Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3365

Appeal PA12-421

Ministry of Finance

July 23, 2014

Summary: The appellant made a request to the Ministry of Finance (the ministry) for records relating to reforms to the automobile insurance regime in Ontario. The ministry granted partial access to the records, claiming the discretionary exemption in section 13(1) (advice or recommendations) and the mandatory exemption in section 21(1) (personal privacy). The appellant raised the possible application of the public interest override in section 23 and also challenged the adequacy of the decision letter and the fee charged for access. The affected parties, comprised of an expert panel convened to review the definition of "catastrophic impairment" for the Financial Services Commission of Ontario (FSCO), raised the application of the exclusion in section 65(8.1) (research). In this order, the adjudicator finds that the records are not excluded from the *Act*, and that the records at issue do not contain personal information. Therefore, the exemption in section 21(1) does not apply. She also finds that many of the records are exempt under section 13(1), and upholds the ministry's exercise of discretion with respect to those records. Lastly, she finds that the public interest override in section 23 does not apply, the fee was reasonable and that there would be no useful purpose in ordering the ministry to issue a new decision letter.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of personal information), 13(1), 23, 29(3) and 65(8.1)(a) and (c).

Orders and Investigation Reports Considered: Orders PO-2693, PO-2694, PO-2825, PO-2942 PO-3244 and PO-3315.

Cases Considered: *Ministry of the Attorney General v. Toronto Star et al.* 2010 ONSC 991 (CanLII); *John Doe v. Ontario (Finance)*, 2014 SCC (36).

OVERVIEW:

[1] This appeal arises from a request for records about reforms to the automobile insurance regime in Ontario. In 2009, the Government of Ontario announced automobile insurance reforms, including a review of the definition of the term "catastrophic impairment" appearing in the *Statutory Accident Benefits Schedule* (*SABS*), a regulation under the *Insurance Act*.[1] This regulation is incorporated by reference in the standard form of automobile insurance policy issued by all Ontario-licensed automobile insurers, and prescribes the accident benefits to which automobile accident victims are entitled.

[2] As part of this review, the government directed the Financial Services Commission of Ontario (FSCO), an arm's-length agency of the Ministry of Finance (the ministry), to consult with the medical community and make recommendations on amendments to the statutory definition of catastrophic impairment, and on the qualifications and experience requirements for health professionals who conduct catastrophic impairment assessments. FSCO established a Catastrophic Impairment Expert Panel (the expert panel) to review and make recommendations on both matters.

[3] The expert panel released its observations and recommendations in two reports: the first report contained recommendations for changes to the definition of catastrophic impairment; the second report contained recommendations for training, qualifications and experience required of those who conduct catastrophic impairment assessments. These reports are publicly available on the Catastrophic Impairment Project website posted by FSCO.

[4] This order disposes of the issues raised as a result of an appeal of a decision made by the ministry in response to an access request made by the appellant under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> Provide 2010, 2011 a) weekly commentaries that Catastrophic Impairment Expert Panel members exchanged, b) the discussion and meeting notes kept by the Catastrophic Impairment Expert Panel and its individual Panel members, and c) the Panel, Panel members exchanges with senior FSCO management.
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> Provide other records released on this above subject under FOIC.

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[1] R.S.O. 1990, Chapter I.8. The information about the Catastrophic Impairment Project in this section is taken from the representations of the ministry in this appeal and publicly-available material on the Catastrophic Impairment Project website (https://www.fsco.gov.on.ca/en/auto/Catastrophic-Impairment/Pages/default.aspx), including published project reports.

[5] The ministry issued a decision to the appellant, advising him that partial access to the records had been granted, but that other portions were withheld. The ministry claimed the application of the discretionary exemptions in sections 13(1) (advice or recommendations), 19 (solicitor-client privilege) and 22 (information soon to be published), as well as the mandatory exemption in section 21(1) (personal privacy). The ministry also advised that a portion of the information contained in one record was found to be non-responsive to the request.

[6] The ministry also advised the requester that the final fee for processing the request was $3,060.40 and that upon receipt of the balance of the fees, the records would be forwarded to him.

[7] The appellant appealed the ministry's decision to this office.

[8] During the mediation of the appeal, the ministry advised the mediator that although section 19 was noted as an exemption claimed in the decision letter, it was not claimed to deny access to any records. It is, therefore, no longer at issue in this appeal.

[9] The appellant advised the mediator that he sought access to all information severed pursuant to section 21(1) of the *Act*, with the exception of information relating to telephone numbers and email addresses. The appellant specified that section 21(1) of the *Act* remains at issue when claimed to deny access to any names, comments/exchanges or descriptions of attached documents. The appellant also advised that there is a public interest in the disclosure of the records. Consequently, the possible application of the public interest override in section 23 of the *Act* was added as an issue.

[10] With respect to the issue of fees, the appellant indicated that he seeks a reimbursement of the fee charged for duplicate records, emails of an administrative nature and publicly available records which were not wanted, but still provided to him. The ministry advised that it did not charge the appellant for publicly available records and it removed any duplicates from the responsive records at the request stage in order to reduce the fees.

[11] With respect to the non-responsive information removed from record #B-86, the appellant indicated that it remains at issue. The appellant also advised the mediator that he did not take issue with the ministry's section 22 claim to withhold a portion of the records. Consequently, the application of section 22 is no longer at issue.

[12] After the mediator's report was issued, the appellant raised an accountability issue related to the adequacy of the ministry's decision letter, which was not discussed during mediation. The appellant maintained that the ministry's decision letter was inadequate as it did not include the name and position of the decision maker required

by section 29(3)(c) of the *Act*. The mediator discussed this issue with the ministry, which then provided the appellant with the name and position of the decision maker and advised that, in accordance with the ministry's practice, the individual who signed the decision letter is the person responsible for the decision. The appellant maintained that the accountability issue remains in dispute in this appeal.

[13] The matter then moved to the adjudication stage of the process, where an adjudicator conducts an inquiry. I sought representations from the ministry, the appellant and ten affected parties (the members of the expert panel). I received representations from all of the parties, except one affected party. The remaining nine affected parties provided joint representations. The representations were then shared between the parties, in accordance with this office's *Practice Direction 7*.

[14] During the inquiry, the ministry disclosed the portions of record B-86 that it had previously withheld as being non-responsive to the request. Consequently, responsiveness is no longer at issue. The appellant noted in his representations that he was not seeking personal information such as personal email addresses, personal home addresses, information about holidays, or comments about the weather. Accordingly, this information is no longer at issue and will not be disclosed to the appellant.

[15] Also during the inquiry, in their representations the affected parties raised the possible application of the exclusion in section 65(8.1)(a) and (c) (research exclusion) to the records. Accordingly, the possible application of the exclusion is now an issue in this appeal.

[16] For the reasons that follow, I find that the records are not excluded from the *Act*, and that the remaining information in the records at issue does not include personal information. Therefore, the exemption in section 21(1) does not apply. I also find that many of the records are exempt under section 13(1) and I uphold the ministry's exercise of discretion with respect to those records. Lastly, I find that the public interest override in section 23 does not apply, the fee was reasonable, and that there would be no useful purpose in ordering the ministry to issue a new decision letter. I order the ministry to disclose a number of records to the appellant, as set out in order provision 1.

RECORDS:

[17] The records remaining at issue include emails, correspondence, draft reports, agendas, meeting minutes and power point presentations.

ISSUES:

A: Does section 65(8.1) exclude the records from the *Act*?

B: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

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

D: Did the institution exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?

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

F: Did the ministry's decision letter meet the requirements of section 29(3) of the *Act*?

G: Should the fee be upheld?

DISCUSSION:

Issue A: Does section 65(8.1) exclude the records from the *Act*?

[18] Section 65(8.1) excludes certain research-related records from the *Act*. The relevant parts of that section state:

> (8.1) This Act does not apply,
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> (a) to a record respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution; or
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> (c) to a record respecting or associated with research, including clinical trials, conducted or proposed by an employee of a hospital or by a person associated with a hospital.

[19] Past decisions of this office have defined research as "... a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research" The research must be referable to specific, identifiable research projects that have been conceived by a specific faculty member, employee or associate of an educational institution[2] or an employee of a hospital or by a person associated with a hospital.

[2] Order PO-2693.

[20] This office has also stated this section applies where it is reasonable to conclude that there is "some connection" between the record and the specific, identifiable research. [3]

Representations

[21] The nine affected parties claim that all of the records at issue are excluded from the operation of the *Act* under section 65(8.1)(a) and (c). The ministry has not claimed this exclusion.

[22] The affected parties submit that all of the records meet the test for this exclusion as they are all respecting or associated with research conducted by the chair of the expert panel (the chair), who is an employee of a research hospital that is affiliated with a university in Ontario. They further state that past orders of this office have dealt with the applicability of this exclusion and have held that:

- The term "research" shall have the same definition as that found in section 2 of the *Personal Health Information Protection Act, 2004*;[4]

- Research that has been conducted or proposed must be referable to a specific, identifiable research project that has been conceived by a specific member of or associate of, a hospital or educational institution;[5] and

- The reference to "an educational institution" supports an interpretation that the exclusion may apply to research proposed or conducted by an individual who does not work at the institution where the access request was made.[6]

[23] The affected parties go on to state that the expert panel's mandate was to review the existing definition of "catastrophic impairment" in the *SABS* and make recommendations to the Superintendent of Insurance on potential amendments. The panel was also to make recommendations regarding the training, qualifications and experience of assessors who conduct catastrophic impairment assessments under the *SABS*.

[24] The affected parties argue that the expert panel was given its mandate with a view to providing recommendations to the Superintendent that were based on medical and scientific evidence and judgement, and that in order to fulfil the mandate, the chair developed and conducted an extensive research project that engaged two research teams. The affected parties advise that the chair is a scientist, a medical/health

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[3] Order PO-2942; see also *Ministry of the Attorney General v. Toronto Star et al.*, 2010 ONSC 991 (Div. Ct.) (CanLII) (*Toronto Star*).
[4] Order PO-2693.
[5] Order PO-2946.
[6] Order PO-2942.

sciences research expert and methodologist, an epidemiologist and an associate professor at a university in Ontario. The first research team, which was hospital-based, developed and explored the methodologies that the second research team, the expert panel, could use in order to fulfil its mandate. In the end, the expert panel chose to conduct a critical literature review and then used a modified version of a methodology known as the Delphi technique.

[25] To explain what the Delphi technique is, the affected parties state:

> The Delphi methodology is a research method used to establish consensus among experts who are asked to answer challenging research questions. The methodology relies on surveying a multidisciplinary panel of experts for their opinion on a specific question, providing them with controlled feedback about the responses to the survey questions and re-surveying them to allow the experts to respond to the input of other panel members. The development of questions used in the surveys is commonly based on 'a priori' conducted reviews of the scientific and medical literature. The validity of the Delphi research methodology requires that the experts be assured that the input provided during the process is kept confidential. This is necessary to ensure that the panel provides honest opinions throughout the research process. Consensus is reached through open discussions and debate, which in this case took place through e-mail communications, electronic surveys and panel meetings. Through this forum, the scientific evidence obtained from the literature review and clinical and scientific judgment of the experts are debated and analysed to support or refute opinions expressed by the [expert panel].
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> The Delphi methodology distils the disagreements and consensus among the panel members and ultimately allows the panel members to come to a consensus on the research questions posed.

[26] The affected parties state that the information in the records was compiled through the Delphi methodology and was tested, synthesized and evaluated through ongoing discussion, thus meeting the definition of "research" as established by this office. They argue that this entailed a systematic investigation and analysis to establish common understanding and general knowledge relating to the panel's mandate. In other words, the affected parties are of the view that the records at issue were created for research purposes. The chair provided an affidavit as part of the representations, in which he states that FSCO was not involved in the design or the conduct of the research, which was entirely proposed and conducted by him and his research team. He goes on to state that his research team at the hospital assisted in retrieving, critically appraising and synthesizing the scientific literature necessary to inform the panel members and guide the Delphi methodology. He also states that as the research

was developing, the panel members would engage in debate, analysis and review of scientific principles to complete the research and to ensure comprehensive data in order to fulfill the mandate.

[27] Lastly, the affected parties submit words similar to "respecting or associated" were broadly interpreted by the Divisional Court in *Ministry of the Attorney General v. Toronto Star et al.*,[7] which held that the words "relating to" and "in respect of" were broad and only required "some connection" between a record and a prosecution, as the case may be. The affected parties further submit that this office subsequently acknowledged that the Divisional Court's interpretation applies to the research exclusion. In Order PO-2946, Adjudicator Daphne Loukidelis found that the exclusion applied to records created by a faculty member at a university as part of a federal research council's peer review process, including the evaluation of grant applications and the awarding of research grants. The affected parties argue that the records at issue exceed the test of having "some connection" to research because they document the very discussion that is the research at issue.

[28] The ministry did not provide representations on the possible application of the exclusion in section 65(8.1)(a) and (c). However, it did provide background information regarding the work completed by the expert panel. The ministry advises that FSCO issued a request for proposals (RFP), resulting in the selection of the chair of the expert panel who, in turn, played an active role in selecting the expert academics and clinicians for the panel. FSCO provided the expert panel with terms of reference which set out, among other things, the purpose and functions of the panel.[8] According to the terms of reference, the purpose of the panel was to review the existing definition of "catastrophic impairment" in the *SABS* and make recommendations on potential amendments to the Superintendent. The panel was also to make recommendations regarding the training, qualifications and experience of assessors who conduct catastrophic impairment assessments under the *SABS*.

[29] The panel's terms of reference set out the expert panel's functions more particularly as follows:

1. Identify whether any ambiguities and gaps exist in the current *SABS* definition of "catastrophic impairment" taking into account emerging scientific knowledge and judgement.

2. Identify the required training, qualifications and experience of assessors who conduct catastrophic impairment assessments under the *SABS*.

[7] See note 3.
[8] The ministry included a copy of the terms of reference in its representations.

3. Make recommendations for changes to the definition of "catastrophic impairment," and for required assessor training, qualifications and experience.

4. Review and comment on such other matters as requested by the Superintendent.

[30] Also according to the terms of reference, the panel's deliverables consisted of two written reports. The first report was to contain the definition of "catastrophic impairment" with recommendations regarding it. The second report was to set out the training, qualifications and experience required for assessors who conduct catastrophic impairment assessments.

[31] Further, the Superintendent selected the chair and the members of the expert panel, in consultation with the chair. The chair and other panel members signed non-disclosure agreements prior to commencing work on the panel. The confidentiality agreement stipulates that the ministry maintains control over information however recorded that is a record for purposes of the confidentiality agreement, and that the *Act* applies to all records, including those held or created by the panel members as well as those provided to the panel by the ministry. The agreement also contains a provision that all records shall be returned to the ministry with no copy kept by the panel as soon as the need to possess them ends, at the ministry's request or prior to the termination or expiry of consulting agreements entered into by the panel and the ministry.

[32] The appellant does not agree that the expert panel was conducting a research project and argues that section 65(8.1) does not apply to exclude the records from the *Act*. The appellant submits that taking records outside of the public domain and claiming that they are under the control and direction of a private university/hospital research project and its researchers is not a proper application of the *Act*. Further, the appellant argues that the affected parties' position on this issue does not correspond with the ministry and FSCO's mandate and direct involvement, direction and input in the discussions. He states that the panel's work was hardly an academic multi-layered methodological exercise or that of a university health institute project.

[33] Finally, the appellant submits that he has already received records from the ministry as part of this and a previous request and that to exclude the remaining records at issue would not be consistent or fair.

[34] In reply, the affected parties state that the appellant's argument is premised on a misguided and improper interpretation of the research exclusion. In addition they argue that any past disclosure of their records was done in error, but that, in any event, the records at issue should be considered in their own right, as there is no concept of waiver in the *Act*.

Analysis and Findings

[35] If section 65(8.1)(a) or (c) applies to the records at issue in this appeal, they are totally excluded from the access and privacy provisions of the *Act*.

[36] This office has emphasized the importance of considering the purposes of the *Act* as a context for the interpretation of section 65(8.1)(a). This is consistent with the "modern" approach to statutory interpretation which has been described as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[9]

[37] In applying the modern principle of interpretation to section 65(8.1), the comments of M.P.P. Wayne Arthurs, speaking on behalf of the government in relation to section 65(8.1)(a), have been helpful. At third reading of the *Budget Measures Act, 2005* (Bill 197), in which the provisions aimed at including Ontario universities under the *Act* were introduced, he stated:

> . . . [T]his bill proposes to make Ontario's universities subject to the provisions of the *Freedom of Information and Protection of Privacy Act* and ensure that Ontario's publicly funded post-secondary institutions are even more transparent and accountable to the people of Ontario. That will be both our universities and our colleges of applied arts and science. *So as not to jeopardize the work being done at these institutions, though, the freedom-of-information provision would take into account and respect academic freedom and competitiveness. Clearly we understand the importance of the university post-secondary sector when it comes to doing research and innovative study programs. Thus we wouldn't want to jeopardize that academic freedom, or the competitive environment that is created accordingly*.[10] [My emphasis.]

[38] These comments have been accepted by this office as signifying the legislature's intention, through section 65(8.1), to protect academic freedom and competitiveness in the university sector.[11] The same can be inferred with respect to the legislature's intent to protect the academic freedom and competitiveness of hospital-based research as well, when hospitals became subject to the *Act* and section 65(8.1)(c) was added, on January 2, 2012.

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[9] Elmer Driedger in Construction of Statutes (2nd ed. 1983), quoted in *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at para. 21.
[10] November 21, 2005.
[11] Orders PO-2693 and PO-2825.

[39] I accept that the work of the expert panel encompassed "research" within the meaning of section 65(8.1). The panel undertook a systematic investigation, based on a literature review, which was intended to establish facts or generalizable knowledge within a specific subject area. The investigation examined the definition of catastrophic impairment, emerging scientific knowledge, assessments of same, and came to conclusions about the current definition based on their investigations. The panel then made recommendations to the ministry regarding these issues.

[40] The exclusion does not apply to all research, however. It must be conducted "by an employee" or a "person associated" with an educational institution or hospital. In this case, members of the expert panel, including the chair, are employees or have an affiliation with educational institutions or hospitals. The position of the affected parties is that the exclusion applies because of these associations. They submit in particular that the chair of the panel, who is an employee of a research hospital and associated with a university, conducted and directed the research.

[41] This cannot be the result of section 65(8.1). As I have indicated, the chair of the panel was selected through an RFP process and, in turn, the chair and Superintendent of FSCO struck the panel. The members of the panel, including the chair, were selected on the basis of expertise in the issues to be addressed, as demonstrated in part through their work with educational institutions or hospitals. Having been chosen to form a panel for the purpose of advising the government on an issue of government policy, however, the work of the panel was not in pursuit of the members' own academic or clinical research goals, but the government's. The research on the issues described in the terms of reference was not conducted under the auspices and for the benefit of their affiliated educational institutions or hospitals. Rather, the research was conducted by the expert panel for the benefit of FSCO and ultimately the ministry.

[42] The government's interest in the work of the panel is reflected in the terms of the confidentiality agreement entered into by its members, which stipulates that the ministry maintains control over the records of the panel. It is also reflected in the provision of that agreement in which the parties acknowledge that the *Act* applies to all records held or created by the panel members.

[43] The position taken by the affected parties would apply the exclusion in section 65(8.1)(a) and (c) to research done by an expert panel at the behest and for the benefit of the government, based on the professional affiliations of individual members of the panel. I find that such an interpretation does not accord with the purpose of the provision. I find that the section must and can be interpreted to take into account the capacity in which the individuals are acting, in conducting the research. On the facts, the individuals on the panel can be said to have several professional roles. One encompasses their own work, in association with or through employment by educational institutions or hospitals. The second encompasses their work as consultants to the government pursuant to the terms of reference and agreements governing the project.

The research by the members of the panel was conducted in relation to this second role. I conclude that this research was not conducted in the members' capacity as employees or persons associated with educational institutions or hospitals but, rather, in their capacity as consultants to the government.

[44] I am satisfied that the interpretation I give to section 65(8.1)(a) and (c) is consistent with and supports the purpose of the exclusion, which is to protect the competitiveness of research that is based in educational institutions or hospitals. It is not intended to protect research undertaken by or for a ministry. While it may be that certain government research is exempted under a provision of the *Act*, it is not, *per se*, excluded from the scope of the *Act*.

[45] Consequently, I find that the information in the records at issue in this appeal does not meet the requirements of section 65(8.1)(a) and (c), and they are not excluded from the *Act*.

[46] I will now determine whether the records contain personal information, below.

Issue B: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[47] Both the ministry and the affected parties claim that a number of the records contain the personal information of the expert panel members. As previously stated, personal information such as personal email or home addresses, holiday information or comments about the weather are no longer at issue in this appeal. The records for which the exemption in section 21(1) is claimed consist of email exchanges between panel members, attachments to emails, one response to a survey, and summaries of meetings of the panel. The subject matter of these records is the panel's discussion and review of the definition of catastrophic impairment and its discussion of recommendations on the qualifications and experience requirements of health professionals who conduct catastrophic impairment assessments.

[48] In order to determine whether the mandatory personal privacy exemption in section 21(1) of the *Act* applies, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. Based on the affected parties' representations, the relevant portion of that term is defined in section 2(1)(e), which reads as follows:

> "personal information" means recorded information about an identifiable individual, including,
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> > the personal opinions or views of the individual except if they relate to another individual,

[49] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[12]

[50] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
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> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[51] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[13] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[14] In addition, to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[15]

Representations

[52] The ministry submits that there is information in the records that, if disclosed, would reveal something of a personal nature about the expert panel members. Specifically, the ministry argues that if the comments made by the expert panel members were divulged in a manner that identified the individual who made the specific comments, these comments would reveal something of a personal nature about the panel members. The ministry cites Order M-230 to support its position, in which former Inquiry Officer Asfaw Seife stated:

> [T]he mere fact that the individual who expresses a view or opinion possesses professional qualifications in the subject matter or is employed

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[12] Order 11.
[13] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[14] Orders P-1409, R-980015, PO-2225 and MO-2344.
[15] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

> by an institution or organization is not sufficient to remove the information from the definition of personal information.
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> In my view, in order for such information to lose its character as personal information, the individual must have created the record or provided the information in his/her capacity as a professional or an employee, **and** in the course of discharging/executing his/her professional or employment responsibilities.

[53] The ministry goes on to state that the expert panel was chosen because they were recognized experts within their fields of practice and expertise, specifically the assessment, diagnosis or treatment of patients with particular medical conditions. In light of their expertise, the ministry argues, they were engaged by FSCO for the specific purpose of providing their personal views, advice and recommendations on matters within their respective fields. Further, the ministry submits that the panel was not engaged by FSCO for the purpose of "discharging/executing [their] professional or employment responsibilities," which it describes as the actual assessment, diagnosis, or treatment of patients. In addition, the ministry states, the panel could have only provided their personal views, advice and recommendations to FSCO outside their professional day-to-day responsibilities. It argues that the personal views of the panel members did not lose their character as personal information even if provided in his or her capacity as a professional. Lastly, the ministry states that it determined that it would be appropriate to sever the records in a manner that would anonymize the comments made by the panel members.

[54] The affected parties submit that the records contain the personal views, opinions and comments of the expert panel members, fitting squarely within the definition of personal information in section 2(1)(e). The affected parties add that even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[16]

[55] In particular, the affected parties argue that the type of personal information intended by the Legislature to be subject to the personal information exemption includes the information contained in the records, such as:

- The confidential personal views, opinions and positions taken by the panel members in the deliberations leading up to the preparation of the final report; and

[16] Order PO-2225. The affected parties also note that the distinction between "professional" and "personal" does not exist in the *Act*.

- The personal views and opinions of the panel members of various medical research, techniques, procedures, literature, scientific research and analysis on complex and sensitive topics in the medical and academic community.

[56] The affected parties state:

> The Expert Panel Members were volunteers and provided confidential deliberations leading to a report that outlined what Catastrophic Impairment is for insurance purposes. Each panel member has a career outside of this volunteer commitment and each is individually trained in various medical/health sciences disciplines with varying skills and expertise. Each member of the Expert Panel is employed in a hospital, university or private medical/health care practice and conducts work on a daily basis that is not related to, or otherwise associated with the research conducted by [the chair].

[57] Lastly, the affected parties provided an affidavit sworn by the panel's chair, in which he describes which portions of the records contain his and the other panel members' personal information.

[58] The appellant submits that the panel members' performance and discussions on the "government sanctioned task" of defining catastrophic impairment for auto insurance purposes does not constitute personal information, as it cannot be considered to be their personal opinions. The panel, the appellant submits, are experts who were paid out of public funds (for their expenses). The appellant states that these types of panel exchanges hardly constitute personal information.

[59] The appellant also notes that the ministry has claimed both the personal privacy exemption in section 21(1) and the advice and recommendations exemption in section 13(1) for several records. In essence, the appellant argues, the ministry claims the panel is both providing advice to the ministry while at the same time expressing personal opinions. The appellant states that the ministry "cannot have it both ways."

Analysis and finding

[60] The current approach of this office in determining whether information relates to an individual in a personal or professional capacity was set out by former Assistant Commissioner Tom Mitchinson in Order PO-2225. This approach has been followed in numerous decisions and essentially involves the consideration of the following two questions:

> ...the first question to ask in a case such as this is: "*in what context do the names of the individuals appear*"? Is it a context that is inherently

> personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?
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> ....
>
> The analysis does not end here. I must go on to ask: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual?*" Even if the information appears in a business context, would its disclosure reveal something inherently personal in nature?[17]

[61] I adopt this approach for the purposes of this appeal.

[62] As previously stated, information that is associated with an individual in a professional or official capacity will not be considered to be "about" that individual. I do not accept the ministry's or the affected parties' position that the expert panel was assembled in order to provide their personal views, advice and recommendations on matters within their respective fields. The panel was engaged by FSCO to review the definition of catastrophic impairment for automobile insurance purposes, to make recommendations regarding it, and to recommend the training, qualifications and experience required for assessors who conduct catastrophic impairment assessments.[18] The panel members were chosen because of their professional expertise in the subject matter in order to provide professional opinions, not personal opinions, to FSCO. In addition, the fact that the panel members were not actually diagnosing and treating patients in carrying out their duties on the panel does not detract from the fact that they were engaged in their professional capacity.

[63] With respect to some of the records for which the ministry has claimed the personal privacy exemption, it withheld only the names of the panel members.

[64] I find that the context in which the name of any of the expert panel members appears in the records at issue is not inherently personal, but relates exclusively to the professional responsibility and activity of these individuals. The records reveal the discussions that took place amongst the panel members, as part of the panel's professional mandate. As evidenced by the contents of the records themselves and the nature of the request, any name that appears in the record at issue does so in the context of the provision of expert opinions to FSCO. The professional context in which any individual's name may appear in the record removes it from the personal sphere.

[65] Other records that have been withheld by the ministry contain both the name of the panel member and the opinion of the panel member on the subject matter for which the panel was engaged.

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[17] Order PO-2225 at page 7-8.
[18] As set out in the panel's terms of reference.

[66] In my view, there is nothing about the information in the records that, if disclosed, would reveal something of a personal nature about any individual who may be named therein. Past orders of this office have found that opinions given by a person in their professional capacity are not "personal information." Throughout the records, the expert panel members are providing their professional opinions with regard to the issues discussed, and at no point do they provide their personal opinions. As such, the opinions expressed do not qualify as personal information for the purposes of the definition contained in section 2(1)(e) of the *Act*. In coming to this conclusion, I take note of the context within which the conversations took place; that is, discussions amongst the panel members on the definition of catastrophic impairment and recommendations to FSCO regarding it; as well as discussions regarding the training, qualifications and experience required for assessors who conduct catastrophic impairment assessments.

[67] Consequently, I find that none of the information at issue consists of "personal information" as defined in section 2(1) of the Act. Accordingly, the personal privacy exemption in section 21(1) does not apply to any of the records for which it was claimed. I order the ministry to disclose those records at issue, or portions thereof, for which it solely claimed the application of section 21(1), as set out in order provision 1. I also note that a few of the records for which section 21(1) was exclusively claimed consist of, for example, an opinion within an email,[19] questions posed within an email,[20] and panel members' responses to a survey.[21] It is possible that section 13(1) would have applied to exempt these records from disclosure. However, it is the responsibility of the head of an institution to claim discretionary exemptions and to exercise its discretion in doing so. In this case, the head did not claim the application of the discretionary exemption in section 13(1) to these records. Consequently, as I have found that these records do not contain personal information, they are not exempt from disclosure.

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

[68] The ministry has claimed the application of the discretionary exemption in section 13(1) to many records, as described in the indices of records.

[69] Section 13(1) states:

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

[19] For example, record A70.
[20] For example, record A397.
[21] For example, records A133, A293, A436, B60 and B64.

[70] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[22]

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

[72] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take. [23]

[73] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[74] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[24]

[75] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[25]

[76] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final

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[22] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[23] See above at paras. 26 and 47.
[24] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[25] See note 1 above at para. 51.

version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 13(1).[26]

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

- factual or background information[27]
- a supervisor's direction to staff on how to conduct an investigation [28]
- information prepared for public dissemination[29]

[78] Section 13(2) creates a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13. Sections 13(2) states, in part:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;

[79] The exceptions in section 13(2) can be divided into two categories: objective information, and specific types of records that could contain advice or recommendations.[30] The first four paragraphs in section 13(2), paragraphs (a) to (d), are examples of objective information. They do not contain a public servant's opinion pertaining to a decision that is to be made but rather provide information on matters that are largely factual in nature.

[80] The remaining exceptions in section 13(2), paragraphs (e) to (l), will not always contain advice or recommendations but when they do, section 13(2) ensures that they are not protected from disclosure by section 13(1).

[81] The word "report" appears in several parts of section 13(2). This office has defined "report" as a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact.[31]

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[26] See note 1 above at paras. 50-51.
[27] Order PO-3315.
[28] Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).
[29] Order PO-2677.
[30] See note 1 above at para. 30.
[31] Order PO-2681; Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).

Representations

[82] The ministry submits that the records or portions thereof at issue contain advice or recommendations made by public servants or by the expert panel to FSCO. As previously stated, the panel was engaged by FSCO to review the definition of catastrophic impairment, to make recommendations on potential amendments to the definition, and to make recommendations regarding the training, qualifications and expertise of assessors who conduct catastrophic impairment assessments. The ministry further submits that in the context of a highly regulated sector such as automobile insurance, it is important that senior decision-making officials such as the Superintendent can rely upon the confidential advice of public servants and experts. In order to be useful, the ministry argues, the advice must be informed by discussions with the sectors regulated by FSCO.

[83] The ministry goes on to state:

> The ability to make hard choices based on frank recommendations from public servants and experts such as the Expert Panel members is crucial in such an environment, and the confidentiality of advice, like that in a solicitor-client relationship is essential.

[84] The ministry relies on a decision of the Ontario Court of Appeal[32] in which the court re-affirmed previous orders of this office but also made the following findings in regard to the scope of section 13(1):

- advice is protected by the exemption and may be no more than material that permits the drawing of inferences with respect to a suggested course of action, but does not recommend a specific course of action;

- there is no requirement under section 13(1) that the ministry be able to demonstrate that the record went to the ultimate decision maker; and

- advice and recommendations in drafts of policy papers that are part of the deliberative process leading to a decision are protected by section 13(1).

[85] The ministry also notes that some of the records for which section 13(1) was claimed are email communications among public servants and the expert panel. While they are not formal briefing documents with a specific section clearly designated as "advice" or "recommendations," there is nothing in section 13(1) that limits its scope to any particular form of record.

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[32] *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (*Finance*).

[86] Lastly, the ministry states:

> The records in issue arise out of meetings with and communications from the Expert Panel members and stakeholders concerning the development and preparation of the Expert Panel Report . . . The records evidence the ongoing development and refinement of the advice of FSCO's public servants and the Expert Panel members in the course of the Superintendent's preparation and finalization of his Report to the Minister of Finance with his recommendations concerning the definition of catastrophic impairment. They include advice arising out of proposals and comments submitted by, and discussions with, stakeholders, many of which involved technical and complex issues. It is submitted that section 13 affords a zone of confidentiality that permits an institution to properly develop its approach and strategy by obtaining collaborative and candid input from appropriate staff and consultants, synthesizing that input, and coming to a decision regarding a lawful and appropriate response. . .

[87] The appellant submits that the panel members were not consultants or employees, but were actually volunteers and that upgrading them to consultants does not make the "FOI grade, making them somehow fall under section 13(1)." The appellant also submits that the ministry applied section 13(1) too broadly to the records. In particular, the appellant raised the following points:

- the panel members were not providing policy advice, but rather an exchange of what constitutes the parameters of the definition of catastrophic impairment, including the examination of factual material;

- the panel produced the final reports that contained recommendations. These reports were publicly released. Therefore, exempting much of the panel discussions makes no sense;

- the ministry has already disclosed much of the details of the panel's input exchanges in 11 surveys on what constitutes or could constitute the elements of a newer definition of catastrophic impairment (as part of another FOI request);

- the ministry has not provided a detailed record-by-record defense of its exemption claims; and

- an example of the ministry's overly broad approach is that it exempted an email exchange discussing a published article.

Analysis and finding

[88] Recently, the Supreme Court of Canada re-visited the exemption in section 13 of the *Act* in the case of *John Doe v. Ontario (Finance)*.[33] This appeal arose from an access request made to the Ministry of Finance for records relating to the issue of retroactivity of amendments made to the *Corporations Tax Act*.[34] The ministry denied access to the records which consisted of undated drafts of a policy options paper, claiming the application of the exemption in section 13(1). The requester subsequently appealed the ministry's decision to this office. In its representations made during the inquiry, the ministry argued that the records were versions of a paper that formed part of the briefings of the Minister and others at the ministry. One of the options was eventually enacted, resulting in the amendments that imposed partially retroactive tax liability.

[89] In Order PO-2872, Adjudicator Diane Smith ordered the ministry to disclose the records. She found that to qualify for exemption under section 13(1), "the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised." She concluded that only the portions of the records indicating which option was not preferred were exempt from disclosure. The remaining information, she held, had to be disclosed as it did not reveal a preferred course of action either expressly or by inference. In addition, Adjudicator Smith found that there was no clear evidence that the information in the records was communicated to any other person. Adjudicator Smith's order was upheld on judicial review[35] by the Divisional Court, but overturned on appeal by the Court of Appeal.[36]

[90] The Court of Appeal allowed the appeal and ordered the matter remitted to this office, finding that: the ministry is not required to prove that the record at issue went to the ultimate decision maker; and that section 13(1) applies to advice on a range of different options, even if it does not include a specific recommendation on which option to take.

[91] On appeal to the Supreme Court of Canada (the Court), the Court, found that "advice" and "recommendations" have distinct meanings for the purposes of section 13(1). It accepted that material relating to a suggested course of action that will ultimately be accepted or rejected by the person being advised falls into the category of "recommendations." However, it held that it must have been the legislative intent to give "advice" a broader meaning than a "recommendation." The Court went on to apply this interpretation to the records at issue in the appeal and found that "advice" would include a public servant's view of policy options to be considered by the decision maker. In addition, the Court held that section 13(1) applies to exempt earlier drafts of

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[33] 2014 SCC 36.
[34] R.S.O. 1990.
[35] 2011 ONSC 2030 (CanLII).
[36] See note 31.

material containing advice or recommendations even if the content of the draft is not included in the final version.

[92] The Court also held that evidence that the advice or recommendations were communicated cannot be a requirement of section 13(1). In making this finding, the Court stated:

> Protection from disclosure would indeed be illusory if only a communicated document was protected and not prior drafts. It would also be illusory if drafts were only protected where there is evidence that they led to a final, communicated version. In order to achieve the purpose of the exemption, to provide for the full, free and frank participation of public servants or consultants in the deliberative process, the applicability of section 13(1) must be ascertainable at the time the public servant or consultant prepares the advice and recommendations. At that point, there will not have been communication. Accordingly, evidence of actual communication cannot be a requirement for the invocation of section 13(1).

[93] However, the Court noted that sections 13(2) and (3) provide exceptions to the exemption in section 13(1), and characterized the type of information that qualifies for the exceptions as "objective information" and "specific types of records that could contain advice and recommendations." The first four paragraphs in section 13(2), paragraphs (a) to (d), are examples of objective information. They do not contain a public servant's opinion pertaining to a decision that is to be made, but rather provide information on matters that are largely factual in nature. The remaining exceptions in section 13(2), paragraphs (e) to (l), will not always contain advice or recommendations but when they do, section 13(2) ensures that they are not protected from disclosure by section 13(1).

[94] The decision in *John Doe v. Ontario (Finance)* was issued following the parties' representations in this appeal. As a result, I sought further representations from the ministry, the appellant and the affected parties on the impact of this decision on the application of the exemption in section 13(1) to the records in this appeal. The ministry submits that the decision in *John Doe v. Ontario (Finance)* not only affirmed the analysis and conclusion of the Court of Appeal's decision, but also further clarified the application of section 13(1), noting that:

- "advice" includes the opinions of a public servant as to the range of alternative policy options;
- policy options constitute an evaluative analysis as opposed to objective information, and can serve as the basis for making a decision between the presented options;
- records containing policy options can take many forms;

- the nature of the deliberative process is to draft and redraft advice and recommendations until the writer is sufficiently satisfied that he is prepared to communicate the results to someone else;
- all of the information in earlier drafts informs the end result even if the content of any one draft is not included in the final version;
- prior drafts fall under the exemption, as they are part of the deliberative process; and
- the advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank.

[95] Applying the Court's decision to the records at issue, the ministry argues that the same rationale stated above must apply to the day-to-day communications, email and otherwise, that took place among the panel members. Each communication, the ministry states, was part of each member's contribution to the ongoing process of the formulation, refinement and finalization of the advice eventually delivered in the panel's final report and, as such, formed part of the deliberative process. The ministry concludes that the information it withheld under section 13(1) is exempt from disclosure. The affected parties advise that they are relying on the ministry's representations on the application of the *John Doe v. Ontario (Finance)* decision to the records at issue.

[96] The appellant submits that the facts of this appeal differ from the facts in the *John Doe v. Ontario (Finance)* case, namely that there is doubt that the expert panel was set up to mainly offer advice. The appellant goes on to say that the panel was "mandated to inform" FSCO on the definition of catastrophic impairment, and therefore engaged in factual exchanges and discussions, which are not to be exempted.

[97] To begin with, I find that each member of the expert panel falls within the scope of the words "a consultant retained by an institution" appearing in section 13(1). Where the ministry has specifically and directly convened a panel of experts to provide FSCO with advice and recommendations on a certain subject matter, it is inconsequential that the members were unpaid volunteers. They have been engaged or "retained" to provide their expert services. The information at issue is entitled to no less protection under the exemption than would be available had panel members been paid for providing the same services.

[98] I have reviewed each record for which this exemption was claimed and note that there is extensive duplication of the content of the emails at issue. For example, many of the emails consist of various panel members responding to and commenting on material that was sent to each of them either by FSCO or a fellow panel member. I note this as an observation only. Having conducted a record-by-record review and considering the representations of the parties, I agree with the ministry that most of the information at issue consists of discussions among the panel either by email or in

meetings, leading to a consensus on the advice and recommendations to be made by it to the Superintendent on the issue of the definition of catastrophic impairment, or the training and qualifications required of those conducting catastrophic impairment assessments. Several records reveal discussions, opinions and suggestions of the panel in regard to the proposed definition of catastrophic impairment. As well, many of the records entail discussions regarding earlier drafts of the two reports that were authored by the expert panel. In addition, two of the records consist of earlier drafts of the two reports.

[99] I find that the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations, or would disclose the actual advice and recommendations made to the Superintendent. Consequently, I find that the majority of the information for which section 13(1) was claimed is exempt, subject to my finding in regard to the ministry's exercise of discretion. I also find that attempts to sever the information that is exempt would result in the disclosure of meaningless snippets of information to the appellant.

[100] However, as the Supreme Court of Canada noted, certain types of information are not protected by the exemption in section 13(1), including what the Court described as "objective" information. This type of information falls within the exception found in section 13(2)(a). Based on my record-by-record review, I find that some of the information at issue consists of factual information or operational information which does not reveal advice or recommendations, nor could inferences of the advice or recommendations be drawn by the disclosure of this information. The type of information that falls within the exception in section 13(2)(a) consists of email communications that:

- set out the general issues to be determined by the panel;
- include requests for comments from panel members by the administrative lead;
- discuss the approach to be taken to build consensus within the panel;
- give instructions as to how to provide comments;
- discuss the timing of the provision of comments;
- set out technical difficulties encountered with the surveys;
- include requests for meeting minutes; and
- include general cover emails to survey responses.

[101] Accordingly, I find that these records, or portions thereof, are not exempt under section 13(1) and fall within the exception in section 13(2)(a). As a result, I order the ministry to disclose them to the appellant, as set out in order provision 1.

Issue D: Did the institution exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?

[102] The section 13(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[103] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

[104] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[37] This office may not, however, substitute its own discretion for that of the institution.[38] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[39]

- the purposes of the *Act*, including the principles that information should be available to the public, and that exemptions from the right of access should be limited and specific;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;

[37] Order MO-1573.
[38] Section 54(2).
[39] Orders P-344 and MO-1573.

- the age of the information; and
- the historic practice of the institution with respect to similar information.

Representations

[105] The ministry submits that it exercised its discretion properly and in good faith, taking into account only relevant and not irrelevant considerations. In particular the ministry states that it disclosed a significant number of records to the appellant and withheld other records on the principled and justified basis that the records contain advice and recommendations of public servants and the expert panel members. The ministry goes on to state that the disclosure of the remaining records would be inconsistent with the purposes behind section 13(1), which are to ensure that persons employed in the public service and consultants engaged by government are able to advise and make recommendations freely and frankly, and to ensure that decision-makers can take action and make decisions based on the best advice available, without unfair pressure. The exemption, the ministry argues, protects the free flow of advice and recommendations necessary for government decision making.

[106] The appellant submits that the ministry has failed to present evidence on a record by record basis that it exercised its discretion, and in doing so, is not being accountable. In addition, the appellant states that contrary to the ministry's position, it has not disclosed a significant number of records that relate to the most significant exchanges about the definition of catastrophic impairment. The majority of the records he received, the appellant states, consist of a number of unwanted administrative panel member records.

[107] Lastly, the appellant states:

> This notion of a broad use of Section 13 offers little comfort to the public and groups wanting transparency on this important attempt to redefine what benefits the most severely injured auto accident victims will receive in future.

Analysis and finding

[108] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.[40] It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.[41]

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[40] Order MO-1287-I.
[41] Order 58.

[109] I have carefully reviewed the representations of the ministry and the appellant I am satisfied that the ministry exercised its discretion under section 13(1) in a proper manner. I am satisfied the ministry considered relevant factors, including the nature of the withheld information, the importance of the exemption, and the purposes of the *Act*, including the appellant's right of access, in exercising its discretion. I am also satisfied the ministry did not consider irrelevant factors. I also note that the ministry has already disclosed a large number of records to the appellant in response to his request and that the final reports of the expert panel were made public.

[110] Consequently, I uphold the ministry's exercise of discretion under section 13(1).

Issue E: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of exemption in section 13 of the *Act*?

[111] The appellant has raised the possible application of the public interest override in section 23, which states:

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

[112] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[113] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[42]

[114] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[43] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public

[42] Order P-244.
[43] Orders P-984 and PO-2607.

opinion or to make political choices.[44]

[115] Any public interest in *non*-disclosure that may exist also must be considered.[45] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[46]

[116] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[47] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation;[48]
- the integrity of the criminal justice system has been called into question;[49]
- public safety issues relating to the operation of nuclear facilities have been raised;[50]
- disclosure would shed light on the safe operation of petrochemical facilities[51] or the province's ability to prepare for a nuclear emergency;[52] or
- the records contain information about contributions to municipal election campaigns.[53]

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

- another public process or forum has been established to address public interest considerations;[54]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;[55] or

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[44] Orders P-984 and PO-2556.
[45] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[46] Orders PO-2072-F, PO-2098-R and PO-3197.
[47] Order P-984.
[48] 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.).
[49] Order PO-1779.
[50] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.
[51] Order P-1175.
[52] Order P-901.
[53] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[54] Orders P-123/124, P-391 and M-539.
[55] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter.[56]

[118] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances. 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.[57]

Representations

[119] The appellant submits that the ministry has failed to provide evidence on a record by record basis why section 23 does not apply. The appellant goes on to state that the records at issue have a significant public health and safety dimension and that he disagrees with the ministry that there is no compelling public interest in the disclosure of the records. To support his position, the appellant states:

- the treatment of catastrophic injury under automobile insurance affects the health and safety of Ontario residents;
- the application of catastrophic injury affects the treatment of those most severely injured, including their short and long-term care;
- individuals who are severely injured in automobile accidents would want more transparency and are seeking more information;
- automobile accidents are a leading cause of premature death and injury in Ontario;
- the debate on how Ontario applies its auto insurance catastrophic impairment provisions deeply affects many in Ontario;
- disclosure of the records would assist public discussion on the re-definition issue;
- these discussions are more than merely a reflection of on-going internal government review, or closed processes with its stakeholders;
- the issue is not a private interest or only a matter of concern to special interest groups;
- the ministry seems more concerned that the records at issue could generate negative media coverage;
- records should not be withheld on grounds of embarrassment or disagreement;

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[56] Order P-613.

[57] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

- the ministry has recognized the public interest in the definition of catastrophic impairment by holding two sets of public consultations and issuing public reports;
- FSCO received 33 written submissions and met with 200 individuals during the expert panel consultation process;
- The issues surrounding the most seriously injured victims are still under active review at "Queen's Park," and are of great public interest as parties, experts and the public review decreases in auto insurance premiums and examine the very nature of auto insurance safety protection and compensation; and
- the public could benefit from a better understanding of the selected medical and academic viewpoints involved, including how the expert panel perceived the definition of catastrophic impairment and how they disagreed.

[120] The ministry submits that there is no compelling public interest in the disclosure of the records, but that even if there was, it must be balanced against the purpose of the exemption and it must clearly outweigh the purpose of the exemption. In particular, the ministry states that the records contain discussions between FSCO and the ministry, and the expert panel, industry stakeholders and representatives in connection with specific and technical matters surrounding the definition of catastrophic impairment. The purpose of these discussions was to develop, and the records reflect, legislative reform process and government policy development related to automobile insurance coverage.

[121] The ministry goes on to state that while some of the records may be of some special interest to individuals with a particular interest in automobile insurance design issues, or may be of some interest to all members of the public, there is no compelling public interest in their disclosure. The records, the ministry argues, and the matters to which they relate are not exceptional, out-of-the ordinary or unique. The ministry further argues that the process of policy development and law reform does not give rise to a compelling public interest merely because it involves a significant consultative component with relevant experts and stakeholders. In addition, the ministry submits that any public interest in the disclosure of the records does not clearly outweigh the purpose of the exemption, because there is no "obvious" reason why the disclosure of the records outweighs the important policy goals of that section.

[122] Lastly, the ministry claims that a large number of records relating to this subject have already been disclosed to the appellant, which is more than adequate to address any public interest considerations.

[123] The affected parties were invited to provide representations on the possible application of section 23 and did. They submit that there is no compelling public interest in the disclosure of the records at issue because the development of policy and legislative change in the automobile accident insurance realm is not a public issue. The

affected parties go on to say that the specific comments of the individual panel members is not comparable to the public interest that exists in, for example, preserving the integrity of the justice system or a public health concern. They further submit that any interest that may exist to those few individuals who are gravely concerned about which panel member made particular comments, should have their interest satisfied by the Superintendent's final report which outlines the final agreed upon analysis, conclusions and position of the panel.

[124] Moreover, the affected parties argue that there is a public interest in the non-disclosure of the records, as disclosure would create a "chilling" affect for those involved in future expert panels. In particular, the affected party argues that the disclosure of the personal views and opinions of experts who advise governments on complex topics could result in:

- a reluctance or unwillingness of experts to participate in future panels, resulting in a reduction in the quality and quantity of willing experts;
- self-censoring of opinions by panel members due to the potential damage to their reputation;
- a decrease in the frankness of discussion, resulting in an impoverished discussion, poorer quality of debate, or less thorough exploration of all aspects of the issue at hand; and
- a final product that is of poorer quality, which could have a substantial and negative impact on the public interest.

Analysis and finding

[125] The records at issue in this appeal consist of discussions between the expert panel members who were engaged by FSCO to work on the Catastrophic Impairment Project, including making recommendations on a re-definition of catastrophic impairment, and making recommendations to FSCO regarding the training, qualifications and experience required of assessors who conduct catastrophic impairment assessments. The final reports completed by the expert panel are publicly available, as well as the Superintendent's report to the Minister containing his final recommendations, after consideration of the expert panel reports.

[126] I have upheld the ministry's section 13(1) claim, in part, on the basis that the ministry properly withheld records that would reveal the advice or recommendations of the expert panel. I find that any public interest that exists in these records does not meet the threshold of "compelling public interest" to warrant the application of the public interest override in section 23 of the *Act*.

[127] While I accept that there is a public interest in the issues around the definition of catastrophic impairment for the purposes of automobile insurance, I do not find there to be a compelling public interest in the disclosure of the records I have found exempt.

I note that a significant amount of information has either been disclosed to the appellant as a result of this request, or is publicly available, as described above. I am not persuaded by the appellant that the disclosure of the information which I have found to be exempt would add to the information the public already has to make effective use of the means of expressing public opinion or to make political choices. Consequently, I find that the public interest override in section 23 does not apply to the records I have found exempt under section 13(1).

Issue F: Did the ministry's decision letter meet the requirements of section 29(3) of the *Act*?

[128] The appellant submits that the ministry's decision letter is inadequate as it does not include the name and position of the decision maker as required by section 29(3)(c) of the *Act*.

[129] Section 29(3) of the *Act*, which sets out the required elements of a decision letter, states:

> Where a head refuses to disclose a record or part thereof under subsection 28(7), the head shall state in the notice given under subsection 28(7),
>
> (a) the specific provision of this Act under which access is refused;
>
> (b) the reason the provision named in clause (a) applies to the record;
>
> (c) the name and office of the person responsible for making the decision to refuse access; and
>
> (d) that the person who made the request may appeal to the Commissioner for a review of the decision.

Representations

[130] The appellant submits that he has not seen evidence of the delegated authority whereby ministry decision makers are assigned responsibilities under section 29(3) of the *Act*, whether that be a procedural manual or other "credible" ministry records. The appellant also states that most institutions assign senior authorities at the Assistant Deputy Minister level or higher, and do not designate the Freedom of Information (FOI) Coordinator as the final responsible authority. The appellant goes on to state that it is insufficient for the ministry to informally claim by email after the fact that the FOI Coordinator is the ultimate decision making authority with respect to the records at issue.

[131] The ministry submits that the decision letter was on the official letterhead of its Freedom of Information and Privacy Office and was signed by the ministry's FOI Coordinator. There was no suggestion, the ministry states, that any person other than the FOI Coordinator was the person responsible for making the decision referred to in section 29(3)(c), and that a reasonable person reviewing the decision letter would conclude that the FOI Coordinator signed the letter in her capacity as the person responsible for making the decision.

Analysis and finding

[132] I have reviewed both the fee estimate and decision letters that were sent to the appellant. Both letters are signed by the FOI Coordinator. Neither letter makes the explicit statement that the FOI Coordinator was responsible for the making the decision.

[133] In essence, the appellant's concerns are two-fold. First, he submits that the decision letter did not explicitly state that the FOI Coordinator was the person responsible for making the decision. Second, he argues that the ministry did not provide proof of delegated authority from the head to the FOI Coordinator.

[134] I find first that the *Act* does not require that ministry provide proof of delegated authority to a requester. Second, although the fee estimate and decision letters do not explicitly state that the FOI Coordinator was the person responsible for making the decision, in the circumstances it would serve no useful purpose to order the ministry to issue a revised decision letter, setting out that the FOI Coordinator was responsible for making the decision. This is a technicality at most, and caused no prejudice and would not change the decision that was made by the ministry with respect to the access request. Therefore, I dismiss this issue without further comment.

Issue G: Should the fee be upheld?

[135] The appropriateness of the fee is an issue because the appellant paid the fee for the records the ministry has already disclosed to him as a result of this request. The appellant seeks a reimbursement of the fee charged for duplicate records, emails of an administrative nature and publicly available records which he states he did not want. During the mediation of the appeal, the ministry advised that it did not charge the appellant for publicly available records and it removed any duplicates from the responsive records at the request stage in order to reduce the fees.

Representations

[136] The appellant submits that he asked the ministry "several times" to not include expert panel member administrative exchanges in the request. In addition, the appellant states that he formally requested only the subject commentary email

exchanges, yet the ministry proceeded to conduct the extra "unwanted" work of searching, preparing and copying administrative records, at great cost to him.

[137] Further, the appellant submits that the ministry has not provided evidence that he was not charged for duplicate copies. He cites as an example that the ministry disclosed administrative letters that were sent to each of the expert panel members in which the content of the letters is identical.

[138] Lastly, the appellant argues that he received public records, such as published academic literature, from the ministry and that these records were not requested by him and were "unwanted." The appellant states that the ministry has not provided evidence that he was not charged for the search, preparation and copies of that data, which is available elsewhere at much less cost.

[139] The ministry states that during the processing of the request, it reviewed the responsive records for duplicates, eliminated any, if found, and adjusted the fee accordingly. The ministry also states that it advised the mediator during the mediation of the appeal that it was prepared to review and adjust the fee if the appellant was able to identify duplicates for which he was charged, but the appellant did not provide such a list.

Analysis and finding

[140] The appellant provided this office with a number of email exchanges between the ministry and him in relation to three access requests he made, including the request which resulted in this appeal. For ease of reference the request is duplicated as follows:

> Provide 2010, 2011 a) weekly commentaries that Catastrophic Impairment Expert Panel members exchanged, b) the discussion and meeting notes kept by the Catastrophic Impairment Expert Panel and its individual Panel members, and c) the Panel, Panel members exchanges with senior FSCO management.
>
> Provide other records released on this above subject under FOIC.

[141] In the emails exchanged between the appellant and the ministry, the appellant seeks clarification that the records in this request include the panel's weekly commentaries and asks if the email exchanges between panel members equates to weekly commentaries. With respect to fees, he advises the ministry that he does not want to pay extra for duplication of the ministry's efforts in processing the three requests. He also states that the payment for this request has to include the weekly commentaries. Further, the appellant explicitly states to the ministry that he did not need literature type-data with respect to one of the other requests, and that he did not

need submissions from the public, letters and correspondence in response to another request. In another email, the ministry advises the appellant that it found a number of duplicate records and wanted to ensure that he was not overcharged.

[142] In essence, the appellant's argument is that records were disclosed to him that were not part of his request and, therefore, he should not be charged a fee for searching, preparing and photocopying those records. In my view, the request, which includes expert panel weekly commentaries, discussion and meeting notes kept by the panel and its members, and panel and member exchanges with senior management at FSCO, is broad in nature.

[143] Based on the information before me, the only clarification sought by the appellant with respect to the request in this appeal was whether the email exchanges by panel members were equivalent to the weekly commentaries that he requested. Although in his communications with the ministry it is evident that he was concerned about keeping the fees low and about not wanting duplication of efforts in the three requests, he did not advise the ministry that literature reviews and administrative records were not part of the scope of this particular request at this stage of the request.

[144] Because the appellant explicitly stated that he wanted literature reviews removed from one request and administrative records removed from another, but did not make the same statements with regard to this request, it was not unreasonable for the ministry to interpret the request broadly. I conclude, therefore, that charging a fee for the literature and administrative records was not unreasonable as they were not excluded from the scope of this request.

[145] With respect to the issue of duplicate records, I am satisfied that the ministry made efforts to remove them prior to charging the fee. The only example the appellant has provided of duplication is that he received copies of letters that were sent to the various panel members in which the content of the letter is the same. In my view a duplicate is an exact copy, which is not what the appellant has described. I also note that the appellant had the opportunity in mediation to provide the ministry with a list of duplicate records, with a view to obtaining a possible fee adjustment, but he did not do so. Consequently, I find that the fee charged by the ministry was reasonable and I uphold it.

[146] In sum, I find that the records are not excluded from the *Act*, and that the records at issue do not contain personal information. Therefore, the exemption in section 21(1) does not apply. I also find that most of the records are exempt under section 13(1), and I uphold the ministry's exercise of discretion. Lastly, I find that the public interest override in section 23 does not apply, the fee was reasonable, and that there would be no useful purpose in ordering the ministry to issue a new decision letter. I order the ministry to disclose a number of records to the appellant, as set out in order provision 1.

ORDER:

1. I order the ministry to disclose records A26-2, A26-3 (except the first sentence), A26-4, A26-5, A31, A62, A70, A94 (except the first sentence), A95 (except the first sentence), A124, A128-1, A132, A133, A134, A151, A179, A199, A206, A209-1, A211-2 (lower half), A211-3, A212-2, A212-3, A214-2, A215-1, A215-2 (top half), A215-3 (except the first three sentences), A215-4, A226-1, A226-3, A237-1 (except the personal email address), A239-2, A243-3, A247-3, A248-1, A248-2 (except the home telephone number), A248-3, A264-1 (top half), A266-1 (except the second paragraph), A282, A286, A287, A292, A293, A296, A299-1 (top half), A310, A320, A322-2 (except the first sentence), A323-2, A351, A360, A367, A370-1, A373 (except the first paragraph), A375-1, A376-1 (top half), A377-1, A377-2 (top half), A378-1, A379-1, A380-1, A381-1, A381-2 (top half), A383-1, A388-2, A389, A391-1, A393-1, A393-2 (top half), A397, A400-1, A404-1, A406-2, A415 (except the first sentence), A416 (except the first sentence), A431, A435, A436, A442, A467, A471-1, A475-1, A476-1, A478-1 (the title of the attachment only), A483-2, A486-1, A486-4, A486-5, A488-3, A488-4, A493-1, A495-1, A499-1, A503, A505, A506, A515-1, A523, A534, A535-1, A550, A558, A560, A566, A573, A577-1 (except the non-responsive personal information), A578-3 (except the non-responsive personal information), B4, B-13 (the portions withheld under s. 21(1)), B18 (the portions withheld under s. 21(1)), B23 (the portions withheld under s. 21(1)), B25-1 (the information withheld under section 21(1) except the last half of the second sentence and the third sentence), B25-2, B30, B42 (the portions withheld under s. 21(1)), B59, B60, B63, B64, B69 (the portions withheld under s. 21(1)), B72, B82 (the portions withheld under s. 21(1)), B91 (the portions withheld under s. 21(1)), B111, B117-2, B118, B122 (except the first sentence at the bottom of page 2), B124, B129, B130, B135, C10 (except the email address) and C41 to the appellant by **August 29, 2014** but not before **August 25, 2014**.

2. I uphold the ministry's decision with respect to the remaining records, found to be exempt under section 13(1).

3. I reserve the right to require that the ministry provide me with copies of the records I have ordered disclosed.

Original Signed By: July 23, 2014
Cathy Hamilton
Adjudicator