Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-4649-I

Appeal PA22-00504

Ministry of the Solicitor General

April 30, 2025

Summary: An individual submitted a request to the Ministry of Solicitor General (the ministry), under the *Freedom of Information and Protection of Privacy Act*, for records related to the Security Assessment for Evaluating Risk (SAFER) program. The ministry granted partial access to the responsive records withholding some information.

The ministry denied access to the SAFER training manual relying on the exclusion in section 65(6) that excludes labour relations and employment records from the application of the *Act*. The ministry also denied access to the SAFER policy manual and the data definition guide based on the exemption in section 13(1) (advice or recommendation).

In this order, the adjudicator finds that the ministry did a reasonable search for records responsive to the request. She finds that the training manual is not excluded from the application of the *Act* and orders the ministry to issue an access decision. She upholds the ministry's decision not to disclose the policy manual and the data definition guide as they contain advice or recommendation but orders the ministry to re-exercise its discretion under section 13(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1), 24 and 65(6).

Orders Considered: Orders P-1495 and PO-3144.

Cases Considered: *Ontario (Ministry of Community and Social Services) v. Doe*, 2014 ONSC 239 (CanLII); *John Doe v. Ontario (Finance)*, 2014 SCC 36.

OVERVIEW:

[1] This order resolves an appeal dealing with a request for access to records related to the Security Assessment for Evaluating Risk (SAFER) program. SAFER is a tool used by the Ministry of the Solicitor General (the ministry) in evaluating an inmate's security risk at the time of admission to a correctional institution. Its purpose is to assist correctional staff in anticipating and mitigating improper inmate behavior and conduct in correctional institutions.

[2] The appellant's request was for the following information:

1. Copies of all policies, procedures, and/or operational manuals applicable to the Security Assessment for Evaluating Risk ("SAFER") program;

2. Copies of all policies, procedures, and/or operational manuals which specify the criteria used to evaluate an inmate's security risk within the SAFER program; and

3. Any records which include statistical or other information concerning the proportions or percentages of inmates who have been given different security classifications within the SAFER program, along with any information regarding the inmates' ages, records of offences, reasons for incarceration (sentenced vs. remand), race, ethnicity, nationality, citizenship, and/or disability statuses.[1]

[3] The ministry issued a decision granting partial access to copies of records pertaining to policies, procedures, and/or operational manuals applicable to the SAFER program.

[4] Some information was withheld due to the exemptions at section 13(1) (advice or recommendation), and section 14(1) (law enforcement)[2] and the exclusion at section 65(6) (employment or labour relations) of the *Freedom of Information and Protection of Privacy Act* (the *Act*).

[5] Dissatisfied with the ministry's decision, the appellant appealed it to the Information and Privacy Commissioner of Ontario (IPC).

[6] A mediator was assigned to explore the possibility of resolution. However, mediation was not able to resolve the appeal. As such, the appeal was transferred to the adjudication stage of the appeal process, where I decided to conduct a written inquiry under the *Act*. I sought and received representations from both the ministry and the appellant.[3]

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[1] The period stated was from January 1, 2021 to July 28, 2022.
[2] During the inquiry, the ministry withdrew its claim that any of the law enforcement exemptions in section 14(1) apply. Accordingly, section 14(1) is no longer at issue in this appeal.
[3] The parties' representations were shared in accordance with the confidentiality criteria in the IPC's *Practice Direction 7*.

[7] During the inquiry, the ministry stated that the policy manual and the data definition guide are draft version of these policies. In response, the appellant confirmed that he is seeking final versions of these polices. As such, I added the issue of reasonable search to the appeal.

[8] For the reasons that follow, I uphold the ministry's decision in part. I find that section 65(6) does not apply to the training manual to exclude it from the application of the *Act*. Accordingly, I order the ministry to issue an access decision with respect to that record. However, I uphold the ministry's decision not to disclose the policy manual and the data definition guide under section 13(1) but order it to re-exercise its discretion under section 13(1).

RECORDS:

[9] The records remaining at issue are the following:

- SAFER Policy and Procedures Manual, pages 40-46 (the policy manual)
- SAFER Data Definition Guide, pages 47-56 (the data definition guide)
- SAFER Training Manual, pages 74-84 (the training manual)

[10] The ministry is relying on section 13(1) to withhold, in full, the policy manual and the data definition guide.

[11] The ministry is relying on the exclusion at section 65(6) to withhold, in full, the training manual.

ISSUES:

A. Did the ministry conduct a reasonable search for records relating to SAFER policy?

B. Does the section 65(6)3 exclusion for records relating to labour relations or employment matters apply to the training manual?

C. Does the discretionary exemption at section 13(1) for advice or recommendations given to an institution apply to the policy manual and the data definition guide?

D. Did the ministry exercise its discretion under section 13(1)? If so, should I uphold the exercise of discretion?

DISCUSSION:

Issue A: Did the ministry conduct a reasonable search for records relating to SAFER policy documents?

[12] As way of background, during the inquiry, the ministry stated, for the first time, that the policy manual and the data definition guide are draft versions, not final versions of these documents. In response, the appellant stated that his request is for the final version of SAFER policy documents and because the ministry did not locate final versions of these documents he believes that final versions should exist. As such, I added the issue of reasonable search for final versions of SAFER policy documents to the appeal.

[13] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*.[4] If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[14] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[5]

[15] The *Act* does not require the institution to prove with certainty that further records do not exist.[6] However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[7] that is, records that are "reasonably related" to the request.[8]

[16] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[9] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[10]

[17] If the requester failed to respond to the institution's attempts to clarify the access request, the IPC may decide that all steps taken by the institution to respond to the request were reasonable.[11]

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[4] Orders P-85, P-221 and PO-1954-I.
[5] Order MO-2246.
[6] *Youbi-Misaac* v. *Information and Privacy Commissioner of Ontario*, 2024 ONSC 5049 at para 9, on the analogous requirement in the provincial equivalent of the *Act*.
[7] Orders P-624 and PO-2559.
[8] Order PO-2554.
[9] Orders M-909, PO-2469 and PO-2592.
[10] Order MO-2185.
[11] Order MO-2213.

Representations, analysis and findings

[18] The ministry explains that it identified draft versions of SAFER policy documents as being responsive, not the final versions, because final versions of these documents were never created, and, therefore, they do not exist. It explains that the SAFER policy documents, specifically the policy manual and the data definition guide, have never been finalized, and, therefore, assuming that final versions of these SAFER policy documents are what the appellant is requesting, not the draft versions that were located, no responsive records exist.

[19] The ministry submits that it conducted a reasonable search for final versions of the policy manual and the data definition guide. It submits that it received confirmation from staff in the Ministry's Institutional Operations Policy Unit that final versions of them were not created, and therefore they do not exist. The ministry explains that this unit is tasked with creating the policy manual and the data definition guide at issue. It also explains that this unit confirmed that final versions of these records do not exist.

[20] In response, the appellant submits that it is simply implausible that no final written policies concerning SAFER were ever prepared, given the clear existence and widespread nature of the SAFER program. He points out that SAFER was first implemented at Thunder Bay Jail and Thunder Bay Correctional Centre in March 2021. The appellant also points out that it has been implemented at five other provincial correctional institutions since March 2021.[12] As such, he submits that it is simply implausible that the ministry has implemented a program in the absence of any written rules or principles whatsoever.

[21] On my review of the parties' representations, I am satisfied that the ministry conducted a reasonable search for records responsive to the appellant's request for final versions of SAFER policy documents for the following reasons.

[22] The ministry has contacted and described the unit tasked with the creating the policy manual and the data definition guide at issue. It received confirmation from this unit that no final versions of the policy manual and the data definition guide exist as they were never created. In my view, the ministry's search was logical and comprehensive. As noted above, a reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[13] I am satisfied that the ministry has provided sufficient evidence to establish this. I am also satisfied that final versions of the policy guide and data definition guide do not exist.

[23] I have reviewed the appellant's representations, and I am not persuaded that he has established a reasonable basis for concluding that final versions of the policy manual and the data definition guide exist. He has not provided any explanation as to why, despite the ministry's search, final versions of these records should exist. As noted above,

[12] Pages 2-3 of the Appellant's Sur-reply Representations.
[13] Orders M-909, PO-2469 and PO-2592.

the requester must provide a reasonable basis for concluding why final versions of policy manual and the data definition guide exist.[14] In this case, the appellant has not provided a reasonable basis for why, despite the ministry's explanation, he believes final versions of these records exist.

[24] For the reasons stated above, I find that the ministry conducted a reasonable search for responsive records related to SAFER policy documents.

Issue B: Does the section 65(6)3 exclusion for records relating to labour relations or employment matters apply to the training manual?

[25] The ministry claims that section 65(6)3 applies to exclude the training manual from the application of the *Act*.

[26] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.[15]

[27] If section 65(6) applies to the training manual, and none of the exceptions found in section 65(7) applies, the training manual is excluded from the scope of the *Act*.

[28] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not stop applying at a later date.[16]

[29] The type of records excluded from the *Act* by section 65(6) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.[17]

[30] Section 65(6) does not exclude all records concerning the actions or inactions of an employee of the institution simply because their conduct could give rise to a civil action in which the institution could be held vicariously liable for its employees' actions.[18]

[31] The ministry relies on paragraph 3 of section 65(6), which read:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

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[14] Order MO-2246.
[15] *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107.
[16] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 509.
[17] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.) ("Ministry of Correctional Services"). The CanLII citation is "2008 CanLII 2603 (ON SCDC)."
[18] *Ministry of Correctional Services*, above.

> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

[32] For section 65(6)3 to apply, the ministry must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or use was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Parties' representations on the third part of the test

Ministry's representations

[33] The ministry submits that the training manual was created for an employment-related matter in which it has an interest. It submits that the training manual contains detailed information exclusively for staff about how to use SAFER.

[34] The ministry submits that it has a duty as an employer to ensure that its staff know how to use SAFER. It explains that if its staff do not know how to use SAFER, then it cannot discharge its statutory duty in section 5 of the *Ministry of Correctional Services Act*[19] to "supervise the detention of … of inmates". The ministry also explains it may be liable for any damages that are caused by the failure of staff to correctly use SAFER and staff who do not correctly use SAFER are subject to discipline.

[35] In support of its position, the ministry relies on Order PO-3144 and Order P-1495. In Order PO-3144, the ministry submits that the adjudicator found that similar types of operational procedure documents were excluded from the *Act*. In Order P-1495, the ministry submits that the adjudicator found that the ministry has a "legal interest in adhering to the standards and requirements of the *Public Service Act*[20] sufficient to bring it within the scope of the third requirement".

[36] Finally, the ministry submits that none of the exceptions in section 65(7) apply to the training manual.

Appellant's representations

[37] The appellant submits that the ministry's interpretation of "labour relations or employment-related matters" is overbroad and contrary to the purpose of the exclusion.

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[19] R.S.O. 1990, c. M.22 ("Ministry of Correctional Services Act").
[20] S.O. 2006, c. 35., Sched. A.

He submits that the common thread, amongst the examples of records excluded noted in the Notice of Inquiry, is that they pertain specifically to the relationship between an employer and its employee – not to the tasks and duties which staff of institutions are required to carry out in their interactions with members of the public.

[38] The appellant submits that Order PO-3144 can be distinguished on the basis that the withheld operational policy in that case contained "detailed information about how to properly input and implement a variety of human resource transactions – including hiring a new employee, processing leaves of absence, terminations, phased retirement and other changes to employee status."[21] In contrast, he submits that the training manual at issue applies to the use of the SAFER program. The appellant submits that training manuals on workplace responsibilities are distinguishable from the "human resources of staff relations issues"[22] focus of what constitute "employment-related matters" under section 65(6)3.

[39] The appellant also submits that the ministry has conflated "employment-related matters" with any workplace policy that employees must follow in discharging responsibilities to members of the public. He submits that in *Ontario (Ministry of Community and Social Services) v. Doe*[23] the Divisional Court found that records arising from an institution's public responsibilities, rather than from an internal employment relationship, do not fall within section 65(6)3. The appellant submits that the training manual fits squarely within the ministry's operational mandate, specifically the use of security classification.

Findings and analysis

[40] For section 65(6)3 to apply, all three parts of the test set out above must be met. Based on my review of the training manual and the parties' representations, I find that the third part of the test for section 65(6)3 is not met. As such, section 65(6)3 does not apply to exclude the training manual from the scope of the *Act*.

[41] Part three of the test requires that the training manual contains labour relations or employment-related matters in which the ministry has an interest.

[42] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to similar relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[24]

[43] The term "employment of a person" refers to the relationship between an

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[21] Order PO-3144, at para 23.
[22] Cited above at para 14.
[23] *Ontario (Ministry of Community and Social Services) v. Doe*, 2014 ONSC 239 (CanLII), at para 39 ("Doe").
[24] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[25]

[44] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- an employee's dismissal;[26]
- a grievance under a collective agreement;[27]
- disciplinary proceedings under the *Police Services Act*;[28]

[45] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce.[29]

[46] The record is excluded only if the meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Matters related to the actions of employees, for which an institution may be responsible are not employment-related matters for the purpose of section 65(6).[30]

[47] I note that the ministry relies on Order PO-3144. I agree with the appellant that Order PO-3144 can be distinguished on the basis that the record at issue in that order contained detailed information about how to properly input and implement a variety of human resource transactions while the training manual at issue in this appeal is about how to use the SAFER program.

[48] Although the ministry also relies on Order P-1495, I note that it was issued prior to the Divisional Court's decision in *Doe* and can be distinguished on that basis. In *Doe*, the Divisional Court states the following about section 65(6):

> [A] purposive reading of the Act dictates that if the records in question arise in the context of a provincial institution's operational mandate, such as pursuing enforcement measures against individuals, rather than in the context of the institution discharging its mandate qua employer, the s. 65(6)3 exclusion does not apply. Excluding records that are created by government institutions in the course of discharging public responsibilities does not necessarily advance the legislature's objective of ensuring the

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[25] Order PO-2157.
[26] Order MO-1654-I.
[27] Orders M-832 and PO-1769.
[28] Order MO-1433-F.
[29] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, above at note 4.
[30] *Ministry of Correctional Services*, above at note 5.

> confidentiality of labour relations information. However, it could have the effect of shielding government officials from public accountability, an effect that is contrary to the purpose of the Act.[31]

[49] I agree with and adopt the reasoning in the above case for the purpose of this appeal.

[50] On my review, I find that the training manual at issue arises from the ministry's operational mandate, specifically the use of security classifications.[32] The training manual provides instructions to the user (likely ministry staff) on how to use SAFER. It does not arise from the ministry's function as an employer. In my view, the training manual would be used by any individual (including non-employees of the ministry) who did not know how to use SAFER. As such, I find that the training manual does not contain information about labour relations or employment-related matters in which the ministry has an interest.

[51] As stated above, all three parts of the test set out above must be met for the exclusion in section 65(6) to apply. As I have found that part three of the test has not been met, I find that the training manual is not excluded from the *Act* under section 65(6)3. Accordingly, I will order the ministry to issue an access decision for the training manual.

Issue C: Does the discretionary exemption at section 13(1) for advice or recommendations given to an institution apply to the policy manual and the data definition guide?

[52] The ministry claims that section 13(1) of the *Act* applies to the policy manual and the data definition guide. 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.

[53] In *John Doe v. Ontario (Finance)* (John Doe),[33] the Supreme Court of Canada held that the purpose of section 13(1) is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[34]

[54] *Advice* and *recommendations* have distinct meanings. *Recommendations* refers to materials that relate to a suggested course of action that will ultimately be accepted or

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[31] *Doe*, cited above at note 11 at para 39.
[32] *Ministry of Correctional Services Act*, above at note 7, section 14.2.
[33] 2014 SCC 36 ("John Doe")
[34] *John Doe*, above at para 43.

rejected by the person being advised. Recommendations can be express or inferred.

[55] *Advice* has a broader meaning than *recommendations*. It includes *policy options*, which are lists of alternative courses of actions to be accepted or rejected in relation to a decision to be made, and the public servant's identification and consideration of alternative decisions that could be made. *Advice* includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.[35]

[56] Advice or recommendations may be revealed in two ways: (1) the information itself consists of advice or recommendations; (2) the information, if disclosed would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[36]

[57] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[37]

[58] Section 13(1) covers earlier drafts of materials containing advice or recommendations, even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).[38]

[59] Examples of the types of information found *not* to qualify as advice or recommendations include factual or background information,[39] a supervisor's direction to staff on how to conduct an investigation,[40] and information prepared for public dissemination.[41]

[60] Section 13(2) creates a list of mandatory exceptions to the section 13(1) exemption. These mandatory exceptions can be divided into two categories: objective

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[35] *John Doe*, above at paras 26 and 47.
[36] 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.), affirmed [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.
[37] *John Doe*, above at note 32 at para 53.
[38] *John Doe*, above at paras 50-51.
[39] Order PO-3315.
[40] Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/91 (Ont. Div. Ct.).
[41] Order PO-2667.

information and specific types of records that could contain advice or recommendations.[42]

Parties' representations

[61] The ministry submits that the policy manual and the data definition guide contain advice and recommendations. It submits that advice and recommendations flowed between ministry staff and possibly a consultant, who appears to have created the data definition guide. The ministry submits that the advice and recommendations are distinctly identifiable within these draft records. It also submits that the purpose of the advice and recommendations was to create final versions of these records for approval purposes. The ministry points out that one of the comments that is contained in the policy manual specifically mentions approvals. Finally, it states that once these records were approved, it was intended they would be used for the SAFER program.

[62] In support of its position, the ministry relies on Order PO-4139, where the adjudicator found that a record contained "internal staff discussion and comments" was properly withheld under section 13(1) because it was "part of the deliberative process that is leading to a final decision".

[63] The appellant relies on Order PO-3778, where the adjudicator found that information providing direction to staff did not constitute as advice or recommendations under section 13(1). He explains that the SAFER program is being actively operationalized across Ontario institutions and is affecting numerous inmates. The appellant submits that implementation of a program necessarily requires direction to staff about how the program policies are to be operationalized, regardless of whether these policies are still in draft.

Analysis and findings

[64] I have reviewed the parties' representations and the policy manual and the data definition guide subject to the ministry's section 13(1) claim. Based on this review, I find that the policy manual and the data definition guide are exempt under section 13(1), subject to my discussion of the exceptions at section 13(2) and my review of the ministry's exercise of discretion below.

[65] As discussed above, "recommendations" refers to a suggested course of action that will ultimately be accepted or rejected by the person being advised. However, "advice" includes policy options as well as 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.[43] In both cases, there is a requirement that the information include some evaluative analysis rather than solely factual or background material.

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[42] *John Doe*, above at note 32 at para 30.
[43] *John Doe*, above at paras. 26 and 47.

[66] As stated above, the appellant relies on Order PO-3778 for the principle that information providing direction to staff do not constitute as advice or recommendations under section 13(1). I acknowledge that the evidence indicates that the SAFER program is being actively operationalized across Ontario institutions. However, there is no evidence before me that the policy manual and the data definition guide themselves are being used or are providing direction to ministry staff and Ontario institutions.

[67] I have reviewed the policy manual and the data definition guide. I find they are subject to the ministry's section 13(1) claim. Clearly, both these records are drafts as they contain comment bubbles made either by ministry staff or a consultant. The policy manual also contains a watermark "draft" on it. I note that they were prepared so that the ministry has policy documents for the SAFER program. In *John Doe*, the Supreme Court of Canada found that prior drafts are protected under section 13(1).[44] Based on my review, the policy manual and the data definition guide contain the requisite evaluative analysis required for exemption under section 13(1) to apply.

[68] Although I find that the exemption at section 13(1) has been established, the appellant has claimed the possible application of the exceptions in sections 13(2)(a) and (i) of the *Act*. If either of these exceptions applies, the ministry is precluded from relying on section 13(1) to deny access. As a result, I will now examine the possible application of these exceptions to the record at issue.

Sections 13(2)(a) and (i) – exceptions to the section 13(1) exemption

[69] Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13(1). The appellant submits that the exceptions at sections 13(2)(a) and (i) apply. Those sections state:

> (1) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) Factual material;
>
> …
>
> (i) A final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;
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> …

[44] *John Doe*, above at para. 51.

Section 13(2)(a): factual material

[70] Section 13(2)(a) contemplates that the records contain factual material. Factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.[45] Where the factual information is inextricably intertwined with the advice or recommendations, section 13(2)(a) may not apply.[46]

[71] The appellant submits that even if the policy manual and the data definition guide consist of "advice or recommendations" the information that they contain falls within the exemption at section 13(2)(a), as it contains factual material.

[72] Although the policy manual contains small amounts of factual information, from my review, that information is not a coherent body of facts, separate and distinct from the advice and recommendations, but is inextricably intertwined with information that I have found to be properly exempt pursuant to section 13(1). As a result, I find that the exception at section 13(2)(a) does not apply to the policy manual.

[73] With respect to the data definition guide, I find that it contains mainly an evaluative analysis of information and does not consist solely of objective or factual information. I acknowledge that there may be small amounts of factual information but it is inextricably intertwined with information that I have found to be properly exempt pursuant to section 13(1). As a result, I find that the exception at section 13(2)(a) does not apply to the data definition guide.

Section 13(2)(i): final plan or proposal to change or establish a program

[74] The term "plan" also appears in sections 18(1)(e), (f) and (g) of the *Act* and has been interpreted as:

- The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding.[47]
- Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme."[48]

[75] In my view, other similar terms, such as the reference to "proposals" in section 13(2)(i), are similarly referable to pre-determined courses of action or ways of proceeding.

[76] As indicated above, the policy manual and the data definition guide are part of a work-in-progress, which includes recommendations and advice given by ministry staff and/or the consultant as part of the deliberative process. The evidence before me from

[45] Order 24.
[46] Order PO-2097.
[47] Orders PO-2034 and PO-2598.
[48] Orders P-348 and PO-2536.

the ministry is that these two records are drafts, and, as such, do not amount to a "final" plan or proposal. Accordingly, I find that the exception in section 13(2)(i) does not apply in the circumstances to the policy manual and the data definition guide.

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

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

[78] 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.

[79] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[49] The IPC cannot, however, substitute its own discretion for that of the institution.[50]

Parties' representations

[80] The ministry submits that it exercised its discretion appropriately. It submits that it has disclosed many of the responsive records to the appellant. The ministry submits that the two records withheld under section 13(1) are draft versions of two policy documents. It explains that it is concerned about disclosing records that have not been finalized as it may interfere with the decision-making process. The ministry submits that disclosure of draft records would encourage ministry employees to self-censor the advice and recommendations contained in such records, and, thereby, preventing them from communicating effectively to each other in a frank and open manner, which would defeat the purpose for which the section 13(1) exemption was established.

[81] In response to the ministry's argument, the appellant submits that the courts have rejected the argument that imposing a duty of care on the Crown would have a "chilling effect" on government actions. He submits the Courts in this context require a Crown actor to present evidence as to a "real potential" for negative policy consequences, rather than speculate about the possibility of a "chilling effect".[51] As well, the appellant submits

[49] Order MO-1573.
[50] Section 43(2).
[51] *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5 at para. 73.

that in *Power v. Canada*,[52] the Supreme Court of Canada rejected the argument that disclosure of policy development documents causes undue interference with the law-making process, even when such documents are generated by "public servants acting in an executive capacity",[53] unlike in this case where the ministry is not contending the records at issue were generated by public servants acting in their "executive capacity". He submits that there is no evidence on the record before the IPC that the ministry was faced with a "real potential" that disclosure of the records at issue could cause actual interference with government activities.

[82] The appellant also submits that the ministry failed to consider relevant considerations in exercising its discretion to withhold the policy manual and the data definition guide, including:

- whether disclosure will increase public confidence in the operation of the institution; and
- 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.

[83] He submits that since the SAFER program affects the supervision of inmates and the safety of correctional institutions, the disclosure of the policy manual and data definition guide would increase public confidence in the operation of Ontario's correctional institutions. Further, the appellant submits that as the security classification affects inmates' liberty interests, this information is of great significance to them as affected persons.

[84] Finally, the appellant submits that the ministry exercised its discretion for an improper purpose. He explains that it is publicly known that his law firm is counsel in several class actions against the Ontario Crown, alleging negligence and violations of the *Canadian Charter of Rights and Freedoms*[54] by it. The appellant submits that there is a real possibility that the policy manual and the data definition guide are being withheld to shield the Crown from potential liability. He cites the Supreme Court of Canada in *Entreprises Sibeca Inc. v. Frelightsburg (Municipality)*[55] for the principle that indirect or circumstantial evidence may support a finding that the Crown has acted for an improper purpose.

Analysis and findings

[85] From my review of the parties' representations and the nature and the content of the policy manual and the data definition guide, I find that the ministry did not properly exercise its discretion in considering whether to disclose these records, despite the fact

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[52] *Canada (Attorney General) v. Power*, 2024 SCC 26.
[53] Above at para. 87.
[54] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the *Charter*).
[55] 2004 SCC 61 at para 26.

that they are exempt under section 13(1).

[86] As noted above, the Commissioner may review an institution's exercise of discretion under section 13(1). The Supreme Court of Canada has affirmed that the IPC may decide not to uphold an institution's exercise of discretion and may return the matter for a proper exercise of discretion where: the discretion was exercised in bad faith or for any improper purpose; or the institution took into account irrelevant considerations or failed to take into account relevant ones.[56]

[87] Based on my review of the parties' representations and the nature and the content of the policy manual and the data definition guide, I find that relevant factors for the ministry to consider in its exercise of discretion are the following:

- whether disclosure will increase public confidence in the operation of the institution; and

- 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.

[88] With respect to the first relevant factor, I find that the ministry considered it. I note that the ministry states that it fails to see how disclosing this type of information would increase public confidence in the operation of the institution.[57] As such, it appears that the ministry has turned its mind to this relevant factor.

[89] Based on the evidence before me, I am not satisfied that the ministry took into account all relevant factors in the exercise of its discretion under section 13(1). In particular, I am not satisfied that the ministry properly considered the nature of the information in the policy manual and the data definition guide and the extent to which it is significant and/or sensitive to the affected parties, the inmates. The ministry's representations are completely silent about this relevant factor, despite having been given an opportunity to submit representations in response to this argument raised by the appellant. As such, I can only conclude that it has not considered this relevant factor.

[90] As a result, I will order the ministry to review the policy manual and the data definition guide that I have found are exempt under section 13(1) and re-exercise its discretion by considering the second relevant factor listed above.

ORDER:

1. I uphold the ministry's decision that section 13(1) applies to the policy manual and the data definition guide.

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[56] *Ontario* (*Public Safety and Security*) *v. Criminal Lawyers' Association*, cited above.
[57] See the ministry's reply representations.

2. I do not uphold the ministry's exercise of discretion under section 13(1). I order the ministry to re-exercise its discretion to consider disclosing the policy manual and the data definition guide taking into account the second relevant factor.

3. If the ministry continues to withhold the policy manual and the data definition guide, I order it to provide the IPC and the appellant with representations about its re-exercise of discretion by **May 30, 2025**.

4. I do not uphold the ministry's decision that section 65(6)3 excludes the training manual from the application of the *Act*.

5. I order the ministry to issue an access decision to the appellant without relying on the section 65(6)3 exclusion, treating the date of this order as the date of the request for procedural purposes.

6. In order to ensure compliance with order provision 5, I reserve the right to require the ministry to provide me with a copy of the access decision.

Original Signed by: April 30, 2025

Lan An
Adjudicator