Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4209

Appeal PA19-00225

Ministry of Health

November 10, 2021

Summary: A media requester made an access request under the *Freedom of Information and Protection of Privacy Act* to the Ministry of Health, seeking data relating to abortion services for Ontario's Northern Region for the years 2017 and 2018. Although the ministry's initial decision was to grant access to the information with severances under the mandatory personal privacy exemption in section 21(1), it revised its position and withheld the information in its entirety, claiming that it was excluded from the *Act* under the exclusion for abortion services information in section 65(13)(a). In this order, the adjudicator finds that the exclusion in section 65(13)(a) does not apply to the information and she orders the ministry to issue a new access decision in respect of it.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 65(13)(a) and 65(15).

Orders Considered: Orders PO-3643, PO-3989 and PO-4090.

Cases Considered: *Re Rizzo & Rizzo Shoes Limited*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27; *ARPA Canada and Patricia Maloney v R*, 2017 ONSC 3285.

OVERVIEW:

[1] This order decides the issue of whether the exclusion for abortion services information in section 65(13)(a) of the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) applies to certain information sought by a media requester, thereby removing it from the right of access under *FIPPA*.

[2] The appeal resulted from an access request submitted under the *Act* by a member of the media to the Ministry of Health (the ministry) for the following:

> Records showing the number of abortions performed in 2017 and 2018 in the districts of Thunder Bay, Temiskaming, Algoma, Cochrane, Kenora, Manitoulin, Sudbury, Rainy River, Parry Sound and Nipissing.[1] All information that would identify individual persons or facilities should be excluded.

[3] The ministry initially issued a fee estimate and interim decision in which it told the appellant that a search by its Health Services Branch had identified a data set, comprised of aggregate totals by the six "geographical areas", meaning districts, within the Northern Region that reported data, with no identifying information. The ministry also advised that it would sever some information under the mandatory personal privacy exemption in section 21(1) of the *Act* before disclosing the record. The appellant paid the requested fee deposit to proceed with the processing of the request.

[4] The ministry subsequently contacted the appellant and stated that, upon further review, the ministry could not release the information, which it called abortion services data, for a specific region or at the LHIN (Local Health Integration Network) level, due to "potential privacy and safety/security issues."[2] The ministry cited the exclusion for abortion services information in section 65(13) of the *Act* and stated that it would not disclose any data or information that would identify specific patients, health care providers or health facilities, or that could be used alone or together with other available data to identify patients, health care providers or health facilities. The ministry noted that its practice was to release de-identified data on abortion services at the provincial level. The ministry apologized for its "erroneous" access decision, refunded the fee deposit and asked the appellant to advise it if he was interested in receiving provincial-level data.

[5] The appellant filed an appeal with the Office of the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was appointed to explore the possibility of resolution. During mediation, the ministry issued a formal access decision to replace the earlier emailed retraction of its initial decision. In this revised access decision, the ministry clarified that it was withholding the one-page record it had identified as responsive under section 65(13)(a) of the *Act* on the basis of its view that the data it contained could reasonably be used to identify specific facilities where

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[1] These districts are identified, collectively, as the Northern District (of Ontario) in the ministry's representations, although sometimes the term Northern *Region* is used. To avoid confusion in this order, I use Northern Region to describe the larger area and "districts" to represent the smaller "geographical areas" within it.

[2] The ministry did not specify whether, by region, it meant "Northern Region."

abortions are performed.

[6] The appellant challenged the ministry's claim that section 65(13)(a) applies to the record and also maintained that there is a public interest in disclosure of the information. As it was not possible to reach a mediated resolution of the appeal, it was moved to the adjudication stage, where an adjudicator may conduct an inquiry.

[7] I decided to conduct an inquiry and began it by sending a Notice of Inquiry to the ministry, initially, seeking representations on the possible application of section 65(13)(a) to the information.[3] I received the ministry's representations and provided a copy of them to the appellant, along with a Notice of Inquiry outlining the issues, to invite his representations in response. I also provided the appellant with a copy of Order PO-3989 (Ministry of the Attorney General), which was the IPC's first consideration of the abortion services information exclusion in section 65(13)(a) of *FIPPA* and had been addressed by the ministry in its representations.

[8] After I received the appellant's representations, I sought reply representations from the ministry, asking it to address specifically how an individual or a facility could be identified by way of disclosure of the information at issue. In turn, I invited the appellant to provide sur-reply representations, which he did.

[9] In this order, I find that the abortion services information exclusion in section 65(13)(a) does not apply to the information at issue, and I order the ministry to issue a new decision respecting access to it.

RECORD:

[10] At issue is a one-page record with two tables containing data about abortion services provided in the Northern Region in 2017 and 2018 (Table 1 and Table 2, respectively). Each table contains five columns for each of the six districts reporting data: district name, location (city), numbers of services provided under each of two OHIP fee schedule codes, and total number of services in that district.[4] Each table also contains a row at the bottom with total numbers of services provided under each of the two OHIP fee codes and a total for all six districts reporting data. The data is not broken down to distinguish between services provided in hospital versus non-hospital settings.

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[3] Although the appellant claims there is a public interest in disclosure, suggesting that he may be asserting that the public interest override in section 23 of the *Act* applies, that provision can apply only to override certain exemptions, not any of the exclusions. Accordingly, I did not seek representations from the parties on section 23 in this appeal.

[4] Of the 10 districts listed in the request, only six reported data.

DISCUSSION:

Does the exclusion for abortion services information in section 65(13)(a) apply?

[11] The ministry claims that section 65(13)(a) applies to exclude the information at issue from the scope of the *Act*. This provision states:

> This Act does not apply to information relating to the provision of abortion services if,
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> > the information identifies an individual or facility, or it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual or facility[.][5]

[12] The following provision is also related to the exclusion in section 65(13) of the *Act* and is discussed below.[6] It reads:

> 65(15) For greater certainty, this *Act* applies to statistical or other information relating to the provision of abortion services that does not meet the conditions of clause (13)(a) or (b).[7]

[13] Therefore, section 65(15) provides that abortion services-related information that does not fit within section 65(13) is subject to the *Act*.

[14] For information to be "relating to" the provision of abortion services in this section, it must be reasonable to conclude that there is "some connection" between the information and the provision of abortion services.[8] The "some connection" standard must involve a connection that is relevant to the statutory scheme and purpose

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[5] Section 65(13) replaced the now repealed section 65(5.7), which excluded from the *Act* all "records relating to the provision of abortion services." The former provision was struck down as a violation of section 2(b) of the *Charter of Rights and Freedoms* in *ARPA Canada and Patricia Maloney v R*, 2017 ONSC 3285 (*ARPA*).

[6] Although not relevant in this appeal, given the appellant's interest in data related to two specific OHIP fee schedule codes, section 65(14) states: "A reference in subsection (13) to a facility includes reference to a pharmacy, hospital pharmacy or institutional pharmacy, as those terms are defined in subsection 1 (1) of the Drug and Pharmacies Regulation Act".

[7] The ministry did not claim that the exclusion in section 65(13)(b) applies, but it states that "This Act does not apply to information relating to the provision of abortion services if,

> … disclosure of the information could reasonably be expected to threaten the health or safety of an individual, or the security of a facility or other building.

[8] *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.). See also, Orders PO-3222 and PO-3442.

understood in their proper context.[9]

[15] In the determination of whether section 65(13)(a) applies, the onus rested with the ministry to establish that the information at issue both relates to the provision of abortion services *and* identifies an individual or facility, or that it is reasonably foreseeable that the information could be utilized, either alone or with other information, to identify an individual or facility.[10]

Representations

Ministry of Health

[16] The ministry submits that the record is excluded from *FIPPA* as a result of the application of section 65(13)(a) to it. The ministry says that it is reasonable to conclude that there is "some connection" between the information at issue and the provision of abortion services, as that standard was articulated in *Ontario (Attorney General) v. Toronto Star*.[11] The ministry's representations refer to the principle of statutory interpretation, which holds that 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.[12]

[17] The ministry submits that the information in the record relates to abortion services because "it sets out data that is specific to abortion services that were provided in a region of Ontario during two calendar years." The ministry asserts that as the information is specific to the delivery of abortion services and because the record is intended to convey information about the provision of those services, there is no question that there is "some connection" between the data in the record and abortion services, as required by the exclusion.

[18] The ministry adds that it has applied its "small cell count policy" to withhold the record in its entirety, noting that the IPC has held that a small cell exists where the pool of choices or candidates is so small that it becomes possible to guess who the individual or choice might be. The ministry acknowledges that what qualifies as a small cell count varies depending on the situation. Finally, the ministry submits that, as applied to the abortion services information exclusion in section 65(13) of the *Act*, its small cell count policy "would apply equally to facilities or individuals who may be identified."

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[9] Order MO-3664, *Brockville* (*City*) *v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).
[10] Order PO-3989.
[11] (2010) ONSC 991 (Div Ct).
[12] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada Inc., 2014), p. 7. The modern rule was adopted by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Limited*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27.

[19] Relying on its "FIPPA Abortion Records Amendment & MOHLTC Data Disclosure Policy (the Data Disclosure Policy),"[13] the ministry submits that to avoid the risk of inadvertently disclosing aggregate data that could lead to the identification of an individual or a facility, it will only provide aggregate data pertaining to abortion services at the provincial level or Local Health Integration Network (LHIN) level in accordance with the following terms:

> Provincial Level
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> • Counts of performed abortion services by hospital and non-hospital settings for each complete fiscal year.
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> • Facility counts by hospital and non-hospital settings.
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> LHIN Level
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> • Counts of performed abortion services by hospital and non-hospital settings and by Regional LHIN Groups (no single LHIN display) for each complete fiscal year.
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> • Facility counts by hospital and non-hospital settings (if requested), and by Regional LHIN Groups.
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> • Supress facility counts where cell counts/ number of providers with a count is under or less than 5.

[20] The ministry submits that the second requirement of the exclusion in section 65(13)(a) is met because it is reasonably foreseeable that the data in the record could be used to identify a facility, since the request relates to a limited geographical area where there are "very few facilities that would offer the services." The ministry explains that each of the six districts in the Northern Region for which there is data has five or fewer facilities contributing to the numbers and therefore,

> It is reasonably foreseeable that the limited geographic region combined with the limited number of facilities in each of those [districts] that provide the services could be used to identify specific facilities where abortions are performed.

The appellant's representations

[21] The appellant acknowledges that the record at issue may relate to abortion

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[13] The Data Disclosure Policy was developed by the Information Management Strategy and Policy Branch. The ministry did not provide a copy of the Data Disclosure Policy for my review.

services, but he rejects the ministry's assertion that it is reasonably foreseeable that disclosure of the information could be used to identify facilities where abortions are performed. The appellant submits that the record

> … simply states the number of abortion procedures performed in a specific geographic district in a calendar year… not … the location of where such procedures are performed … These statistics provide no information at all about where they are performed and certainly nothing even close to identifying the individuals involved. Further, I don't see how it could be 'utilized, either alone or with other information, to identify an individual or facility' any more than releasing province-wide abortion figures already does.

Ministry of Health reply representations

[22] In seeking the ministry's reply representations, I asked the ministry to explain how the number of procedures listed in the record could itself, or with other publicly available information, allow for identification of facilities "any more than releasing province-wide abortion figures already does," as the appellant submits.

[23] While acknowledging that the data could not be used, either alone or with other information, to identify an individual, the ministry submits that it is a matter of avoiding the identification of facilities that provide abortion services. The ministry says that the record contains data for the facilities in each of the six districts of the Northern Region, including identifying the location (city) within the district. Further,

> It is self-evident that the number of facilities that are listed for a district within a region or for a municipality would be significantly few[er] than the number of facilities that would be listed for a region or for the province as a whole. Similarly, if a district or municipality is relatively small and includes very few facilities that perform the services, then the risk that the facilities could be identified would be higher.

[24] The ministry argues that a simple internet search for the term "abortion clinics in Ontario" leads to thousands of results that provide facility names and as the record at issue here provides data related to abortion services performed in districts and municipalities where the number of facilities providing those services is very low, it is reasonably foreseeable that the record, when combined with the publicly available information, "would positively identify specific facilities where those services are performed." Conversely, the ministry submits, it would be difficult to "positively identify" specific facilities providing abortion services with the disclosure of provincial aggregate data, even when the data is combined with publicly available information, given the large number of facilities and lack of other identifying information.

Appellant's sur-reply

[25] The appellant agrees with the ministry's position that with a smaller geographic area (of the data), the number of facilities providing abortion services is also smaller, but he disputes the assertion that there is a corresponding higher risk that the facilities could be identified. The appellant maintains that knowing the number of procedures performed in any one geographic area of the province would not assist an individual who wants to know where abortion services are being provided.

[26] The appellant rejects the ministry's claim that the results of an internet search of "abortion clinics in Ontario" might reasonably lead to the identification of facilities providing abortion services when combined with the information at issue because he rejects the assertion that there is a connection between such publicly available information, which may or may not be accurate, and the data at issue. He adds:

> [A]nyone making that search in order to locate an abortion clinic will not be aided by knowing how many abortions were performed in their region of Ontario. So I completely refute that the release of this statistical data makes it 'reasonably foreseeable' that citizens would all of sudden know where abortions are being performed.

Analysis and findings

[27] In the determination of whether section 65(13)(a) applies, the onus rested with the ministry to provide sufficient evidence to establish that the information at issue both relates to the provision of abortion services *and* identifies an individual or facility, or that it is reasonably foreseeable that the information could be utilized, either alone or with other information, to identify an individual or facility.[14] For the reasons that follow, I find that the exclusion in section 65(13)(a) of the *Act* does not apply. Specifically, I find that while the information relates to abortion services, it is not reasonably foreseeable that it could be used to identify an individual or facility.

[28] For information to be "relating to" the provision of abortion services for the purpose of the exclusion in section 65(13)(a), it must be reasonable to conclude that there is "some connection" between the actual information and the provision of abortion services.[15] The "some connection" standard must involve a connection that is relevant to the statutory scheme and purpose understood in their proper context.[16] In

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[14] Order PO-3989.
[15] *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.). See also, Orders PO-3222 and PO-3442.
[16] Order MO-3664, *Brockville* (*City*) *v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).

this appeal, I am satisfied, and I find, that the responsive information "relates to" the provision of abortion services.

[29] I am not satisfied, however, that disclosure of this particular information could reasonably be used to identify facilities where abortions are performed because the ministry has not provided me with sufficient evidence to establish a link between what I view as statistical information and the identification of any facility or facilities that provide abortion services in Ontario's Northern Region. Further, although the ministry initially submitted that the information could be used to identify individuals, it appears to have abandoned that argument. In any event, I am not satisfied that the information could be used, either alone or with other publicly-available information, to identify any individual or individuals.

[30] In reaching my conclusion that the disclosure of the information at issue could not reasonably be expected to identify any facility or facilities where abortion services are provided, I have considered the history of the exclusion in section 65(13) and its review in recent IPC orders, including Order PO-4090. Order PO-4090 established that the exclusion in section 65(13) should be interpreted consistently with the *Safe Access to Abortion Services Act, 2017*, because they were both enacted as part of Bill 163 and share the same legislative purposes of protecting the privacy, health, safety, and security of persons seeking and providing access to abortion services.[17] In this appeal, I have considered the exclusion in section 65(13)(a) within the context of the *Act* as a whole, with reference to the purposes of the *Act* and the surrounding text, including the exception in section 65(15), which specifically removes from the ambit of the exclusion statistical information, thereby preserving a right of access to it under the *Act* if certain conditions are met, including that the information covered by the *Act* would not identify patients, providers or facilities. The combination of section 65(13)(a) and section 65(15) distinguishes the current (amended) abortion services information exclusion from the former exclusion in section 65(5.7) that was struck down by the Divisional Court in *ARPA* as violating section 2(b) of the *Canadian Charter of Rights and Freedoms* (the Charter), the right to freedom of expression, which is closely connected with the key purposes of *FIPPA* and other freedom of information legislation.

[31] Section 2(b) of the Charter provides a derivative right to information where the applicant can demonstrate that a denial of access to information effectively precludes meaningful public discussion on a matter of public interest.[18] The Court's concerns

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[17] Passed in October 2017, Bill 163, An Act to enact the Safe Access to Abortion Services Act, 2017 and to amend the Freedom of Information and Protection of Privacy Act in relation to abortion services. In introducing the bill, the Hon. Yasir Naqvi stated that "this act would also amend the Freedom of Information and Protection of Privacy Act to further clarify that statistical or other information related to the provision of abortion services would be subject to the act."

[18] *ARPA*, cited above, at para. 3.

about the former abortion services exclusion in section 65(5.7) of *FIPPA* provide context for my rejection of the ministry's position on the current version of the exclusion at issue in this appeal. At paragraph 36 of *ARPA*, Labrosse J. observed the following:

> As noted by the Intervener, [the IPC,] there is no criteria which applies to the records relating to the provision of abortion services. There is no qualifier for records which contain identifying information or any other similar criteria for allowing the disclosure of certain records. The exclusion is absolute. It is a broad brushed exclusion which does not leave the door open for any exceptions. The Intervener suggests that the exclusion in s. 65(5.7) appears to cover information fitting in the following categories: 1) statistical information; 2) funding and 3) facilities and staff that perform abortions. I agree.

[32] In deciding that the former exclusion in section 65(5.7) of the *Act* violated section 2(b) of the Charter, the judge reasoned as follows, in part (at para. 44):

> Having considered each of the arguments advanced by Ontario in these proceedings, I am left with the conclusion that s. 65(5.7) of *FIPPA* has substantially impeded meaningful public discussion and criticism about abortion services for the following reasons:
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> > (i) the exclusion of all records related to abortion services is a broad brushed exclusion which leaves no room for discretion, even when dealing with **non-identifiable general statistical information or historical statistical information which may no longer present any safety risks**; …
> >
> > (iv) there is **insufficient reliable statistical data to allow for meaningful debate on abortion**. Having less than 50% of some of the available information through CIHI and other statistical data which pre-dates the adoption of section 65(5.7) of FIPPA or voluntary survey information published in medical journals do not allow for a meaningful debate. …
> >
> > (vii) examples of voluntary disclosure focus on limited statistical information such as the total number of abortions in a year or the value of the OHIP billings related to abortion services. The evidence in these proceedings leads me to conclude that **in order to have a meaningful public debate the available information to allow for a meaningful public debate certainly needs to go beyond some of the basic statistical information offered by Ontario in these proceedings.** … [emphasis added]

[33] The comments of the Court impugning the constitutionality of the former

exclusion for abortion services records in section 65(5.7) of *FIPPA* accurately reflect my concerns about the ministry's reliance on the amended abortion services information exclusion in section 65(13)(a) of the *Act* to refuse disclosure of the information at issue in this appeal. The amended provision was intended as redress for the former provision's exclusion from the right of public access to "non-identifiable general statistical information or historical statistical information which may no longer present any safety risks." In my view, the ministry's application of the Data Disclosure Policy[19] and its corresponding claim to section 65(13)(a) in this appeal runs the same risk of precluding meaningful public discourse on statistical abortion services information that led to the former exclusion being struck down in *ARPA*.

[34] In Order PO-4090, the adjudicator found that the exclusion in section 65(13)(a) applied to some of the information at issue, because the records specifically identified facilities that provide abortion services. In that order, the Ministry of the Attorney General provided sufficient evidence to persuade the adjudicator that the exclusion applied to certain statistical information. Both the nature of the request and the responsive records themselves were key to that finding. The two records containing that statistical information also contained the names of facilities that provided abortion services and the adjudicator found that, even if facility names were severed from those records, it was "reasonably foreseeable in the circumstances that other information in the records could be used, either alone or with other information, to identify these facilities." The "other information" in these records that could be used to identify the facilities consisted of "… information regarding the cities or locations where the facilities are located, descriptions of the facilities themselves, and other facility-specific information."

[35] In this appeal, and in contrast to the circumstances before the adjudicator in Order PO-4090, the information at issue is more closely analogous to the non-identifying general statistical information considered in *ARPA*, which was OHIP claims numbers and amounts for abortion services.[20] My description of the information at issue above bears repeating: for each of 2017 and 2018, there is a table consisting of five columns for each of the six (of 10) districts in the Northern Region reporting data: district name, location (city), numbers of services provided under two OHIP fee schedule codes, and total number of services in that district. In a bottom line for each table is a row containing the total numbers of services provided under each of the two OHIP fee codes, as well as a total for all six districts that had data to report in the relevant years.

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[19] As noted above, this refers to the ministry's FIPPA Abortion Records Amendment & MOHLTC Data Disclosure Policy.

[20] The request that had been at issue in Order PO-3222, considering section 65(5.7), from which the *ARPA* Court of Appeal decision resulted, was the "number of claims and amounts billed for abortion services under OHIP." See para. 44.

[36] The ministry concedes that it is not possible to identify facilities when only aggregate statistics for the province are disclosed, given the larger number of facilities and "lack of other identifying information" for the province as a whole. However, it does not follow from this that facilities in the Northern Region districts whose data is at issue here would be identified by disclosure, without more evidence to support the ministry's implicit assertion that there is "other identifying information" in the record at issue in this appeal.

[37] The ministry argues that the record contains data for the facilities in each of the six reporting districts of the Northern Region including for the location (city) within the district. However, neither the records nor the ministry's representations provide any details that are specific to the actual facilities that provide abortion services. The record before me does not even distinguish between hospital or non-hospital services. It contains no description of the facilities themselves or any other facility-specific information at all, unlike the records before the adjudicator in Order PO-4090. The ministry has not provided evidence to supplement the information in the record, including how many facilities there are or where they are located in any of the six districts, to help illustrate how the contents of the record could somehow serve to identify any of the facilities in the six districts, either alone or with other publicly available information. I address these points below.

[38] The ministry asserts that "the request is for data from a limited geographical region where there are very few facilities that would offer the services," and its specific evidence about those facilities is that each of the six districts has "five (5) or less facilities with results." The ministry's position is that the limited geographical region, combined with the limited number of facilities in each district that provide abortion services, is sufficient to lead to the identification of those facilities. One of the things the ministry does not explain, however, is how that "number of facilities" factor apparently led it to apply its small cell count policy to withhold the record in its entirety under section 65(13)(a) when the "very few facilities" are in no way represented by the data in the record. I will address what I view as the ministry's misapplication of the small cell count concept given the content of this record further, below.

[39] I am not persuaded by the ministry's submission about the purported ease of identification of the facilities in the six districts of the Northern Region through a "simple Internet search" for "abortion clinics in Ontario", which it says would yield thousands of results. Having considered the potential use of this publicly available information, together with the information at issue, to identify facilities providing abortion services, I agree with the appellant's rejection of this argument, and for similar reasons, I dismiss it. I find that the Internet search results described by the ministry could not reasonably be expected to connect the data at issue, including (and especially) the numbers of abortion services provided under the two OHIP fee codes, with identifiable facilities that provide abortion services in any of the six districts of the Northern Region. The ministry's evidence about this source of information does not satisfy me that the identifiability requirement of section 65(13)(a) has been met.

[40] The ministry's reliance on its Data Disclosure Policy and the small cell count concept are also not persuasive. As noted above, the ministry's initial access decision to disclose the data, with severances under the mandatory personal privacy exemption in section 21(1), was replaced by the revised decision, in which it claimed it could not release abortion services data for a specific region or at the LHIN (Local Health Integration Network) level, due to "potential privacy and safety/security issues." The ministry did not provide a copy of its Data Disclosure Policy for my review in this appeal, but I understand the policy to be crafted to avoid inadvertent disclosure of data that could lead to the identification of an individual or a facility. Under the policy, which was excerpted in the ministry's representations, "aggregate data pertaining to abortion services may only be provided at either a Provincial Level or Local Health Integration Network (LHIN) level." The "LHIN level" of the policy contemplates disclosure of counts of performed abortion services by hospital and non-hospital settings and by Regional LHIN Groups (no single LHIN display) for each complete fiscal year; facility counts by hospital and non-hospital settings (if requested), and by Regional LHIN Groups; while suppressing facility counts where cell counts/ number of providers with a count is under or less than 5. The ministry's representations, however, do not allow me to understand why it could not disclose *any* of the requested abortion services data, at the LHIN level or otherwise. The ministry does not, for example, identify the relevant Regional LHIN Group or Groups represented by the data in the tables, or provide any explanation of the relation between the six districts in the Northern Region that reported data and the LHIN level mentioned in the policy. The six districts of the Northern Region that reported data are, or were, part of both the North East and the North West LHINs, as they were known at the time of the request and representations.[21] It would have been helpful to have additional evidence from the ministry about the relationship between the districts and the LHINs and to know how that may have factored into the ministry's access decision (if it did).

[41] It can be supposed that the ministry's reference to each of the six districts having "five (5) or less facilities with results" is related to the final clause of the ministry's Data Disclosure Policy calling for suppression of facility counts where cell counts or number of providers is "under or less than 5." While first observing that the policy refers to suppression of *facility* counts, where the number of facilities for each region is not even listed in the record, I will still address the ministry's reliance on the small cell count concept by considering its application in past IPC orders.[22] In Order PO-2811, former Senior Adjudicator John Higgins described the term "small cell" count as:

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[21] Ontario subsequently (in April 2021) brought the LHINs under Ontario Health with a different name, Home and Community Care Support Services, but this is not relevant to my analysis in this order.

[22] Past orders have addressed it when reviewing whether the disclosure of numerical or statistical data could reasonably be expected to identify individuals.

> [A] situation where the pool of possible choices to identify a particular individual is so small that it becomes possible to guess who the individual might be, and the number that would qualify as a "small cell" count varies depending on the situations…. If …5 individuals is a "small cell" count, this would mean a person was looking for one individual in a pool of 5. By contrast, the evidence in this case indicates that one would be looking for 5 individuals in a pool of anywhere from 396 to 113, 918. This is not a "small cell" count.

[42] In Order PO-3643, Adjudicator Stella Ball considered whether a record listing the number of suicides committed in Ontario hospitals and psychiatric facilities, broken down by year and facility, was exempt under section 21(1). This determination required her to decide first whether that information constituted "personal information" about identifiable individuals with reference to the small cell count concept. The main argument advanced to oppose disclosure, particularly by facilities that served small communities and populations, was that disclosing the number of suicides in a specific year would mean reporting on a sample size with fewer than five members. The argument was that because the annual suicides at the smaller facilities were fewer than five for the time period in question, this constituted a small cell count. In rejecting this position, the adjudicator considered the ratio of suicides to overall deaths at each facility each year, observing that this was the "appropriate ratio" to consider. As none of the facilities had fewer than five total deaths in one year, the adjudicator found that the statistical information could not reasonably be expected to identify the individuals who died by suicide and she ordered disclosure of it as non-identifying aggregate data.[23]

[43] In this appeal, the ministry has not sufficiently explained how the small cell count concept applies. There is no way to resolve the question of the appropriate ratio on the scant evidence before me, given the ministry's vague submission only that each of the six districts has "five (5) or less facilities with results." Regardless, I do not see how the small cell count policy could apply to the identification of facilities when the only numbers in this record are contained in the two columns representing number of services provided under each of the two OHIP abortion fee codes. There are no numbers in the tables representing the number of facilities reporting data and the ministry simply has not explained how the numbers of abortion services provided under the two OHIP fee codes or any other information in the tables could be connected with facilities providing those services, as the exclusion requires. I find that the numbers in the OHIP fee code columns do not themselves identify an individual or facility, nor is it reasonably foreseeable that they could be used, either alone or with other information,

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[23] For a similar outcome to a review of the small cell count concept, see Order PO-2744. For reasons for finding the small cell count relevant in deciding that disclosure could reasonably be expected to lead to the identification of individuals, see Order MO-3763-I.

to identify an individual or facility.

[44] The ministry was required to establish that the abortion services information for the Northern Region that is at issue in this appeal satisfied the conditions for exclusion under section 65(13)(a): that there be "some connection" between the information and the provision of abortion services and that the particular information at issue would, if disclosed, identify an individual or facility, or that it is reasonably foreseeable that the information could be utilized, either alone or with other information, to identify an individual or facility.

[45] For the reasons given, I find that the second condition for the application of section 65(13)(a) is not satisfied for the information at issue – the numerical totals for abortion services provided in each of six districts of Ontario's Northern Region in 2017 and 2018, individually and collectively. As the exclusion does not apply, the information is not excluded from the *Act* under section 65(13)(a), and I will order the ministry to issue a new access decision respecting it.

ORDER:

I do not uphold the ministry's decision, and I order it to issue another access decision respecting the information at issue in accordance with the *Act*, treating the date of this order as the date of the request for the purposes of the procedural requirements of that access decision.

Original Signed by: November 10, 2021

Daphne Loukidelis
Adjudicator