Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4533-I

Appeals PA23-00067 and PA23-00070

Cabinet Office

July 22, 2024

Summary: This interim order arises from two issues raised by an affected party during an inquiry into an appeal of Cabinet Office's decision to deny a request made under the *Act*. The request was for the call log of the personal cell phone number of an identified individual for a specific time period. Cabinet Office denied access to the records claiming they are not under its custody or control. The appellant appealed Cabinet Office's decision. During the inquiry, the adjudicator notified an affected party and invited them to make submissions on the issues under appeal. In their representations and further correspondence, the affected party raised two additional issues: whether there is a reasonable apprehension of bias on the part of the adjudicator, and whether limitations should be placed on the appellant's use of the affected party's representations. In this interim order, the adjudicator finds there is no reasonable apprehension of bias and does not place restrictions on the appellant's use of the affected party's redacted representations.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 52(3), (9) and (13), and section 55*. Freedom of Information and Protection of Privacy Act*, F-25 RSA 2000 (Alberta), section 58.

Orders and Investigation Reports Considered: Orders MO-1539-I, PO-2263-I, PO-3703-I, and PO-3925-I.

Cases Considered: *Alberta (Information and Privacy Commissioner) v. Alberta Federation of Labour*, [2005] AJ No. 1776; *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 SCR 369, 1976 CanLII 2 (SCC); *McBreairty v. College of the North Atlantic Board of Governors*, 2010 NTLD 28; *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673; *Ontario*

(Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner) (June 3, 1999), Toronto Docs. 103/98, 330/98, 331/98, 681/98, 698/98 (Ont. Div. Ct.); *University of Calgary v JR*, 2013 ABQB 652; *University of Calgary v. JR*, 2013 ABQB 652.

OVERVIEW:

[1] This interim order considers two issues raised by an affected party during my inquiry into appeals of Cabinet Office's decisions to deny the appellant access to information requested under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*). These issues are: 1) whether there is a reasonable apprehension of bias on my part, as the adjudicator, and 2) whether limitations should be placed on the appellant's use of the affected party's representations shared during the course of the inquiry.

[2] The appellant submitted two requests under the *Act* to Cabinet Office for a list of all incoming, outgoing or missed calls for an identified personal cell phone number for two time periods.

[3] For each request, Cabinet Office advised the appellant the responsive records are not its custody or control because the cell phone number is not assigned to a government account. In other words, the cell phone number identified in the requests is the personal cell phone number of an individual.

[4] The appellant appealed Cabinet Office's decisions to the Information and Privacy Commissioner of Ontario (the IPC).

[5] Mediation did not resolve the appeals and they were transferred to the adjudication stage of the appeals process, in which an adjudicator may conduct an inquiry under the *Act*. The adjudicator originally assigned to the appeals decided to conduct a joint inquiry into these matters because they relate to the same type of information, involve the same parties, and raise the same issue. The adjudicator sought and received representations from Cabinet Office and the appellant.

[6] The appeals were then transferred to me to continue the inquiry. On September 19, 2023, I decided to notify an affected party and invite them to submit representations in response to a Notice of Inquiry and the other parties' representations.

Summary of correspondence with the affected party

[7] On October 16, 2023, the affected party submitted representations in response to the Notice of Inquiry. In addition to their representations on the substantive issue of custody or control, the affected party raised a number of concerns regarding the

publication of Cabinet Office's reply representations in relation to a different appeal[1] in the media. The affected party claimed the publication of portions of Cabinet Office's reply representations in relation to the other appeal should lead to the automatic dismissal of these current appeals on the grounds that the publication constituted an abuse of process. The affected party also alleged an adjudicator's impartiality could be unduly influenced and tainted by exposure to media articles. Finally, the affected party suggested the appellant is the same media requester appellant as the one who published Cabinet Office's representations in the media. In the alternative, the affected party claimed that if the appellant in these appeals is not the same media requester appellant as in the related appeal, they "have been providing confidential materials obtained in the course of and through the IPC process to" the media.

[8] On October 17, 2023, I wrote to the affected party advising I would not be dismissing the appeals. I advised the affected party I could not confirm the identity of the appellant and had no evidence before me to support the affected party's claim that the appellant has been disclosing materials shared during the inquiry to the media. I invited the affected party to submit representations on the issue of reasonable apprehension of bias. I also advised the affected party I would not be sharing their representations with the appellant "at this time."

[9] On October 24, 2023, the affected party raised concerns regarding my refusal to dismiss the appeals and claimed that I ought to invite submissions from Cabinet Office and the appellant on the issues of bias and the appellant's use of the affected party's representations. Specifically, the affected party noted that "in reaching this conclusion [to not dismiss the appeals], it does not appear that [I] have requested any submissions from the Requester or, moreover, Cabinet Office." Given these circumstances, the affected party claimed I "disqualified" myself as the adjudicator in this appeal and asked me to recuse myself from the inquiry due to bias. The affected party also took the position that I ought to have required the appellant to confirm whether they shared Cabinet Office's representations with the media. The affected party also asked that I not share any portion of their October 16, 2023 representations with the appellant. In the alternative, the affected party asked me to require the appellant to enter into an express written undertaking to not publish or disclose their submissions to any third party, in any form or manner, the breach of which would immediately result in the dismissal of the appeal.

[10] On November 14, 2023, I declined the affected party's request to recuse myself from the inquiry on the grounds of reasonable apprehension of bias. I specifically noted the affected party did not provide sufficient evidence to demonstrate that "the alleged reasonable apprehension of bias caused by the reference to representations in a different, albeit related, appeal in the media has an impact on the inquiry before me

[1] I note the appeal, where Cabinet Office's representations were published in the media, was filed by a different requester/appellant but concerns the same issue, i.e. whether the personal cell phone logs of an individual are under the custody or control of Cabinet Office.

here." I declined to confirm the identity of the appellant. I also declined to ask the appellant whether they shared Cabinet Office's submissions with the media and, if so, for what purpose. I advised the affected party I would be sharing with the appellant only the portions of the affected party's representations containing the background information and legal arguments they submitted in support of their claim that the requested information is not in the custody or control of Cabinet Office. I confirmed I would not be sharing any portion of the affected party's representations containing information that fits within the confidentiality criteria in Practice Direction Number 7 of the IPC's *Code of Procedure* (the *Code*) or submissions unrelated to the substantive issue under appeal. I also advised I would not place limitations on the appellant's use of the affected party's representations.

[11] On November 22, 2023, the affected party wrote to me advising that they forwarded the correspondence we exchanged to Cabinet Office for its information. On December 15, 2023, Cabinet Office submitted written representations claiming that inquiries before the IPC should be conducted in private.

[12] On November 27, 2023, the affected party submitted a reconsideration request in response to my refusal to recuse myself from the inquiry and my decision to share the non-confidential portions of the affected party's representations with the appellant.

[13] On January 9, 2024, I wrote to the affected party declining their request for reconsideration. I confirmed I would continue to adjudicate this inquiry and affirmed my decision to share the non-confidential portions of its representations with the appellant. On January 12, 2024, the affected party wrote to me advising they continue to disagree with my decisions to not recuse myself from this inquiry and to share a redacted version of their representations with the appellant without restriction.

[14] Given the affected party's position, I decided to invite full submissions from the parties on whether there is a reasonable apprehension of bias on my part in this inquiry and whether any restrictions should be placed on the appellant's use of the affected party's representations that will be shared with the appellant pursuant to my sharing decision.[2] I sought and received representations on these two preliminary issues from all parties.

[15] In the discussion that follows, I find there is no reasonable apprehension of bias on my part. In addition, I place no restrictions on the appellant's use of the redacted version of the affected party's representations, which will be shared with the appellant in due course.

[2] I note that since my sharing decision was issued in November 2023, I have agreed to a discrete number of additional redactions. Specifically, I have agreed to withhold identifiers of the affected party, such as their gender and job title.

PRELIMINARY ISSUE

The Supplementary Notice of Inquiry

[16] Based on the circumstances in this appeal, I determined the expeditious resolution of the issues raised by the affected party required that I go out to all parties for representations on the issues of bias and sharing. The affected party disputes my decision to issue a Supplementary Notice of Inquiry on these issues.

[17] The affected party claims I have already ruled on these matters through the correspondence I sent to them over the past number of months in response to the issues they raised in their original representations and subsequent correspondence.

[18] The affected party further submits that their bias allegation and dispute with the sharing of their representations were raised in their "private and privileged correspondence" with me. In my view, the affected party's allegations relate to issues which affect all the parties to the appeal and those parties should have an opportunity to address these issues. I reiterate that in their October 24, 2023 correspondence, the affected party noted that I had not solicited submissions from the appellant or Cabinet Office on the issues raised by the affected party.

[19] I considered the affected party's claims regarding bias and whether restrictions should be placed on the appellant's use of the shared version of their representations. I also considered the affected party's request that I engage Cabinet Office in this process. I further considered section 20.04 of the *Code*, which states "(b)efore deciding whether to vary the process, the IPC may notify and invite representations from the parties."

[20] Given the above, I decided to issue a Supplementary Notice of Inquiry to provide all parties with an opportunity to make arguments regarding these issues to ensure fairness and due process. In reaching my findings in this interim order, I considered the representations of the affected party, Cabinet Office, and the appellant in response to that Supplementary Notice of Inquiry.

ISSUES:

A. Is there a reasonable apprehension of bias on the part of the adjudicator conducting this inquiry?

B. Should there be any restrictions placed on the appellant's use of the affected party's October 13, 2023 representations?

DISCUSSION:

Issue A: Is there a reasonable apprehension of bias on the part of the adjudicator conducting this inquiry?

[21] In administrative law, there is a presumption, in the absence of evidence to the contrary, that an administrative decision-maker will act fairly and impartially. The onus of demonstrating bias is on the person who alleges it. In this case, the onus of demonstrating bias is on the affected party.

[22] Mere suspicion of bias is not enough; there must be a reasonable apprehension of bias. The Ontario Court of Appeal has affirmed, "The threshold for finding a reasonable apprehension of bias is extremely high…. There is a strong presumption in favour of the impartiality of the trier of fact and the question of reasonable apprehension requires a highly fact-specific inquiry."[3]

[23] Actual bias does not need to be proven. The test is whether there exists a *reasonable apprehension* of bias. The Supreme Court of Canada articulated what is now a longstanding test for establishing a reasonable apprehension of bias as follows:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly."[4]

[24] I invited the affected party, Cabinet Office, and the appellant to make submissions on this issue. Cabinet Office advised it "does not take a position on this issue." In their representations, the appellant submits there has not been a reasonable apprehension of bias on my part.

[25] The affected party submits that bias denotes a state of mind predisposed to a particular result or closed with regard to particular issues.[5] They also submit bias can include "unwarranted negative comments about a party, their counsel, their positions and their arguments and entering the fray as an advocate for a party."[6]

[26] The affected party claims they raised the issues of bias and sharing to ensure the

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[3] *Clayson-Martin v. Martin* (2015), 2015 ONCA 596 (CanLII) at para. 72. See also: *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 at para 40, appeal dismissed 2018 ONCA 673.

[4] *Committee for Justice and Liberty et al. v. National Energy Board et al*. [1978] 1 SCR 369, 1976 CanLII 2 (SCC).

[5] *Chainauskas v. Burnett*, 2009 ONCA 572 (CanLII) at para. 10.

[6] *Stuart Budd & Sons Ltd. v. IFS Vehicle Distributors ULC*, 2016 ONCA 60 (CanLII) at para 88.

appeal process maintains its integrity and fairness. However, the affected party claims I pre-determined these issues and failed to properly address them.[7] The affected party also submits I decided there was nothing inappropriate in the publication of Cabinet Office's representations in relation to another appeal in the media. Further, the affected party submits the integrity of these appeals was tainted by the publication of those representations in the media. The affected party also submits I decided the publication of Cabinet Office's representations in the media was not improper and did not result in bias on my part, without the input of Cabinet Office. The affected party submits I invited submissions from Cabinet Office on the issue of the public disclosure of its representations only after I had already decided the issue. The affected party submits I made "rulings in a secretive manner, prejudiced the parties, and with respect to the IPC office, unfortunately, irretrievably tainted the FOI Appeal process."

[27] Upon review of the affected party's representations, it appears they make two main arguments. First, the affected party claims my bias is demonstrated through the manner in which I have conducted this inquiry, exhibiting a "closed mind" to the issues they raised. Second, the affected party claims the publication of portions of Cabinet Office's representations in relation to another appeal in the media has resulted in a reasonable apprehension of bias on my part with respect to the issues on appeal. I note that while the published representations relate to a different appeal, they concern the same substantive issue of whether the call log from an identified individual's personal cell phone is under the custody or control of Cabinet Office. Given these circumstances, I will consider whether the publication of arguments made by Cabinet Office in relation to this issue resulted in bias in this inquiry.

[28] The affected party's first argument is there is evidence of bias in the manner in which I have conducted this inquiry. To support this argument, the affected party refers to the correspondence we exchanged during the inquiry. For example, the affected party claims I "ruled" on October 17, 2023 that I would share their representations with the appellant without restricting the appellant's use of those representations. The affected party states I referred to IPC jurisprudence, including Interim Order MO-1539-I, without first seeking their submissions on those decisions. The affected party submits I held "the IPC does not and cannot control what a party chooses to do with the non-confidential representations that another party agrees to share with it," thereby exhibiting a "closed mind" on the issues of confidentiality in the FOIC appeal process and "essentially acting as an advocate for the Requester."

[29] As noted above, in my correspondence of October 17, 2023, I advised the affected party I would not be dismissing the appeal and invited them to submit representations on the issue of reasonable apprehension of bias. I also advised the affected party I would not be sharing their representations with the appellant "at this time."

[7] I have summarized the correspondence between myself and the affected party in the Overview, above.

[30] The effect of these statements was threefold: (1) I was not persuaded the affected party had advanced grounds for outright dismissal of the appeals based solely on the publication of portions of Cabinet Office's reply representations; (2) I was prepared to entertain the affected party's submissions on bias; and (3) I would leave open any questions concerning sharing portions of the affected party's representations with the appellant until I had heard further submissions on that issue. With respect, I fail to see how any of the foregoing, including my reference to the IPC's past jurisprudence about imposing restrictions on the use of non-confidential representations, demonstrates I have a closed mind on any issues the affected party is raising. Further, while the affected party claims I am "acting as an advocate" for the appellant, this is a wholly unsupported allegation since they do not provide any evidence to support this claim.

[31] In its submissions in response to the Supplementary Notice of Inquiry, the affected party submits I exhibited a closed mind on the issue of bias and the impact the publication of Cabinet Office's representations in the media by failing to seek submissions from Cabinet Office on this issue. Further, the affected party takes issue with me advising them that they do not "represent Cabinet Office in this matter and I will not be addressing this issue further" in my November 14, 2023 correspondence. The affected party claims, by making this statement, I denied them standing to claim bias due to the publication of Cabinet Office's representations in the media.

[32] It is clear from my exchange of correspondence with the affected party that they do not agree with my decisions. However, the affected party's arguments do not establish I was biased in my decision-making. In any case, in January 2024, I decided to conduct a supplementary inquiry and consider the issues of bias and the use of the affected party's representations afresh in a structured, fair and comprehensive manner. Accordingly, I invited all parties to submit representations in response to a Supplementary Notice of Inquiry and the impact of Interim Order MO-1539-I in the circumstances of these appeals. In light of the foregoing and the representations received in response, I find the affected party's arguments regarding my conduct during this inquiry are unfounded.

[33] To support their second argument, the affected party claims the publication of Cabinet Office's representations in the media in a related appeal resulted in a reasonable apprehension of bias on my part in conducting this inquiry and determining the substantive issues under appeal. The affected party refers to the fact that the appellant in the related appeal published large portions of Cabinet Office's representations on multiple media platforms as part of its for-profit commercial news production. I acknowledge the appellant in a related appeal published portions of Cabinet Office's representations in the media during the inquiry. I also acknowledge that Cabinet Office's reply representations in these appeals are substantially similar to those that were published in the media. However, I find the affected party's claim that I may have somehow been tainted by the publication of information I had already reviewed and am familiar with to be speculative at best. The affected party claims the

disclosure of what was expected to be "confidential or private submissions can unfortunately taint an adjudicator or a finder of fact and result in a reasonable apprehension of bias that an adjudicative process is no longer fair or perceived to be fair to a party." However, the affected party has not demonstrated how the publication in the media of portions of Cabinet Office's reply representations which I had already seen could have reasonably impacted my impartiality in conducting this inquiry. As noted above, there is a presumption of impartiality and the threshold for establishing a reasonable apprehension of bias is a high one. Upon review of the circumstances and the affected party's representations, I find the affected party has not established that the publication of Cabinet Office's representations in the media resulted in a reasonable apprehension of bias on my part.

[34] Moreover, while this fact is not determinative of the issue, I note Cabinet Office was offered an opportunity to make submissions on the issue of reasonable apprehension of bias and it did not do so.

[35] Throughout their representations, the affected party suggests I have already reached a decision on the substantive issue in these appeals, namely, whether Cabinet Office has custody or control over the call log for the personal cell phone of an identified individual. The affected party submits they have a "reasonable apprehension of bias that the Adjudicator has already pre-determined the merits of [these appeals] and will not carefully consider the submissions made by Cabinet Office or the Affected Party." I find the affected party's arguments on this point are wholly unsupported given that I have not yet completed my inquiry nor have I rendered my decision regarding the substantive issues on appeal or indicated any predisposition with respect to those issues.

[36] The affected party has not provided sufficient evidence to support their position that there is a reasonable apprehension of bias against them. I have not reached any conclusions on the substantive issue in these appeals. I have yet to seek or review the appellant's arguments in response to the affected party's submissions on the substantive issue of whether Cabinet Office has custody or control over the personal cell phone log of the identified individual. Without these submissions, I am unable to determine the outcome of these appeals.

[37] For the above reasons, I find there is no reasonable apprehension of bias on my part with respect to the adjudication of this appeal and I will not recuse myself.

Issue B: Should there be any restrictions placed on the appellant's use of the affected party's October 13, 2023 representations?

[38] Based on the circumstances in this appeal, I will not restrict the appellant's use of the affected party's representations when the non-confidential portions of them are shared with the appellant.

[39] Previous decisions of the IPC and the courts have considered the manner in which the IPC shares representations between parties to an appeal and the purpose of sharing representations.[8] In Interim Order MO-1539-I, the adjudicator considered the Windsor Essex Catholic District School Board's (the board) request that she impose conditions on the appellant's (a member of the media) use of the representations after they were shared with him during the inquiry. The adjudicator stated the purpose of an inquiry under the *Act* is to receive and test evidence and arguments and, on that basis, to have a decision rendered by an impartial decision maker. As such, the adjudicator explained the IPC decided to share representations between parties to "enhance fairness throughout the inquiry, improve the processes for the gathering and testing of evidence and, ultimately, provide IPC decision makers with better quality, more relevant and more focused representations."[9] The adjudicator referred to Practice Direction Number 7 of the IPC's *Code of Procedure* (the *Code*), which addresses the sharing of representations between parties, and confirmed decision makers should consider the interests of the parties who submitted representations through the application of the confidentiality criteria. However, the adjudicator noted,

> Once a decision-maker is satisfied that the confidentiality criteria do not apply to the representations, or to portions of them, and that they may be shared with another party, the interests intended to be protected by section [52(13) of the *Act*] are, in my view, satisfied. Generally speaking, the parties are free, thereafter, to use the information received through this process as they wish (subject to any other legal recourse outside the *Act* that an aggrieved party may have in connection with their use). I am not persuaded that the use of the representations should be restricted simply because the Board is concerned that they may be used to embarrass it or to publicize its arguments beyond this proceeding.

[40] When seeking representations on the issue of restrictions being placed on the appellant's use of the affected party's representations, I provided all the parties with a copy of Interim Order MO-1539-I to review and comment on the principles regarding a party's used of shared representations.

The parties' representations

[41] In their representations, the affected party submits the FOI appeal process before the IPC is private in nature. The affected party submits the IPC does not hold public hearings and does not provide the public with access to the submissions of any party in any appeal. The affected party refers to section 55 of the *Act*, which states:

> The Commissioner or any person acting on behalf of or under the direction of the Commissioner shall not disclose any information that

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[8] *Toronto District School Board v. Ontario (Information and Privacy Commissioner)*, [2002] O.J. No. 4631 at paras. 7-9, 14-15. (Ont. Div. Ct.).
[9] Interim Order MO-1359-I at page 10.

> comes to their knowledge in the performance of their powers, duties and functions under this or any other Act.

[42] The affected party also refers to section 52(9) of the *Act*, which provides that, "Anything said or any information supplied or any document or thing produced by a person in the course of an inquiry by the Commissioner under this Act is privileged in the same manner as if the inquiry were a proceeding in a court."

[43] Finally, the affected party notes that section 52(13) provides that parties are entitled to make representations in an appeal, but "no person is entitled to have access to or to comment on representations made to the Commissioner by any other person or to be present when such representations are made." The affected party submits this provision confirms the private nature of their submissions.

[44] With respect to the issue of sharing, the affected party refers to the IPC's "well-established practice" of restricting the sharing of submissions to the parties to an appeal. The affected party submits parties to an appeal are asked whether they are willing to share their submissions with the other parties, not whether they are willing to share them with the public-at-large.

[45] The affected party submits the statutory scheme and practice of the IPC establishes a zone of confidentiality, privilege and privacy over information received in an appeal. To support this claim, the affected party submits that section 52(9) contains an implied undertaking for a party to not use submissions during the appeal process for a "collateral purpose." The affected party claims the principles articulated in Interim Order MO-1539-I "conflates the issue of confidentiality with the issue of the private nature of the FOI Appeal process and completely ignores the fundamental rules of statutory interpretation." The affected party submits the private nature of the FOI appeal process is broader than the issue of confidentiality, which relates to the sharing of submissions between parties in an appeal. The affected party submits the issue of confidentiality of submissions is related to the issue of procedural fairness within an FOI appeal, while the private nature of the process relates to its overall integrity.

[46] The affected party acknowledges that regardless of a party's request that submissions not be shared with another party due to confidentiality, an adjudicator can permit the disclosure of these submissions to another party as a matter of administrative fairness. Nonetheless, the affected party submits this does not permit the recipient of the representations to release disclosed information and submissions to the public during the appeals process. The affected party submits the private nature of the process "must prevail, otherwise the entire intent of the legislated process and scheme of *FIPPA* is undermined." The affected party does not explain how the process under the *Act* is undermined by a party's publication of the non-confidential legal arguments in another party's representations.

[47] The affected party submits the phrase in section 52(9) of the *Act*, namely, "is

privileged in the same manner as if the inquiry were a proceeding in a court" has not been judicially interpreted in Ontario. However, the affected party submits the same phrase in Alberta's FOI legislation[10] has been interpreted as being subject to an implied undertaking, "such that things disclosed in the course of an inquiry will be used only in connection with the matter before the tribunal and for no other purpose."[11] The affected party submits this implied undertaking rule has been codified in section 52(9) of the *Act*.

[48] The affected party submits the "open court" principle is not engaged in the FOI appeal process. The affected party submits the private nature of the appeal process is further supported by the fact that the *Statutory Powers and Procedures Act*[12] does not apply to the IPC. Moreover, the affected party submits the IPC is not subject to the *Tribunal Adjudicative Records Act, 2019*[13], which requires tribunals named therein to make adjudicative records in its possession available to the public.

[49] The affected party submits the intent of the Ontario legislature was to make the FOI appeal process private and "to preclude the public dissemination of information and submissions shared between parties to an appeal." The affected party submits the IPC and I, as the adjudicator, should control any abuse of its processes and "cannot sit idly by and permit a requester to violate the sanctity of the private nature of the FOI Appeal process." Accordingly, the affected party submits I can order the appellant to not publicly disseminate the affected party's redacted submissions dated October 13, 2023.

[50] In its representations, Cabinet Office submits "it is not appropriate for it to comment on whether any restrictions should be placed on the appellant's use of another party's representations." However, Cabinet Office submits the IPC inquiry process should be private and its privacy should be maintained and upheld by participants. To support its position, Cabinet Office refers to sections 52 and 55 of the *Act* and the fact that the *Statutory Powers and Procedures Act* and the *Tribunal Adjudicative Records Act, 2019* do not apply to the IPC. Cabinet Office also identifies the following considerations in its representations regarding what it claims to be the private nature of the appeals process:

- Unfairness caused to affected persons who may have significant privacy interests at peril and through no fault of their own are engaged in the IPC's investigation and inquiry process;

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[10] Specifically, section 58 of Alberta's *Freedom of Information and Protection of Privacy Act*, F-25 RSA 2000, which states, "Anything said, any information supplied or any record produced by a person during an investigation or inquiry by the Commissioner is privileged in the same manner as if the investigation or inquiry were a proceeding in a court."

[11] *University of Calgary v. JR*, 2013 ABQB 652 at para 53.

[12] R.S.O. 1990, c. S.22.

[13] S.O. 2019, Chapter 7, Schedule 60.

- The chilling effect on the frank and fulsome representations provided to the IPC with its corresponding impact on the efficacy of the IPC's investigation and inquiry; and

- The potential for distraction and delay impacting the efficiency of the IPC investigation and inquiry.

[51] In light of these considerations, Cabinet Office requests I find the inquiry is a private proceeding until its conclusion and/or ensure representations shared between the parties are subject to an undertaking that they will not be published or shared with third parties until the conclusion of the inquiry.

[52] In their representations, the appellant submits no restrictions should be placed on how representations shared in this inquiry are used. The appellant submits that "maximal transparency" in the appeal process is important for all parties involved.

Analysis and Findings

[53] I have reviewed the parties' representations on the issue raised by the affected party about the appellant's potential public dissemination of their representations, if they are shared. Given the circumstances before me, I find no reason to deviate from the principles set out by the adjudicator in Interim Order MO-1539-I, where she determined that, generally speaking, no restrictions should be placed on representations shared between the parties during the inquiry conducted into that appeal.

[54] The circumstances of the appeal that resulted in Interim Order MO-1539-I are relevant to these appeals because it considers whether a requester should be restricted from circulating or publishing the non-confidential representations shared during an inquiry before the IPC. In the appeal that resulted in Interim Order MO-1539-I, the board acknowledged it is not the IPC's practice to place restrictions on the publication of representations released to a party through the IPC's adjudication process. Despite this, the board asked the appellant, a member of the media, to refrain from publishing the board's representations. The board analogized the inquiry process before the IPC with the discovery process under the *Rules of Civil Procedure*,[14] in which the use of information provided during the discovery process is limited to that proceeding. The board submitted this restriction was appropriate because the IPC's "process was not intended to take place in a public forum." Cabinet Office and the affected party have echoed this position in the current appeal.

[55] In Interim Order MO-1539-I, the adjudicator stated, "the purpose of an inquiry under the Act is to receive and test evidence and argument and on that basis to have a decision rendered by an impartial decision maker."[15] Upon consideration of the *Rules of*

[14] R.R.O. 1990, Regulation 194.
[15] Interim Order MO-1539-I at page 9.

Civil Procedure,[16] the adjudicator found an inquiry under the *Act* is analogous to a hearing and not the discovery process. The adjudicator noted section 52(3) states an inquiry *may* be conducted in private. To be clear, there is no requirement for an inquiry to be held in private in the *Act*. Further, the adjudicator referred to the municipal equivalent to section 52(13) and the 1999 decision of the Divisional Court in *Ontario (Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner)*,[17] where the court found that section 52(13) does not warrant the sealing of parties' representations on judicial review of the IPC's decisions. The court went on to hold that "this principle shall apply unless representations are otherwise ruled as confidential by the IPC." It is noteworthy the court's rationale in upholding the IPC's authority to order the sharing of the parties' non-confidential representations in *Solicitor General* was to afford a greater measure of procedural fairness in the inquiry process.

[56] In Interim Order MO-1539-I, the adjudicator found the interests of the parties submitting representations are considered through the application of the confidentiality criteria. However, as I quoted above, the adjudicator also found that once a decision maker is satisfied the confidentiality criteria do not apply to representations, or portions of them, and they may be shared with another party, the confidentiality interests protected by the municipal equivalent of section 52(13) are satisfied.

[57] I agree with and adopt the principles set out in Interim Order MO-1539-I for the purposes of my analysis. I have considered the circumstances in this appeal, the parties' representations and the relevant sections of the *Act*. Based on this review, I am not satisfied the affected party or Cabinet Office provided sufficient evidence to support the position that the appellant's use of the non-confidential portions of the affected party's representations[18] should be restricted in the circumstances of this case. I note I have decided to share only the non-confidential legal arguments and background information the affected party submitted in support of their claim that the records at issue are outside the custody or control of Cabinet Office.

[58] In addition, I agree with the adjudicator in Order MO-1539-I that while section 52(3) provides the IPC *may* conduct an inquiry in private, there is no requirement that all inquiries be conducted in private, nor does it mean all inquiries under the *Act* are "private in nature." Furthermore, I am not persuaded by Cabinet Office and the affected party's argument that the lack of inclusion of the IPC under the *Statutory Powers and*

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[16] See in particular Rule 30.1.01(5)(b), which sets out the "deemed undertaking" provision. This section states the "[deemed undertaking requirement] does not prohibit the use, for any purpose of evidence that is given or received *during a hearing*." [emphasis added]

[17] (June 3, 1999), Toronto Docs. 103/98, 330/98, 331/98, 681/98, 698/98 (Ont. Div. Ct.). (*Solicitor General*)

[18] I will be providing the affected party with a copy of the version of their representations to be shared with this order. To be clear, the version I will be sharing will be the version I redacted pursuant to my November 14, 2023 sharing decision with the additional requested redactions from the affected party dated November 27, 2023 and January 12, 2024.

Procedures Act and the *Tribunal Adjudicative Records Act* necessarily means the IPC's appeals processes are always or completely private. I also acknowledge the duty of confidentiality imposed on the Commissioner and her delegates in section 55 but note that duty of confidentiality is not imposed on the parties to an inquiry in relation to the sharing of representations. Based on my review, I find the affected party and Cabinet Office have not established that the current inquiry should be made private.

[59] To be clear, Interim Order MO-1539-I does not stand for the proposition that inquiries may never be conducted in private. Section 52(3) of the *Act* clearly states that inquiries *may* be conducted in private providing the IPC with the discretion to do so. In addition, as stated above, section 20.04 of the IPC's *Code of Procedure* allows adjudicators to vary the processes of an inquiry. Further, there is no restriction on the IPC's ability to impose confidentiality undertakings in certain circumstances. For example, it may be appropriate to require a confidentiality undertaking on parties in cases where sensitive personal information must be shared between parties to ensure fair and fulsome representations, but should not be shared any further or for a different purpose.[19] Therefore, it is well within the IPC's ambit to exercise its discretion to conduct an inquiry in private and to place restrictions on a party's use of another party's representations.

[60] However, based on my review, I find the circumstances of this appeal do not warrant such action. The portions of the affected party's representations that I intend to share with the appellant consist of non-confidential background information and legal argument regarding the substantive issue under appeal; it does not contain sensitive personal information or any information that would require the additional protection of a confidentiality undertaking. The affected party has not demonstrated what harm could reasonably be expected to result from the disclosure of the non-confidential portions of its submissions that I intend to share with the appellant.

[61] I now turn to the affected party's arguments regarding section 52(9) of the *Act*, which states,

> Anything said or any information supplied or any document or thing produced by a person in the course of an inquiry by the Commissioner under this Act is privileged in the same manner as if the inquiry were a proceeding in a court.

[62] The affected party claims there is an implied undertaking of confidentiality codified in section 52(9) relating to the sharing of representations. The affected party

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[19] See PHIPA Decision 192, for example, where in a review under the *Personal Health Information Protection Act* the adjudicator allowed for the disclosure of portions of a complainant's patient chart to an affected party. Because this patient chart contained the personal health information of the complainant, the adjudicator ordered that certain express conditions and restrictions attach to the use and disclosure of the portions of the record shared with the affected party.

relies on *University of Calgary v. JR*,[20] which considered the issue of whether the Information and Privacy Commissioner of Alberta could require the production of records subject to solicitor-client privilege. In that decision, the Court of Queen's Bench of Alberta considered similar language in section 58 of Alberta's *FIPPA*[21] which it interpreted as "being subject to an implied undertaking, such that things disclosed in the course of an inquiry will be used only in connection with the matter before the tribunal and for no other purpose."

[63] In my view, the reasoning of the Court of Queen's Bench in *University of Calgary v. JR* is flawed and unreliable for three reasons. First, the court's interpretation of section 58 of Alberta's *FIPPA* found no support at the appellate level, including at the Supreme Court of Canada.[22] Second, the lower court's reasons relied on *McBreairty v. College of the North Atlantic Board of Governors*.[23] In that case, the Newfoundland and Labrador Supreme Court arrived at its interpretation of a similar "privilege" provision based on two orders of the IPC which predated the *Solicitor General* case (described above),[24] where the IPC's authority to order the sharing of non-confidential representations in an inquiry was affirmed.

[64] Finally, the lower court's ruling in *University of Calgary v. JR* is in direct conflict with an earlier ruling of the Alberta Court of Queen's Bench in *Alberta (Information and Privacy Commissioner) v. Alberta Federation of Labour*,[25] where that court rejected the Alberta IPC's argument that section 58 of Alberta's *FIPPA* created a new form of privilege that protected records the IPC had inadvertently disclosed. In that case, the court held that section 58 of Alberta's *FIPPA* is simply a form of immunity protecting parties from having their statement made in an inquiry used as the basis for a defamation action.[26]

[65] In *University of Calgary v. JR*, the Court of Queen's Bench cited the *Alberta Federation of Labour* case but offered no rationale for rejecting its earlier interpretation of section 58 as simply providing protection against claims of defamation, nor did it recognize that the implied undertaking rule only applies to documents produced at the pre-hearing or discovery stage of a proceeding, and not to documents introduced at the hearing or inquiry stage.

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[20] 2013 ABQB 652.
[21] Section 58 of Alberta's *Act*, reproduced at note 7, above.
[22] 2016 SCC 53.
[23] 2010 NLTD 28 at para 104.
[24] See Orders 537 and 592. In Order 537, the adjudicator found that section 52(9) did not apply to records generated in the mediation stage of an appeal. In Order 592, the adjudicator found section 52(9) applied to representations provided by a party in a different, earlier appeal. However, neither order examined any law pertaining to the meaning of the worlds "privileged in the same manner as if the inquiry were a proceeding in a court." In addition, neither order held that these words give rise to an implied undertaking of confidentiality.
[25] [2005] AJ No. 1776.
[26] See paragraph 22.

[66] In any case, I find the affected party's arguments regarding *University of Calgary v. JR* do not support the imposition of an implied undertaking of confidentiality on the parties to an inquiry in relation to any non-confidential representations which have been shared.

[67] My decision in this respect finds ample support in the IPC's Interim Order PO-2263- I, in which the adjudicator rejected virtually identical submissions advanced by the Ministry of Community Safety and Correctional Services (the ministry). In that case, the ministry asked the adjudicator to adopt the Court's "implied undertaking" rule applicable in the civil discovery context and apply it to evidence submitted during an inquiry under section 52(9) of the *Act*. The adjudicator found "the analogy between the implied undertaking rule in civil proceedings and the privilege referred to at section 52(9) is wholly inapt."[27] The adjudicator further states,

> … the implied undertaking rule is designed to protect information received by one party to litigation from another through discovery in the pre-adjudication stage of a trial from being made generally known or used by the discovering party for a purpose collateral to the litigation. It is not designed to afford continuing protection to information actually admitted into evidence at the adjudication stage which, in the context of a civil proceeding, usually occurs in open court. While it is the longstanding practice of this office to restrict the evidence and submissions made during the course of an oral or written inquiry to the participating parties, the IPC has never imposed any restrictions or limitations on the further publication or use of any evidence or submissions received by a party from another party during the course of an inquiry.
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> …
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> Both the practice of this office in sharing representations among the parties without the imposition of restrictions on subsequent use and the practice before the Divisional Court with respect to filing the public and private record of proceedings are consistent with the principle that the administration of justice should take place in as open a fashion as possible, without jeopardizing legitimate confidentiality interests, such as those reflected in section 5 of Practice Direction 7. Having found that the confidentiality criteria in Practice Direction 7 have no application to the vast majority of the information contained in the search affidavits in this inquiry, I can identify no rationale, based on the Ministry's representations or otherwise, for imposing a further restriction on the appellant's use or publication of the information contained in these documents.[28]

[27] Interim Order PO-2263-I at para 93.
[28] Interim Order PO-2263-I at para 94-95 and 97.

[68] I agree with and adopt this analysis in this decision. I find section 52(9) of the *Act* does not establish an unlimited privilege to the evidence received by the IPC in the course of an inquiry under the *Act*. I also note the adjudicator's comment at paragraph 99 of Interim Order PO-2263-I that he was "not satisfied that the salutary effects of [a sealing] order, including any impact it would have on the fair disposition of the issues raised in this inquiry, would outweigh its deleterious effect, including the effect on the appellant's right to free expression."

[69] Interim Order MO-1539-I confirms the general practice at the IPC to apply the confidentiality criteria in Practice Direction Number 7 of the *Code* to satisfy the interests protected by section 52(13). In the present appeal, I redacted portions of the affected party's representations and, through my sharing decision, advised I intend to share only the arguments made by the affected party relating to the substantive issue before me. I reviewed these arguments and determined the confidentiality criteria in Practice Direction Number 7 does not apply to them and therefore, that they should be shared with the appellant their response. I have redacted the confidential representations of the affected party along with any representations that do not relate to the substantive issue under appeal. Accordingly, I find the confidentiality concerns raised by the affected party and the interests of section 52(13) have been addressed and the affected party has not established any reason to place further restrictions on the appellant's use of the non- confidential portions of the affected party's representations.

[70] I have also considered the factors raised by Cabinet Office in its representations. Upon review of the circumstances, I find Cabinet Office has not demonstrated how sharing the non-confidential portions of the affected party's representations will result in unfairness to the parties in this appeal. In addition, it is unclear how my decision not to place restrictions on the appellant's use of the non-confidential portions of the affected party's representations might have the chilling effect on a party providing frank and fulsome representations, as Cabinet Office suggests. All parties are advised to submit complete representations to support their position in an inquiry and, for the information that is deemed sensitive or confidential, a party may rely on the confidentiality criteria in Practice Direction Number 7 to protect these portions from disclosure while ensuring a decision maker will be able to consider them. Finally, Cabinet Office has not provided an explanation as to how the sharing of the non-confidential portions of the affected party's representations with the appellant without restrictions on their use could potentially result in distraction or delay in the IPC appeals process. Overall, the potential harms raised by Cabinet Office are remote and are not supported by the facts in this appeal.

[71] I also note Cabinet Office refers to Interim Order PO-3703-I, in which the adjudicator stated that the inquiry process "is intended to allow the IPC to obtain the necessary evidence to decide appeals while also taking into account that in the great majority of appeals, the records must remain confidential while the appeal is ongoing, and arguments that disclose their contents must, of necessity, remain confidential

[emphasis added]."[29] I agree with and do not depart from this principle in this decision. The arguments provided by the affected party in their non-confidential representations pertain to issues of custody and control. They do not disclose the contents of any records at issue because there are no such records before me in this appeal. It is my view the affected party's representations ought to be shared with the appellant to provide them with the opportunity to address the legal arguments regarding the issue of whether Cabinet Office has custody or control over the records requested.

[72] In light of the above, I will share the agreed-upon non-confidential portions of the affected party's representations with the appellant in accordance with the procedure set out below. I will make no order as to the use to which these representations may or may not be put.

PROCEDURAL FINDINGS:

1. I find there is no reasonable apprehension of bias on my part in the manner in which I have conducted this inquiry.

2. I will share the redacted version of the affected party's representations with the appellant no earlier than **August 6, 2024**. For greater clarity, I have provided the affected party with a copy of the redacted version of their representations that I intend to share with the appellant.

Original Signed By: July 22, 2024
Justine Wai
Adjudicator

[29] Interim Order PO-3703-I at paras 30-31.