

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4227-F

Appeal PA16-678-2

Cabinet Office

January 19, 2022

**Summary:** This is a final order, in which the remaining records at issue consist of “stakeholder notes” created in connection with various organizations’ and businesses’ meetings with the Premier’s Advisory Council on the subject of the sale and distribution of alcohol in the Province. In this final order, which was preceded by Order PO-3839-I, the adjudicator upholds Cabinet Office’s access decision, in part. She finds that the majority of the stakeholder notes are exempt from disclosure under section 17(1)(b) (third party information), but that other notes are not exempt from disclosure under either section 17(1)(a) or (b). She further finds that section 13(1) (advice or recommendations) is not applicable to any of the records at issue in this appeal. She also finds that some of the information at issue is exempt from disclosure under section 18(1) (economic interests of Ontario) and upholds Cabinet Office’s exercise of discretion under section 18(1). Cabinet Office is ordered to disclose some of the stakeholder notes, either in whole or in part, to the appellant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2 (definition of “personal information”), 13(1), 17(1)(a), 17(1)(b), 18(1)(c) and 18(1)(d).

**Orders and Investigation Reports Considered:** Orders PO-2225, PO-2569, PO-2901-F, PO-3365, PO-3720 and PO-3839-I.

### OVERVIEW:

[1] This order disposes of the outstanding issues that arose as a result of an appeal of an access decision made by Cabinet Office under the *Freedom of Information and*

*Protection of Privacy Act (the Act).*

[2] The appellant had made an access request to Cabinet Office under the Act for the following information:

For the period of October 1, 2014 to October 1, 2016, meeting minutes, meeting notes and briefing notes produced by the Premier's Advisory Council on Government Assets that reference the following [named] organizations in conjunction with the key words "wine and spirit retailing and distribution"

[3] In response, Cabinet Office issued a decision to the appellant, denying access in full to the records responsive to the request, claiming the application of the mandatory exemptions in sections 12(1) (Cabinet records) and 17(1) (third party information), as well as the discretionary exemptions in sections 13(1) (advice or recommendations), 18(1) (economic and other interests) and 19 (solicitor-client privilege) of the *Act*. This access decision was appealed to the Office of the Information and Privacy Commissioner of Ontario (the IPC).

[4] After conducting an inquiry on May 10, 2018, I issued Interim Order PO-3839-I, finding that most of the voluminous records at issue were exempt under section 12(1).<sup>1</sup> As a result, it was not necessary to determine whether sections 13(1), 18(1) or 19 applied to those records. With respect to the remaining records at issue, which I found were not exempt under section 12(1), and for which Cabinet Office claimed section 17(1), I deferred any findings regarding section 17(1) pending notification of third parties (the affected parties). Cabinet Office also claimed the application of sections 13(1) and 18(1) to these records, which are referred to as "stakeholder notes." These stakeholder notes were taken by the Premier's Advisory Council (the Advisory Council) during meetings with stakeholders. For ease of reference, I will refer to the affected parties as the stakeholders.

[5] I then notified 27 stakeholders of the appeal and provided them with the opportunity to submit representations on the possible application of the mandatory exemption in section 17(1) to the stakeholder notes. I received representations from eight of the stakeholders. One of the eight stakeholders provided its consent to release its information. In addition, I had previously received representations from both Cabinet Office and the appellant on the possible application of section 17(1) to the stakeholder notes. Portions of the stakeholders' representations will not be referred to in this order because they meet the IPC's confidentiality criteria.<sup>2</sup> However, I have taken them into consideration in making my findings.

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<sup>1</sup> On October 4, 2018, Cabinet Office submitted a reconsideration request with respect to Interim Order PO-3839-I, arguing I erred in finding that some records are not exempt under section 12. Since Interim Order PO-3939-I was not a final order in respect of those records, I have decided to issue this final order before entertaining any reconsideration request.

<sup>2</sup> Set out in Practice Direction 7 of the IPC's Code of Procedure.

[6] I also note that in their representations, two of the stakeholders raised the possible application of the mandatory exemption in section 21(1) (personal privacy) to portions of the stakeholder notes. I asked these stakeholders to provide the names and contact information of the individuals for whom they are claiming section 21(1). Instead, both stakeholders provided representations on behalf of these individuals.

[7] With respect to sections 13(1) and 18(1), I had previously received representations from both Cabinet Office and the appellant on the possible application of these discretionary exemptions.

[8] For the reasons that follow, I uphold Cabinet Office's decision, in part. I find that the majority of the stakeholder notes are exempt from disclosure under section 17(1)(b), but that other notes are not exempt from disclosure under either section 17(1)(a) or (b).<sup>3</sup> I find that section 13(1) is not applicable to any of the stakeholder notes. I also find that some of the information at issue is exempt from disclosure under section 18(1) and I uphold Cabinet Office's exercise of discretion under section 18(1). Cabinet Office is ordered to disclose some of the stakeholder notes to the appellant as set out in the Order provisions.

## **RECORDS:**

[9] As stated above, the records at issue are "stakeholder notes," which consist of notes that were taken by the Premier's Advisory Council to Provide Advice on Government Assets (the Advisory Council) during meetings with stakeholders, such as retailers, growers and alliances, brewers, distillers, retail councils, a Crown corporation, an advocacy group, a charitable organization, a law enforcement association and a health care provider. The stakeholder notes that are at issue in this appeal were provided to the IPC by Cabinet Office on a USB key. The stakeholder notes as a whole are referred to by Cabinet Office as "Stakeholder Meeting Notes" on the USB key. The stakeholder notes for each meeting are also titled by the relevant stakeholder.

## **ISSUES:**

- A. Do the stakeholder notes contain personal information as defined in section 2(1) of the *Act*?
- B. Are the stakeholder notes exempt from disclosure under the mandatory exemption for third party information in section 17(1)?
- C. Are the stakeholder notes exempt from disclosure under the discretionary exemption for advice or recommendations in section 13(1)?

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<sup>3</sup> Neither Cabinet Office nor the stakeholders claimed the application of sections 17(1)(c) or (d).

- D. Are the stakeholder notes exempt from disclosure under the discretionary exemption for the economic interests of Ontario in section 18(1)?
- E. Did Cabinet Office exercise its discretion under section 18(1)? If so, should the IPC uphold the exercise of discretion?

## **DISCUSSION:**

### **Background**

[10] By way of background, in April of 2014, the Premier of Ontario established the Advisory Council. The mandate of the Advisory Council, established by Order-in-Council through Terms of Reference, required the Advisory Council to provide analysis, advice and recommendations directly to the Premier, on how best to maximize the value and performance of government business enterprises and other provincial assets in order to help delivery on the government's multi-year targets set out in the 2014 Budget.

[11] The membership of the Advisory Council was made up of senior leaders in the public and private sectors comprised of: the former Group President and Chief Executive Officer of the TD Bank Group; the former President and CEO of the Canada Pension Plan Investment Board; the former Minister of Finance and CEO of the Toronto Financial Services Alliance; the President and CEO of Cineplex Entertainment; and a former MPP and Minister, and former President and CEO of the United Way, Toronto.

[12] In addition, the work of the Advisory Council was supported by a dedicated project team in Cabinet Office. This project team provided direct support to the Chair of the Advisory Council and members of the Advisory Council as well as coordination and project management support for the Advisory Council's work with other government ministries and its government business enterprises.

[13] The general functions and responsibilities of the Advisory Council were further described in the Terms of Reference. The Premier requested that the Advisory Council review and report on government asset optimization opportunities, including considering possible asset mergers, acquisitions and divestments. The initial mandate of the Advisory Council also included providing advice on possible changes to the corporate structure of government business enterprises, including private-public sector partnerships. The Advisory Council was also asked to provide advice to the Premier on any other matters related to maximizing the value of provincial assets.

### **Issue A: Do the stakeholder notes contain personal information as defined in section 2(1)?**

[14] As previously stated, two of the stakeholders are claiming the application of the section 21(1) personal privacy exemption to portions of the stakeholder notes, namely the names of their employees and/or representatives who participated in the

stakeholder meetings either in person or by telephone. In order to determine whether the exemption applies, it is necessary to determine whether these records contain "personal information," which is defined in section 2(1) of the *Act* as follows:

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[15] 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.<sup>4</sup>

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

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<sup>4</sup> Order 11.

(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.

(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.

[17] 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.<sup>5</sup> 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.<sup>6</sup> To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>7</sup>

### ***Representations***

[18] The first stakeholder (a retailer) submits that its stakeholder notes contain the names of two employees who attended the stakeholder meetings. These employees advised the stakeholder that their presence at the meetings is their personal information and the disclosure of their names would disclose this personal information, which would constitute an invasion of their privacy under section 21(1) of the *Act*.

[19] The second stakeholder (also a retailer) submits that the names of its employees that attended the stakeholder meetings are exempt from disclosure under section 21(1), and that it has privacy commitments to its current and former representatives and employees.

### ***Analysis and findings***

[20] In Order PO-2225, former Assistant Commissioner Tom Mitchinson considered whether the names of non-corporate landlords who owed money to the Ontario Rental Housing Tribunal qualified as their personal information. As part of his analysis, he posed two questions to help to illuminate the distinction between information about an individual acting in a business capacity as opposed to a personal capacity:

...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

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<sup>5</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>6</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>7</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

personal, or is it one such as a business, professional or official government context that is removed from the personal sphere? ....

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 that it inherently personal in nature?

[21] Applying the approach taken in Order PO-2225 as well as a long line of IPC orders on this issue and based on my review of the records and the parties' representations, I find that the names of the stakeholders' employees or representatives who participated in the stakeholder meetings do not qualify as their "personal information" within the meaning of section 2(1) of the *Act*. Their names relate to them solely in a professional capacity as participants in the stakeholder meetings on behalf of two retailers. Further, I find that there is nothing about their names appearing in these notes that would reveal something of a personal nature about them. Therefore, upon my review of the information at issue, I find that it does not constitute "personal information" within the meaning of that term in section 2(1) of the *Act*.

[22] As the mandatory exemption in section 21(1) can only apply to personal information, I find that the disclosure of the names of the employees or representatives of the stakeholders are not exempt from disclosure under section 21(1). I will now consider whether this information, as well as all of the stakeholder notes, are exempt from disclosure under the mandatory exemption in section 17(1).

**Issue B: Are the stakeholder notes exempt from disclosure under the mandatory exemption for third party information in section 17(1)?**

[23] Cabinet Office is claiming the application of the mandatory exemption in section 17(1)(b) to the notes taken during the stakeholder meetings by the Advisory Council. The participating stakeholders are also claiming the application of section 17(1)(a) to these notes in addition to section 17(1)(b). Sections 17(1)(a) and (b) of the *Act* state:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;<sup>8</sup>

[24] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>9</sup> Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.<sup>10</sup>

[25] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information, and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly, and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

[26] An exception to section 17(1) is found in section 17(3), which states:

A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure.

[27] One of the stakeholders, a health care provider, consented to the disclosure of its information. Nonetheless, I will go on to decide whether section 17(1) applies to it.<sup>11</sup>

## ***Representations***

### *Cabinet Office's representations*

[28] Cabinet Office submits that disclosure of the stakeholder notes could reasonably be expected to harm the Crown's ability to work with stakeholders in a confidential manner in the future, as it would undermine the confidence that such stakeholders place in the presumed confidentiality of these types of consultations. Accordingly, Cabinet Office argues, this would result in similar information, which is important to the

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<sup>8</sup> Paragraphs (c) and (d) were not claimed by either Cabinet Office or the stakeholders.

<sup>9</sup> *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

<sup>10</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

<sup>11</sup> Section 17(3) only provides that, if the third party consents, Cabinet Office “may” disclose information that is exempt under section 17(1).



government when making informed policy choices and decisions, no longer being provided.

[29] With respect to part one of the three-part test, Cabinet Office submits that the records contain the financial and commercial information of stakeholders, including information about the organizations' finances, business and operational plans, sales, pricing, profit and loss, and competition.

[30] Concerning the second part of the test, Cabinet Office submits that the information in the stakeholder notes was supplied to Cabinet Office by way of oral submissions that were captured in writing by the Advisory Council and, in some cases, the oral presentations were accompanied by a written submission from the relevant stakeholder. Cabinet Office argues that while the notes were taken by the Advisory Council, the "supplied" portion of the second part of the test is met because the notes reflect direct submissions made by stakeholders during the meetings about options in connection with the alcohol beverage industry.

[31] Turning to whether the information that was supplied by the stakeholders was done so in confidence, Cabinet Office advises that when staff of the Advisory Council undertook consultations with external stakeholders, the organizations that were consulted were asked to enter into a confidentiality agreement with the Advisory Council, where both parties agreed that all consultations were confidential, thus creating an explicit expectation of confidentiality. In addition, Cabinet Office argues that the information the stakeholders provided to the Advisory Council would not otherwise be made available to the public, and was not intended to be made public.

[32] With respect to the harms contemplated in section 17(1)(b), Cabinet Office submits that without the participation of the stakeholders, the Advisory Council would not have had the benefit of their views when formulating its advice and recommendation to the government. In this regard, Cabinet Office states, the confidential consultation process enabled the Advisory Council to provide the Premier and Cabinet with the best advice, informed by an in-depth understanding of stakeholder views, reactions and impacts.

[33] Cabinet Office goes on to argue:

The consultation process undertaken by the Advisory Council demonstrates how full and complete information sharing and candour is critical during the policy-development process particularly with respect to economic and business policies that may impact participants in the marketplace. For this reason, if confidential submissions of stakeholders were to be disclosed, it is reasonable to expect that future consultations with a similar stakeholder community will be less frank and candid.

On this basis, Cabinet Office respectfully submits that by disclosing the meeting notes, the information provided by stakeholders during the confidential meetings and consultations detailing finances, business and operational plans, sales, pricing, profit and loss and competition could result in the stakeholders declining to participate in future consultation processes, which would undermine the Crown's ability to develop and implement informed economic policy in the public interest.

*The appellant's representations*

[34] The appellant questions whether the stakeholders listed in the access request would resist disclosure of the records or would no longer supply information to Cabinet Office in the future if the disclosure of these records took place. The appellant further submits that the changes to the Province's wine and spirit retail and distribution have already taken place, and, therefore, the disclosure of records provided by stakeholders no longer provides any commercial or financial value to any competitors or other relevant third parties.

[35] In addition, the appellant calls on Cabinet Office to show that the disclosure of records has been or would be resisted by all of the stakeholders listed in the access request.

*The stakeholders' representations*

[36] The eight stakeholders who provided representations consist of major retailers in the grocery industry, growers of grapes and associated wineries, a retail trade association, a provincial Crown corporation and a teaching hospital/research centre. I have summarized their collective representations in this order. Of the eight stakeholders, as I noted above, one of the stakeholders provided its consent to disclose the stakeholder notes relating to the meeting it had with the Advisory Council.

[37] The other seven object to the stakeholder notes relating to them being released either in whole, or in part.

[38] Concerning part one of the three-part test, the seven stakeholders submit that the records contain commercial and/or financial information and/or labour relations information and/or a trade secret. In particular, they submit that the commercial information relates to the buying and selling of alcoholic beverages in the Province.

[39] With respect to part two of the three-part test, the stakeholders submit that information they directly supplied to the Advisory Council and that the information was consistently treated as confidential and not publicly available. As part of ensuring the confidentiality of the information, confidentiality agreements were signed between the Advisory Council and the participants of the stakeholder meetings, and there were no provisions in these agreements that possible disclosure of the information might arise from the *Act*. The stakeholders further submit that they held a reasonable and objective

expectation of confidentiality, both explicit and implicit at the time the information was provided, as information that was provided and discussed during these meetings was given on the understanding that it was being provided in confidence and would not be distributed or discussed. Further, all written materials provided by the Advisory Council, such as the stakeholder notes themselves, would remain the sole and exclusive property of the Government of Ontario, and it was agreed that the stakeholders would return or destroy these materials.

[40] As for the third part of the three-part test, the stakeholders rely on sections 17(1)(a) and (b). Their position with respect to the application of section 17(1)(a) is that the disclosure of the information at issue could give a competitor confidential financial and commercial information, such as:

- lease and tenancy agreements,
- supplier and licence agreements information,
- employee training initiatives and programs,
- operational plans and capabilities,
- store performance,
- attitudes to auction pricing,
- product inclusions,
- packaging formats,
- margins, pricing and going to market strategies,
- sales targets,
- potential capital expenditures and,
- information about their general merchandising strategy with respect to the development of its business in the emerging provincial retail alcohol sales markets.

[41] The stakeholders submit that the following harms could reasonably be expected to result from disclosure of their information:

- prejudice to their competitive positions, as the information provides a “roadmap” to how internal proprietary decisions are made and outlines areas of vulnerability for their businesses,

- significant prejudice to and impairment of their bargaining positions in future negotiations,
- significant prejudice to their competitive position and the ability to negotiate prices,
- adjustments in competitors' bid requirements and offerings in their pricing strategies,
- undue gains to competitors relating to trade issues,
- interference with their contractual relationships, and
- interference in negotiations with suppliers or third parties who operate in retail settings.

[42] Turning to the application of section 17(1)(b), the stakeholders' position is that should the information be disclosed, they will no longer be able to rely on the assurances of confidentiality given by Cabinet Office or any other government institution subject to the *Act*. This will have a chilling effect on the ability of Cabinet Office and other government institutions to obtain information from the business sector in its policy-making process. They assert that it is in the public interest that government consult with business before making legislative and policy decisions that will have a wide-ranging impact on Ontarians, and that if they cannot rely on assurances given regarding confidentiality, they will be unable to provide confidential information in such settings in the future.

### ***Analysis and findings***

#### *Part One*

[43] With respect to part one of the three-part test in section 17(1), the types of information listed in section 17(1) have been discussed in prior orders:

*Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.<sup>12</sup> The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.<sup>13</sup>

*Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this

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<sup>12</sup> Order PO-2010.

<sup>13</sup> Order P-1621.

type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.<sup>14</sup>

[44] I find that the stakeholder notes contain “commercial information” for the purposes of the first part of the three-part test in section 17(1), because this information relates solely to the buying, selling or exchange of merchandise or services, namely the sale and distribution of wine, beer and spirits in the Province. As a result, the first part of the test is met with respect to these stakeholder notes. In addition, I find that many of the stakeholder notes also contain information that qualifies as “financial information”, as this information relates to money and its use or distribution and refers to specific financial data. I will now determine whether this information was “supplied in confidence” by the affected parties to Cabinet Office (via the Advisory Council).

### *Part Two*

[45] The second part of the three-part test is that the information was “supplied in confidence,” which reflects the purpose in section 17(1) of protecting the informational assets of third parties.<sup>15</sup>

[46] Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.<sup>16</sup>

[47] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.<sup>17</sup>

[48] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- treated consistently by the third party in a manner that indicates a concern for confidentiality,
- not otherwise disclosed or available from sources to which the public has access, and

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<sup>14</sup> Order PO-2010.

<sup>15</sup> Order MO-1706.

<sup>16</sup> Orders PO-2020 and PO-2043.

<sup>17</sup> Order PO-2020.

- prepared for a purpose that would not entail disclosure.<sup>18</sup>

[49] Having reviewed the representations of the affected parties, Cabinet Office and the appellant, as well as having reviewed the stakeholder notes themselves, I am satisfied that most of the information contained in these notes was supplied by the stakeholders to the Advisory Council.

[50] It is not in dispute that the information in the stakeholder notes at issue in this appeal was provided to Cabinet Office by the Advisory Council. I am also satisfied that the information that was supplied by the stakeholders to the Advisory Council (and forwarded to Cabinet Office) was done so in confidence, as the information was consistently treated as confidential and not publicly available. In addition, confidentiality agreements were signed between the Advisory Council and the participants of the stakeholder meetings, and I am satisfied that they held a reasonable and objective expectation of confidentiality, both explicit and implicit at the time the information was provided.

[51] Conversely, in other instances, I find that there is commercial and financial information in the stakeholder notes that was supplied by the Advisory Council to the relevant stakeholder as part of the “give and take” of a conversation/discussion, rather than supplied by the stakeholder to the Advisory Council.<sup>19</sup> To be clear, in these instances, this information was provided by the Advisory Council to the stakeholder participants in the stakeholder meetings. This information does not qualify as having been “supplied in confidence” to the Advisory Council (and by extension to Cabinet Office) and does not meet the second part of the three-part test in section 17(1). As a result, this information is not exempt from disclosure under the mandatory exemption in section 17(1). However, I note that Cabinet Office has also claimed the application of the discretionary exemptions in sections 13(1) and 18(1) to the stakeholder notes, which I consider in Issues C and D, below.

[52] I will now consider whether the third part of the three-part test in section 17(1) applies to the information that I have found was “supplied in confidence” to Cabinet Office (via the Advisory Council) by the stakeholders.

### *Part Three*

[53] The third part of the three-part test is that parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such

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<sup>18</sup> Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

<sup>19</sup> See, for example, Order PO-3986, in which I found that certain information was not supplied by a third party to the Ministry of Natural Resources and Forestry, instead finding that this information was provided to the third party by the Ministry.

harm.<sup>20</sup>

[54] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.<sup>21</sup> The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.<sup>22</sup>

[55] Based on my review of the parties' representations and the records themselves, I am satisfied that the vast majority of the information that was supplied by the stakeholders to the Advisory Council would, if disclosed, be reasonably expected to cause the harms contemplated in section 17(1)(b). I find the comments and findings of Adjudicator Frank DeVries in Final Order PO-2901-F to be instructive. In that appeal, the records were communications between the Ministry of Finance and stakeholders in the insurance industry relating to insurance rate filing information and the costing of possible auto insurance reforms. Adjudicator DeVries found that most of the information was exempt from disclosure under section 17(1)(b). In making this finding, he stated:

In general, in light of the representations set out above and the information provided regarding how the records were created and the consultation process, I am satisfied that the records provided by identified insurance companies during the consultation process, and which would reveal confidential commercial, financial or technical information about these companies, qualify for exemption under section 17(1)(b). Contrary to the position taken by the appellant, it appears that the third parties were involved in the consultation on a voluntary basis, and the companies provided the information about their own situation to the Ministry in confidence. In my view, based on the representations of the parties, disclosure of the information could reasonably be expected to result in similar information no longer being supplied to the institution by these companies. I also find that, based on the representations and the description of the consultative process, it is in the public interest that similar information continue to be so supplied. . .

[56] I agree with and adopt the approach taken by Adjudicator DeVries in Order PO-2901-F. In the circumstances of this appeal, I am satisfied that should the commercial and financial information of the various retailers, growers and alliances, brewers,

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<sup>20</sup> *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>21</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

<sup>22</sup> Order PO-2435.

distillers, retail councils, and a Crown corporation that supplied this information to the Advisory Council in confidence be disclosed, it is reasonable to expect that these organizations would no longer provide this type of information to it or Cabinet Office in the future. I am also satisfied, given the breadth and scope of the information provided to the Advisory Council on the sale and distribution of alcohol in the Province, that it is in the public interest that this type of information continue to be supplied to Cabinet Office. As a result, I find that the majority of the stakeholder notes are exempt from disclosure under section 17(1)(b). Consequently, it is not necessary to determine whether these stakeholder notes are exempt from disclosure under section 17(1)(a).

[57] Conversely, I find that the commercial information in the stakeholder notes supplied to the Advisory Council by four stakeholders is not exempt from disclosure under section 17(1)(b). Those four entities are a health care provider,<sup>23</sup> an advocacy group that provides education to communities to eradicate impaired driving, a charitable organization working to stop impaired driving, and a law enforcement association.<sup>24</sup> In my view, this information addresses the opinions of these organizations regarding the public health and safety aspects of alcohol sales and consumption in the Province. I find these organizations would continue to provide this type of information to government institutions as part of their public health and safety education and advocacy work, and in the case of the law enforcement association, the enforcement of laws surrounding the consequences of alcohol consumption, for example, impaired driving.<sup>25</sup>

[58] I will now consider whether the information I have found not to be exempt under section 17(1)(b), above, is exempt under section 17(1)(a). For ease of reference, section 17(1)(a) states that a head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

[59] I find that the information remaining at issue is not exempt from disclosure under section 17(1)(a). First, I reiterate that the health care provider gave its consent to disclose its information to the appellant. In any event, on my review of the stakeholder notes relating to the health care provider, I find that the information in these records does not relate to the types of services the health care provider engages

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<sup>23</sup> I note that the health care provider provided consent to disclose the information contained in the stakeholder notes relating to it, as contemplated in section 17(3).

<sup>24</sup> These four affected parties did not provide representations to the IPC although they were provided with the opportunity to do so.

<sup>25</sup> This approach was also taken in Order PO-2901-F with respect to information supplied by a trade association to the Ministry of Finance.



in, or any of its contractual arrangements with others. In my view, therefore, this information does not engage any interest in protecting the health care provider's competitive advantage in relation to other health care providers. As a result, I find that it could not be reasonably expected that the disclosure of the information of the health care provider supplied to the Advisory Council would result in the harms contemplated in section 17(1)(a).

[60] Turning to the information supplied by the advocacy group, the charitable organization and the law enforcement association to the Advisory Council, I find that on my review of their stakeholder notes, it could not be reasonably expected that the disclosure of this information would result in the harms set out in section 17(1)(a). In particular, I find that the information consists simply of factual information and these organizations' views of the public health and safety aspects of the sale and distribution of alcohol in the Province. I find that there is nothing in these stakeholder notes which could prejudice significantly their competitive position. In fact, it is not clear whether they have competitors in the first place. In addition, I find that the information at issue does not reveal anything that would significantly interfere with the contractual negotiations of themselves or anyone else. As a result, I find that this information is not exempt under section 17(1)(a).

[61] Having found that the information supplied to the Advisory Council by the health care provider,<sup>26</sup> the advocacy group, the charitable organization and the law enforcement association is not exempt from disclosure under either section 17(1)(a) or (b), I will now consider whether it is exempt under section 13(1) or 18(1).

**Issue C: Are the stakeholder notes exempt from disclosure under the discretionary exemption for advice or recommendations in section 13(1)?**

[62] Cabinet Office is claiming the application of the discretionary exemption in section 13(1) to the stakeholder notes. Section 13(1) of the Act exempts certain records containing advice or recommendations given to an institution. This exemption aims 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.<sup>27</sup>

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.

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<sup>27</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

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

[64] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are the public servant or consultant's identification of alternative possible courses of action. "Advice" includes the views or opinions of a public servant or consultant 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.<sup>28</sup>

[65] "Advice" involves an evaluative analysis of information. Neither "advice" nor "recommendations" include "objective information" or factual material.

[66] Section 13(1) applies if disclosure would "reveal" advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.<sup>29</sup>

[67] The relevant time for assessing the application of section 13(1) is the point when the public servant or consultant prepared the advice or recommendations. The institution does not have to prove that the public servant or consultant actually communicated the advice or recommendations. Section 13(1) can also apply if there is no evidence of an intention to communicate, since that intention is inherent to the job of policy development, whether by a public servant or consultant.<sup>30</sup>

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

- factual or background information,<sup>31</sup>
- a supervisor's direction to staff on how to conduct an investigation,<sup>32</sup> and
- information prepared for public dissemination.<sup>33</sup>

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<sup>28</sup> See above at paras. 26 and 47.

<sup>29</sup> 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.

<sup>30</sup> *John Doe v. Ontario (Finance)*, cited above, at para. 51.

<sup>31</sup> Order PO-3315.

<sup>32</sup> 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.).

<sup>33</sup> Order PO-2677

## ***Representations***

[69] Cabinet Office submits that all of the records that contain advice, including a description of prospective options whether or not accompanied by evaluative analysis, qualifies for exemption. It goes on to argue that based on the evaluative and analytical work performed by the Advisory Council, the advice and recommendation exemption applies to every draft and working note of the Advisory Council and staff developed as part of the Advisory Council's deliberation of advice and recommendations. In this regard, Cabinet Office argues, the exemption applies to all records that list, as well as consider and analyze, options and different potential courses of action.

[70] The appellant submits that it is reasonable to expect that some records qualify as factual or background information provided by the public service and therefore should be disclosed.

## ***Analysis and findings***

[71] There are two categories of information remaining at issue. The first is the information that I found was not "supplied" by the stakeholders to the Advisory Council. This information, I found, was in fact provided by the Advisory Council to the stakeholders and, as a result, did not meet the second part of the three-part test in section 17(1).

[72] The second category is the information that was supplied to the Advisory Council by a health care provider, an advocacy group, a charitable organization and a law enforcement association. I found that this information did not meet part three of the three-part test and was, therefore, not exempt under section 17(1). Both categories of information are contained in the stakeholder notes remaining at issue, that is, the notes reflecting the meetings in which the health care provider, advocacy group, charitable organization and law enforcement association participated.<sup>34</sup>

[73] For the following reasons, I find that section 13(1) has no application to either category of information referenced above and, therefore, this information in the stakeholder notes is not exempt under section 13(1).

[74] As previously stated, the purpose of section 13 is to preserve an effective and neutral public service by ensuring that persons employed in or retained by the public sector are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.<sup>35</sup>

[75] With respect to the first category of information, which is the information that was provided by the Advisory Council to the stakeholders, I find that section 13(1) does

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<sup>34</sup> As previously stated, I found the other stakeholder notes to be exempt from disclosure under section 17(1)(b).

<sup>35</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36.

not apply to this information. In particular, on my review of the four stakeholder notes at issue, I find that the information provided by the Advisory Council to the stakeholders is factual information, which in section 13(2)(a) is an exception to section 13(1). As a result, section 13(1) does not apply to this information. In any event, this is information flowing to external stakeholders, rather to an institution itself. Section 13(1) is aimed at protecting advice to government, not to external parties.

[76] Turning to the second category of information, I find that Order PO-3720 is instructive. In that order, Adjudicator Diane Smith found that the Insurance Bureau of Canada (the IBC) was a stakeholder consulted by the Ministry of Finance on issues relating to the consideration of automobile insurance reform. She found that as a stakeholder, the IBC did not qualify as “a consultant retained by an institution” as set out in section 13(1).

[77] I agree. Adopting and applying the approach taken by Adjudicator Smith, I find that while the stakeholders, provided their views and opinions on the public safety and health considerations of the sale and distribution of alcohol in the Province, section 13(1) does not apply to this information because these stakeholders were simply invited to participate in stakeholder meetings. They were not “retained” by Cabinet Office for the express purpose of providing advice or recommendations to Cabinet Office. To provide context, I refer to Order PO-3365. In that order, the Financial Services Commission of Ontario (FSCO), an arm’s-length agency of the Ministry of Finance, was directed to consult with the medical community and make recommendations on the amendments to the statutory definition of catastrophic impairment which appeared in a regulation under the Insurance Act. FSCO then established a Catastrophic Impairment Expert Panel to review and make recommendations. In that order, I found that each member of the expert panel fell within the scope of the words “a consultant retained by an institution” in section 13(1) because FSCO had specifically and directly convened a panel to specifically provide advice and recommendations on a certain subject matter.<sup>36</sup> This is not the case with the stakeholders in this instance, who were invited to participate in meetings to provide their views on the sale and distribution of alcohol. I find that they were not “retained” to specifically provide advice and recommendations.

[78] In sum, I find that neither category of information is exempt from disclosure under section 13(1). Cabinet Office has also claimed the application of section 18(1) to this information, which I consider, below.

**Issue D: Are the stakeholder notes exempt from disclosure under the discretionary exemption for economic interests of Ontario in section 18(1)?**

[79] Cabinet Office is claiming the application of sections 18(1)(c) and 18(1)(d) to the “briefing materials and the working materials that underlie the briefing materials”,

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<sup>36</sup> I also noted that the members of the expert panel were unpaid, but that was inconsequential to the finding that they were “retained” to provide advice and recommendations.

which I presume to include the stakeholder notes. The purpose of section 18 is to protect certain economic and other interests of institutions. It also recognizes that an institution's own commercially valuable information should be protected to the same extent as that of non-governmental organizations.<sup>37</sup>

Sections 18(1)(c) and (d) state:

A head may refuse to disclose a record that contains,

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

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

[80] An institution resisting disclosure of a record on the basis of sections 18(1)(c) or (d) cannot simply assert that the harms mentioned in those sections are obvious based on the record. It must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, the institution should not assume that the harms are self-evident and can be proven simply by repeating the description of harms in the *Act*.<sup>38</sup>

[81] The institution must show that the risk of harm is real and not just a possibility.<sup>39</sup> However, it does not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.<sup>40</sup>

[82] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. It recognizes that institutions may have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse to disclose information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.<sup>41</sup> Section 18(1)(c) requires only that disclosure of the information could reasonably be expected to

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<sup>37</sup> *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

<sup>38</sup> Orders MO-2363 and PO-2435.

<sup>39</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>40</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

<sup>41</sup> Orders P-1190 and MO-2233.

prejudice the institution's economic interests or competitive position.<sup>42</sup>

[83] Section 18(1)(d) is available if the institution can demonstrate that disclosure of information contained in a record could reasonably be expected to cause injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the provincial economy.<sup>43</sup>

### ***Representations***

[84] Concerning section 18(1)(c), Cabinet Office submits that the Liquor Control Board of Ontario (the LCBO) is a government enterprise which controls the distribution and sale of beverage alcohol in the Province. It goes on to argue that the disclosure of information that would prejudice the economic and competitive position of the LCBO will necessarily materially affect the economic and competitive position of the Crown, including its ability to raise revenues in order to meet its larger fiscal plan. Cabinet Office explains that the review of the distribution and sale of beverage alcohol involved the review of beer, wine and spirits, including the weighing of numerous financial and commercial considerations in order to determine which options were likely to generate revenue for the Province. The briefing notes and working materials describe this information in particular detail. Cabinet Office goes on to argue that the disclosure of the material would reveal confidential business and negotiation strategies of the LCBO and the government in relation to Winery Retail Stores and the Beer Store, impairing the ability of the government to effectively employ the strategies and approaches suggested in the material. Lastly, Cabinet Office submits that the disclosure of this information would prejudice the government's and the LCBO's economic interests and competitive position in the marketplace under section 18(1)(c).

[85] With respect to section 18(1)(d), Cabinet Office argues that the disclosure of this information would be injurious to the financial interests of the Government of Ontario or its ability to manage the economy in that it would impair the government's ability to effectively employ strategies detailed in the records to maximize fiscal return and to protect Ontario's economic interests.

[86] The appellant submits that section 18(1) is not relevant to the market for wine and spirits, as the market is a quasi-monopoly system with limited competition impacting the economic interests of the LCBO. The appellant goes on to argue that since the implementation of the government's policy (regarding wine and spirit retail and distribution), the market has had significant time to react and adjust its expectations. Therefore, the appellant submits, it would be unreasonable to be concerned that the disclosure of records would prejudice the economic interests and competitive position of a public institution or enterprise.

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<sup>42</sup> Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

<sup>43</sup> Orders P-219, P-641 and P-1114.

### ***Analysis and findings***

[87] I find that the first category of information, that is, information in the stakeholder notes that was provided by the Advisory Council to the stakeholders, is exempt from disclosure under section 18(1)(c) because the disclosure of this information could reasonably be expected to prejudice the economic interests of the government and its competitive position. Based on my review of the particular commercial and financial information contained in these stakeholder notes, I accept that disclosure of this information could reasonably be expected to impede future negotiations between the LCBO and alcohol distributors/manufacturers. I find that the relationship between these distributors/manufacturers and the LCBO is an ongoing one and that disclosure of this information would reveal how the LCBO does business with them, which would have relevance in future negotiations.<sup>44</sup> I also accept Cabinet Office's argument that anything that would negatively affect the LCBO's ability to make money would equally affect the tax revenue generated by the LCBO, which is passed on to the government.

[88] Consequently, subject to my findings regarding Cabinet Office's exercise of discretion, I find that this information is exempt from disclosure under section 18(1)(c).

[89] Having found that the information that was provided by the Advisory Council to the stakeholders is exempt from disclosure under section 18(1)(c), it is not necessary to determine whether it is also exempt under section 18(1)(d).

[90] Turning to the second category, the information that the four stakeholders provided to the Advisory Council, on my review of the parties' representations and the information itself, I find that neither the exemption in section 18(1)(c) nor section 18(1)(d) applies. Cabinet Office's representations on the application of section 18(1) argue that disclosure of the material would reveal confidential business and negotiation strategies of the LCBO and the government in relation to Winery Retail Stores and the Beer Store, impairing the ability of the government to effectively employ the strategies and approaches suggested in the material, such that the disclosure of this information could reasonably be expected to prejudice the government's and the LCBO's economic interests and competitive position in the marketplace under section 18(1)(c).

[91] With respect to section 18(1)(d), Cabinet Office argues that the disclosure of the information would be injurious to the financial interests of the Government of Ontario its ability to manage the economy in that it would impair the government's ability to effectively employ strategies detailed in the records to maximize fiscal return and to protect Ontario's economic interests. In both instances, Cabinet Office describes the information as detailing numerous financial and commercial considerations in order to determine options regarding the sale and distribution of alcohol in order to generate income for the Province.

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<sup>44</sup> See also Order PO-2569.

[92] As previously noted, the information at issue contains the views of these four stakeholders regarding the public health and safety ramifications in the context of the sale and distribution of alcohol in the Province. In my view, there is nothing on the face of these records that reveals the type of information that Cabinet Office describes, above. In addition I find that there is nothing in this information the disclosure of which could reasonably be expected to prejudice the economic interests or the competitive position of Cabinet Office or any other institution such as the LCBO. Similarly, I find that the disclosure of this information could not reasonably be expected to be injurious to the financial interests of the Government of Ontario its ability to manage the economy. As a result, I find that this information is not exempt from disclosure under section 18(1)(c) or 18(1)(d).

[93] Having found that the information that was provided by the stakeholders to the Advisory Council is not exempt under section 18(1), I will order Cabinet Office to disclose it to the appellant.

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

[94] The information that I have found to be exempt under section 18(1) is the information that was provided to the health care provider, the advocacy group, the charitable organization and the law enforcement association by the Premier's Council during the stakeholder meetings. As a result, my findings regarding Cabinet Office's exercise of discretion relate to application of section 18(1) to only this information.

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

[96] In addition, the IPC 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.

[97] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>45</sup> The IPC cannot, however, substitute its own discretion for that of the institution.<sup>46</sup>

[98] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant.<sup>47</sup>

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<sup>45</sup> Order MO-1573.

<sup>46</sup> Section 54(2).

<sup>47</sup> Orders P-344 and MO-1573.



- 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,
- the relationship between the requester and any affected persons,
- 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,
- the age of the information, and
- the historic practice of the institution with respect to similar information.

### ***Representations***

[99] Cabinet Office submits that it exercised its discretion and did so in good faith and for purposes consistent with the policy intention of the discretionary exemptions. It further submits that it took into account all relevant considerations and did not base its decision on irrelevant considerations.

[100] Specifically, Cabinet Office submits, it took the following factors into consideration:

- the recommendations of the Advisory Council, together with supporting rationale and analysis, have been published in two reports, such that the public interest in transparency of the Advisory Council's work has been reasonably served in that this information is available to the public to consider and use to inform commentary and choices about the decisions of the government,
- the records detail options and related considerations that the government could consider in the future with respect to raising revenue and making operational decisions in relation to beer and wine retail and distribution. As a result, this information continues to be relevant to the ongoing agenda setting of the Premier and the decision-making of Cabinet,
- the head considered the specific harms that may flow from the disclosure of the records, particularly the government's relationship with stakeholders, and

- given Cabinet's ongoing mandate to consider and implement strategies to raise revenues and optimize government assets, the head considered that Cabinet would not wish to disclose records that could negatively impact the ability of the Crown to derive value and revenue from these assets.

[101] The appellant submits that wine and spirit retailing and distribution generates a significant portion of revenue for the Government of Ontario. This revenue is used to fund and operate public services critical to the well-being of all Ontarians, including healthcare, social services and transportation infrastructure. Considering the importance of this revenue to the operation of the government and these services, the appellant is of the view that it is in the public interest to disclose these records in order to properly review and scrutinize the Advisory Council's policies and decision-making approach.

[102] The appellant further submits that Ontario residents are *de facto* shareholders of the LCBO and as shareholders are directly impacted from significant changes to the wine and spirit retailing and distribution policy in the Province. In addition, the appellant argues that there is more political interest in restricting disclosure of information, rather than publicizing it, as there was limited public service involvement in the Advisory Council compared to the conventional policy development conducted by the public service.

[103] Lastly, the appellant states:

The Premier's Advisory Council was responsible for the most transformative policy changes in Ontario's wine and spirit market in the past 30 years. The implication of its policy decisions will be felt for years to come by both Ontario's economy and its Provincial treasury. Ontarians have a right to have these records disclosed to truly understand how this monumental change in wine and spirit retailing and distribution occurred.

### ***Analysis and findings***

[104] 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.<sup>48</sup> It is the IPC's responsibility to ensure that this exercise of discretion is in accordance with the *Act*.

[105] If the IPC concludes that discretion has not been exercised properly, it can order the institution to reconsider the exercise of discretion, but cannot substitute its discretion for that of Cabinet Office.<sup>49</sup>

[106] I have carefully reviewed the representations of Cabinet Office and the appellant. I am satisfied that Cabinet Office exercised its discretion under section 18(1) in a proper

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<sup>48</sup> Order MO-1287-I.

<sup>49</sup> Order 58.

manner. I am satisfied Cabinet Office considered relevant factors and did not take into account irrelevant factors.

[107] In particular, I find that Cabinet Office considered the nature of the withheld information and the relationship between that information and the purpose and importance of the exemption in section 18(1), which in this case is to protect the economic interests of Ontario. I also find that Cabinet Office considered and the purposes of the *Act*, including the appellant's and the public's right of access, in exercising its discretion. I also note that the final reports of the Advisory Council were made public, and are available on-line which address some, if not all of the appellant's public interest arguments about disclosure of the records.

[108] In circumstances like the present appeal where the institution must balance the province's interests with the interests of the appellant's right to know, I accept that Cabinet Office properly considered all relevant factors and did not inappropriately exercise its discretion to withhold the records.

[109] Consequently, I uphold Cabinet Office's exercise of discretion under section 18(1).

## **ORDER:**

1. I order Cabinet Office to disclose the portions of the stakeholder notes which are not exempt from disclosure under either sections 13(1), 17(1) or 18(1) to the appellant by **February 23, 2022** but not before **February 18, 2022**. I have included copies of the records with the order sent to Cabinet Office. The highlighted portions are not to be disclosed to the appellant.
2. reserve the right to require Cabinet Office to provide the IPC with copies of the records it discloses to the appellant.

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

Cathy Hamilton  
Adjudicator

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January 19, 2022