impact on the health services Ontarians will receive.

[85] The appellant compares this case to prior IPC orders where a compelling public interest was found, including:

- records relate to the economic impact of Quebec separation[24]
- the integrity of the criminal justice system has been called into question[25]
- public safety issues relating to the operation of nuclear facilities have been raised[26]
- disclosure would shed light on the safe operation of petrochemical facilities[27] or the province's ability to prepare for a nuclear emergency[28]
- the records contain information about contributions to municipal election campaigns.[29]

[86] The appellant argues that the withheld information in this appeal is similar because it involves issues with serious implications for the public.

[87] The appellant submits that disclosure of the withheld information would shed further light on the topic in addition to the information that has published on the same topic. For example, she notes that the Financial Accountability Office of Ontario's (FAO) report did not specify any projection of the shortages over a 10-year period, unlike the record at issue. Moreover, she notes that the FAO report does not state the ministry's targets for hiring and does not allow for comparison of the targets with the expected needs.

[88] The appellant submits that the withheld information would provide a clear picture of the need for healthcare workers and would reveal any remaining gaps and the government's hiring plans. She refers to the severances in the record and suggests that the withheld information may contain several observations by the ministry employees which may not be included in the FAO report or any other public document on the healthcare workforce. The appellant argues that while the media and various unions have

---

[24] Order P-1398, upheld on judicial review in Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner), [1999] O.J. No. 484 (C.A.).
[25] Order PO-1779.
[26] Order P-1190.
[27] Order P-1175.
[28] Order P-901.
[29] *Gombu v. Ontario* (*Assistant Information and Privacy Commissioner*) (2002), 59 O.R. (3d) 773

reported about the shortage of nurses and PSWs, their numbers vary. She notes that other organisations do not have access to the same information and tools the ministry has to evaluate current workforce, future needs and the realistic increase of the health workforce noting that they do not have access to hospital data the same way the ministry does. She notes that no other organisation has produced 10-year projections. The appellant submits that because of the resources and access to information the ministry has, the record at issue has more credibility and provides more insight than other estimates.

[89] In reply, the ministry submits that the appellant has not identified a compelling public interest in disclosure of the information. The ministry submits that the redacted information would only marginally add to the already extensive debate and media coverage of the health staffing shortage. The ministry suggests that while there may be public curiosity about the information, it does not rouse strong interest or attention and is therefore not compelling.

[90] In her sur-reply representations, the appellant refers to Order P-984 where the adjudicator defined "compelling public interest" as follows:

> the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

[91] The appellant states that the health care system in Ontario, and across Canada, is facing increased public scrutiny due to, among other matters, increased wait times and the difficulty in finding a family doctor. She suggests that the withheld information would permit public scrutiny of information pertaining to healthcare workers, which in turn sheds light on the operation of the provincial public healthcare system. She submits that at a time when the public is increasingly seeking answers to the government's shortcomings in this area, this information is more important than ever to ensure the citizenry is informed when participating in the democratic discourse.

[92] The appellant suggests that the withheld information also identifies some reasons behind retention issues in the healthcare sector and that it is in the public interest to link those factors to the gap itself. She notes that some of those factors are things beyond the government's control, like the pandemic, while other factors can be linked more directly to government's management, like working conditions and Bill 124.

[93] She argues that the compelling public interest clearly outweighs the purpose of the exemption because it is important for public scrutiny and for democracy as Ontarians

ought to be able to make decisions based on facts in order to keep the government accountable. Moreover, she submits that the consequences of the shortage in healthcare workers are significant as it impacts the quality-of-care Ontarians are able to receive in regard to their health.

Analysis and finding

[94] 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).

[95] 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.[30] 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 means of expressing public opinion or to make political choices.[31]

[96] The IPC has defined the word "compelling" as "rousing strong interest or attention".[32] In my view, there is a compelling public interest in information concerning the shortage of healthcare workers. This is supported by the news reports, 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.

[97] Although a compelling public interest has been found not to exist where a significant amount of information has already been disclosed,[33] 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

[30] Orders P-984 and PO-2607.
[31] Orders P-984 and PO-2556.
[32] Order P-984.
[33] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

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.

[98] 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.[34]

[99] 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 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.

[100] Both parties referenced Order P-1398, where 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

[34] See Order P-1398 discussed below.

> information I have just described above does **not** clearly outweigh the purpose of this exemption and section 23 does not apply to it.

[101] 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.

[102] I considered the appellant's arguments that the public interest outweighs the purpose of the exemption because the human resources shortage is a challenge that will be felt for years and will have an important impact on the health services Ontarians receive. However, as noted above, the ministry has 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 a large proportion of public spending, I find that the interests protected by the exemptions are not outweighed by the compelling public interest in disclosure.

[103] 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).

ORDER:

The appeal is dismissed.

Original signed by: April 16, 2024
Alec Fadel
Adjudicator