Court File No.: 15-64024

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA and PATRICIA MALONEY

Applicants

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Respondent

*APPLICATION UNDER r*ules 14.05(2) and 38 of the *Rules of Civil Procedure.*

FACTUM OF THE APPLICANTS

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PART I: OVERVIEW

1. The Applicants, Patricia Maloney and the Association for Reformed Political Action (ARPA) Canada ("ARPA Canada"), make application for an Order pursuant to the *Canadian Charter of Rights and Freedoms*[1] (the "*Charter*"):

    a. declaring that section 65(5.7) of the *Freedom of Information and Access to Information Act*[2]("*FIPPA*") violates section 2(b) of the *Charter* and is not saved under section 1;
    b. declaring that section 65(5.7) of *FIPPA* is of no force or effect, effective immediately; and,
    c. awarding costs on substantial indemnity basis.

2. In 2010, the Ontario Legislature passed Bill 122 – the *Broader Public Sector Accountability Act, 2010*[3] ("Bill 122") – which, among other things, amended *FIPPA*. In amending *FIPPA*, Bill 122 expanded *FIPPA*'s reach to healthcare institutions, but it also added section 65(5.7), a provision that now excludes any and all information "related to the provision of abortion services" from *FIPPA*'s reach. Before the section 65(5.7) exclusion came into force, such information was accessible through *FIPPA*.

3. Denying access to information which is neither private nor personal violates the freedom of expression of both Ms. Maloney and ARPA Canada.

4. Prior to the enactment of Bill 122, Ms. Maloney successfully made multiple requests under *FIPPA* for information related to the provision of abortion services. In March 2012, a similar request Ms. Maloney had made was denied, citing the section 65(5.7) exclusion of *FIPPA* as the basis of the refusal.

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[1] *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11* [*Charter*].

[2] *Freedom of Information and Protection of Privacy Act,* RSO 1990, c F31 [*FIPPA*].

[3] Bill 122, *An Act to increase the financial accountability of organizations in the broader public sector*, 2nd Sess, 39th Leg, Ontario, 2010 (Royal Assent received December 8, 2010) [Bill 122], **Applicants' Application Record** ("**AAR"),** Tab 3-A.

5. Ms. Maloney appealed the refusal through the internal mechanisms provided, eventually bringing an Application for Judicial Review of the refusal and subsequent decisions affirming the refusal. One month before the hearing of her Application for Judicial Review, the Ministry of Health provided her with the information she had requested, "outside of the *FIPPA*", and then took the position that her Application for Judicial Review was moot.
6. The Ministry of Health's decision to provide Ms. Maloney with the information related to the provision of abortion services which she had requested—information which was limited to the number of occurrences and the cost associated with a specific type of abortion within a specific time period—demonstrates that the section 65(5.7) exclusion of any and all information related to the provision of abortion services is unnecessary and not a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.
7. According to the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers Association*[4] ("*Criminal Lawyers*"), if a denial of access to information effectively precludes meaningful public discussion on a matter of public interest, a *prima facie* right of access under section 2(b) of the *Charter* is established. The claimant must go on to show that there are no countervailing considerations inconsistent with disclosure that would negate the *prima facie* right of access derived from section 2(b) of the *Charter*.
8. The section 65(5.7) exclusion hides or permits the government of Ontario to hide from the public any and all information in the government's control related to abortion, which is a publicly funded procedure in Ontario. The exclusion erases the right of access to information and removes independent oversight over disclosure decisions with respect to abortion-related information in the government's control.

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[4] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [*Criminal Lawyers*], **Applicants' Book of Authorities ("Applicants' Authorities"), Tab 1.**

9. The Applicants, through their writing, speaking, and campaigning, inform and educate Canadians about abortion. The allocation of taxpayer funds and their use to fund abortions is an important political issue in Ontario and Canada and the information excluded by section 65(5.7) makes it impossible for the Applicants to ensure transparency within the government and to participate meaningfully in the democratic process.

10. The section 65(5.7) exclusion impairs the freedom of the Applicants to carry on their mission of commenting on abortion with a view to educating Canadians about the issue. The result is a violation of section 2(b) of the *Charter*.

11. The *prima facie* freedom of expression claim is not negated by countervailing factors. No form of privilege protects information of the kind requested by Ms. Maloney in 2012. Moreover, information related to the provision of abortion services was previously disclosed under *FIPPA* and there is no evidence that any interference with the proper functioning of government institutions resulted. Nor is there any reasonable expectation that disclosing information related to the provision of abortion services, particularly information that does not identify particular facilities or providers, would interfere with the proper functioning of government in the future.

12. The violation of section 2(b) of the *Charter* cannot be saved under section 1. The complete lack of a right of access to information related to the provision of abortion services is not a limit “prescribed by law” as required by section 1, but the consequence of the non-application of *FIPPA* or any other law governing access to information. If the government has discretion to disclose or not disclose records “outside of the Act”, it amounts to plenary discretion, since neither *FIPPA* nor any other law governs its exercise or provides a basis for judicial review. Such discretion is repugnant to the rule of law and cannot satisfy the

"prescribed by law" requirement in section 1 of the *Charter*.

13. The impugned provision serves no pressing and substantial objective. Before section 65(5.7) was added, *FIPPA* already protected personal and third party information (sections 21 and 17) and allowed government institutions to withhold information in order to protect the safety or security of persons or facilities (sections 14 and 20). The *Personal Health Information Protection Act* ("*PHIPA*") already protects personal health information.[5] The section 65(5.7) exclusion therefore contributes nothing further to public safety, security, or personal privacy. But it does render government information on an important public policy issue inaccessible to the public.

14. Nor is the impugned provision minimally impairing. It is broad and sweeping on its face. The Information and Privacy Commissioner (the "IPC") has confirmed that it excludes from *FIPPA* even general statistical and financial information relating to abortion services not tied to any identifiable facilities or persons.[6]

15. The section 65(5.7) exclusion is also disproportionate, as per the last stage of the *Oakes* analysis.[7] Its ills are illustrated by Ms. Maloney's former ordeal seeking access to government data on abortion, the disclosure of which posed absolutely no risk to anybody, and by the fact that, going forward, it is clear that even non-identifying statistical information related to the provision of abortion services is inaccessible under *FIPPA*. The section 65(5.7) exclusion appears to have no benefits whatsoever that the government of Ontario can demonstrate.

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[5] *Personal Health Information Protection Act,* SO 2004, C 3, Sched A, at ss. 1-4, 7, 8 [*PHIPA*].

[6] *Ministry of Health and Long Term Care (Re)*, Order PO-3222, Appeal PO12-243, 2013 CanLII 38913, [Order PO-3222] **Applicants' Authorities, Tab 2**; *Ottawa Hospital (Re)*, Order PO-3442, Appeal PA13-213, 2014 CanLII 79900, [Order PO-3442], **Applicants' Authorities, Tab 3**.

[7] *R*. *v*. *Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes*]. **Applicants' Authorities, Tab 4.**

PART II: FACTS

A. The Applicants

1. Patricia Maloney

16. Patricia Maloney is an individual residing in the City of Ottawa, Ontario. Since March 31, 2010, Ms. Maloney has been writing and administering the blog "Run with Life", which serves as a platform for the discussion of abortion and sanctity of life issues. "Run with Life" offers regular commentary on issues of public and political interest and current events related to abortion.

17. For some time, Ms. Maloney has focussed part of her writing on the number and cost of abortions in Ontario. In the past, she has obtained (and continues to try to obtain) information on the cost of abortions in Ontario as paid for by Ontario taxpayers through the Ontario Health Insurance Plan.

18. Since beginning "Run with Life", Ms. Maloney has regularly made Freedom of Information Requests ("FOI Requests") to the Ontario Ministry of Health and Long-Term Care ("MOH") to obtain information regarding the number of abortions performed in particular time periods and the amount of taxpayer dollars used to fund abortions during particular time periods.

19. "Run with Life" has become quite popular, attracting over 2,000 visitors per month.

2. ARPA Canada

20. ARPA Canada is a not-for-profit and non-partisan organization devoted to educating, equipping, and assisting members of Canada's Reformed churches and the broader Christian community as they seek to participate in the public square.

21. Since its incorporation in 2007, ARPA Canada has become the primary means through

which many Reformed Christians engage socially and politically in their communities, province, and nation. ARPA Canada coordinates approximately 12 local ARPA chapters across Canada.

22. ARPA Canada operates and manages the "WeNeedaLaw" campaign, which seeks to educate and mobilize Canadians regarding Canada's complete lack of legislation protecting pre-born children. WeNeedaLaw campaigns for legal protection for pre-born children.

B. The introduction of the section 65(5.7) exclusion in *FIPPA*

23. In 2010, the Government of Ontario introduced Bill 122, which added section 65(5.7), among other provisions, to *FIPPA*. The subsection reads:

> (5.7) This Act does not apply to records relating to the provision of abortion services.

24. The stated purposes of Bill 122 were to ensure transparency and accountability of hospitals by making them subject to *FIPPA*, while continuing to protect personal health information.

25. The addition of section 65(5.7) to *FIPPA* was never discussed during debate of Bill 122 in the Legislative Assembly of Ontario. In fact, the word "abortion" was never mentioned during any of the debates or Legislative Committee meetings.[8]

26. According to Jawhar Kassam—who was Manager of Policy, Research and Issues Management in the Information, Privacy and Archives Division of the Ministry of Government Services from October 2011 to March 2015—the section 65(5.7) exclusion "was proposed to address the OHA's [Ontario Hospital Association] concerns that the disclosure of such records could pose risks to the safety and security of patients, hospitals and their staff."[9]

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[8] Affidavit of Colin Postma, **AAR,** Volume 2, Tab 5.

[9] Affidavit of Jawhar Kassam, at para 6, **Respondent's Application Record** ("**RAR**"), Tab 1.

27. However, there is not even a scintilla of evidence to suggest that the safety and security of patients, hospitals and their staff were ever put at risk during the time prior to the section 65(5.7) exclusion, when "information related to the provision of abortion services" was accessible under *FIPPA* and when such information had been disclosed in response to FOI requests.[10]

28. In its June 25, 2012 Briefing Note on the subject "Abortion Records FIPPA Exclusion", the Information, Privacy and Archives Division of the Ministry of Government Services ("MGS") contrasts an exclusion with an exemption:

> An **exclusion** removes a record from the jurisdiction of the Act, meaning that there is no right to obtain access to it under the FOI process. Where there is a right to seek access to a record under the Act an **exemption** requires or permits the withholding of information in limited circumstances, where legitimate interests need to be protected. The decision to exempt a record can be challenged, reviewed and overturned by the Act's oversight body (e.g. IPC). Further, when a record falls under the Act it can also be subject to a public interest override, in circumstances where the public interest in disclosure is found to outweigh the purpose of the exemption.[11]

29. The MGS Briefing Note observes that prior to the introduction of the section 65(5.7) exclusion, abortion records had been requested and disclosed under *FIPPA* and decisions denying access had been appealed to the IPC, which reviewed the government's reliance on certain exemptions, sometimes upholding a denial of disclosure and sometimes ordering disclosure. With section 65(5.7) now in force, however, it is just as the MGS Briefing Note

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[10] Refusals to disclose records were overturned or partially overturned in the following Ontario IPC orders: *Ontario (Health) (Re)*, Order 202, Appeal 890310, 1990 CanLII 3881, [Order 202]; **Applicants' Authorities, Tab 5**; *Ontario (Health) (Re)*, Order PO-1695, Appeal PA-980277-1, 1999 CanLII 14374, [Order PO-1695] **Applicants' Authorities, Tab 6**; *Ontario (Health) (Re)*, Order PO-1747, Appeal PA-980336-1, 2000 CanLII 20933, [Order PO-1747] **Applicants' Authorities, Tab 7**; *Ontario (Health and Long-Term Care) (Re)*, Order PO-1880, Appeal PA-000196-1, 2001 CanLII 26053, [Order PO-1880] **Applicants' Authorities, Tab 8;** and *Ontario (Health and Long-Term Care) (Re)*, Order PO-2378, Appeal PA-040173-1, 2005 CanLII 56495, [Order PO-2378] **Applicants' Authorities, Tab 9**.

[11] Page 2 of the MGS Briefing Note, appendix to Answers to Undertakings from Kassam examination, **RAR, Tab 3**.

anticipated: "the new exclusion for abortion records will result in abortion records/statistics becoming inaccessible under FIPPA."

30. There is no evidence to suggest that disclosing non-identifying information (that is, information that does not identify particular providers, facilities, or patients) related to the provision of abortion services could pose a safety or security threat. Any such concerns are speculative at best. Indeed, Ontario has been unable to point to actual instances of safety or security threats related to the disclosure of documents related to the provision of abortion services, instead, pointing to non-relevant events and speculative theories. In response to a question about the harm in disclosing non-identifying data, Mr. Kassam said (in full):

> There have been many incidents in Ontario where the safety and security of women who receive abortions or staff who have performed abortions or where the security of health facilities has been threatened - e.g. the shooting of a physician providing abortion services in Ancaster, Ontario - see http://www.cbc.ca/news/canada/charge-dropped-against-suspect-in-shooting-of-ontario-abortion-doctor-1.780549. There **may have been** incidents where the safety and security of staff who have performed abortions or patients has been threatened **as a result of the disclosure of information by Ontario about abortion service providers, patients or facilities**. It is impossible for Ontario to know what happens with information once it has been provided to a requester, who is free to disseminate that information through any media, to anyone. Finally, it is important to recognize that the disclosure of records related to abortion service providers and facilities also raises the risk, which is difficult to quantify, that access to abortion services will be reduced either because physicians are afraid to provide these services or because women are afraid to access them [emphasis added].[12]

31. The CBC News story cited by counsel for Ontario reports that attempted murder charges against a man named James Kopp were dropped. James Kopp reportedly shot an abortion provider in Ancaster, Ontario in 1995. There is no mention of any connection between the attempted murder and an FOI request. Further, there is no other incident—however remote—

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[12] Further Answers to Kassam Undertakings, **RAR, Tab 3**, pp. 151-152.

of an abortion provider's security being threatened since then. Even if the James Kopp incident could be reasonably relied on as justification for the addition of section 65(5.7) to *FIPPA*—and the Applicants deny that it can—how can Ontario explain the 15-year delay in adding the section?

32. Clearly, Ontario is grasping at straws with this after-the-fact reasoning.

33. Ontario says there "*may have been*" threats resulting from disclosing information "about abortion service providers, patients or facilities". Ontario has no evidence of that. Moreover, prior to section 65(5.7) being enacted, information about providers, patients, or facilities could be and was withheld anyway, where relevant exemptions applied.[13]

34. Prior to the section 65(5.7) exclusion being added to *FIPPA,* the MOH received fourteen *FIPPA* requests for documents related to abortion services.[14]

35. Two of those requests were made by Ms. Maloney. Both were granted in full. With respect to the other *FIPPA* requests received by the MOH, one was granted in full, one was granted in part, four were abandoned before the Ministry made a decision, and in one, the MOH had no responsive records.[15]

36. The other five of the fourteen requests were denied and the denials were appealed to the IPC. In each case, the IPC reviewed the MOH's reliance on certain *exemptions* contained in *FIPPA*, namely sections 14(1), 17(1), 20, and 21.[16] Prior to section 65(5.7) being added to

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[13] See Order 202, *supra*, **Applicants' Authorities, Tab 5**; *Ontario (Health) (Re)*, Order P-1499, Appeal P_9700188, 1997 CanLII 11658, [Order P-1499] **Applicants' Authorities, Tab 10**; and Order PO-1695, *supra*, **Applicants' Authorities, Tab 6**; Order PO-2378, *supra*, **Applicants' Authorities, Tab 9**.

[14] Further Answers to Kassam Undertakings, **RAR, Tab 3**, pp. 151-152.

[15] Further Answers to Kassam Undertakings, **RAR, Tab 3**, pp. 151-152.

[16] See Further Answers to Kassam Undertakings, **RAR, Tab 3**, pp. 151-152, where the Respondent has identified the following five IPC Orders as related to requests for abortion-related information from the MOH: Order 202, *supra*, **Applicants' Authorities, Tab 5**; Order P-1499, *supra*, **Applicants' Authorities, Tab 10**; Order PO-1747, *supra*, **Applicants' Authorities, Tab 7**; Order PO-1880, *supra*, **Applicants' Authorities, Tab 8**; and Order PO-2378, *supra*, **Applicants' Authorities, Tab 9**. The Applicants found one other IPC decision to be relevant: Order PO-1695, *supra*, **Applicants' Authorities 6**.

FIPPA, refusals had to be justified by reasonable reliance on exemptions, but now any and all such material is *excluded* outright, with no justification required.

C. Abortion-related FOI requests after Bill 122

1. Ms. Maloney's post-Bill 122 attempt at obtaining information

37. In March 2012, Ms. Maloney made an FOI Request for two, two-page charts titled "Medical Management of Non-Viable Fetus or Intra-Uterine Fetal Demise between 14 and 20 Weeks Gestation Volume by Diagnostic Code and by Service Location, Fiscal Year 2009" and "Medical Management of Non-Viable Fetus or Intra-Uterine Fetal Demise between 14 and 20 Weeks Gestation Volume by Diagnostic Code and by Service Location, Fiscal Year 2010" (the "Requested Charts").

38. The MOH refused Ms. Maloney's FOI Request, relying on the newly enacted section 65(5.7) exclusion. No other explanation was provided.

39. Ms. Maloney appealed the MOH's decision to the IPC. Ontario opposed Ms. Maloney's appeal and the IPC, in Order PO-3222 on June 24, 2013, upheld the MOH's decision, finding that the requested information was excluded from *FIPPA* by section 65(5.7).

40. On or about July 15, 2013, Ms. Maloney requested a review of the IPC's decision, which Ontario again opposed. Her Request for Reconsideration was denied by the IPC on October 3, 2013.

41. On or about July 14, 2013, Ms. Maloney filed an Application for Judicial Review of the IPC's decision, which Ontario vigorously opposed.

42. After approximately two and a half years of opposing Ms. Maloney's request and denying disclosure, and after receiving Ms. Maloney's factum for her Application for Judicial Review of the IPC's decision, Ontario disclosed the Requested Charts "outside the Act".

43. In disclosing the Requested Charts, Ontario stated:

> As confirmed by the adjudicator of the Information and Privacy Commissioner in *Re Ministry of Health and Long-Term Care*, IPC Order PO-3222, the record that your client has requested is excluded from the *Freedom of Information and Protection of Privacy Act* (the "*Act*") pursuant to section 65(5.7), as the information in the record "[relates] *to the provision of abortion services*." The Ministry of Health and Long-term Care (MOHLTC) relies on this exclusion to deny access under the *Act*.
>
> However, MOHLTC is prepared to disclose the record to your client outside the *Act* and to relieve you of the undertaking of confidentiality with respect to this record. The record being released to your client contains dated information of a statistical nature at the provincial level and is enclosed with this letter.
>
> We believe that this provides the relief that your client is seeking in the above-noted application for judicial review, but please advise whether you will be proceeding with the application nonetheless. [17]

44. Ontario's position in the present litigation is that disclosure of the Requested Charts did not pose any threat to health or safety.[18] At the same time however, it maintains that such information must be excluded from *FIPPA* to avoid speculative safety and security threats.

PART III: ISSUES, LAW, AND ARGUMENT

A. Issues

45. The Applicants submit that the following issues are raised by this Application:

a. **Issue 1:** Does section 65(5.7) of *FIPPA* violate section 2(b) of the *Charter*?

b. **Issue 2:** If there is a breach of section 2(b) of the *Charter*, can Ontario justify this breach under section 1 of the *Charter*?

c. **Issue 3:** What is the appropriate remedy?

d. **Issue 4:** Costs.

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17 Affidavit of Patricia Maloney, Exhibit "H", **AAR**, Volume 1, Tab 3-H.

18 Answers to Kassam Undertakings, **RAR, Tab 3.**

B. Argument

Issue 1: Does section 65(5.7) of *FIPPA* violate section 2(b) of the *Charter*?

1. The Legislative Framework

(a) Access to information legislation and democracy

46. Accountable democratic government depends in large part on an effective legal framework governing access to information. As the Supreme Court of Canada recognized in *Dagg v. Canada (Minister of Finance)*:[19]

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.[20]

47. The question at the heart of this case is whether governments can avoid accountability on a particular matter simply by excluding information related to that matter from the right of access and independent oversight provided by access to information legislation.

48. If public scrutiny regarding the environmental impact of public infrastructure projects were causing political headaches, for example, could the government simply amend access to information legislation to say "this Act does not apply to information related to the environmental impact of public projects"? Other examples are easy to imagine. Such a move would clearly be against the spirit of access to information legislation as articulated in *Dagg*. But that is precisely what Ontario has done with respect to information related to abortion services.

49. In Order PO-1747 (2000), the IPC ordered the Ministry of Health to disclose statistical information about the provision of abortions in Ontario, explaining:

> The information at issue in this appeal consists of general statistical information on a province-wide basis. This information cannot be

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[19] *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403, [*Dagg*], **Applicants' Authorities, Tab 11.**

[20] *Dagg, supra*, at para 61, **Applicants' Authorities, Tab 11.**

> linked to any individual facility or person involved in the provision of abortion services. I do not accept that the sequence of events, from disclosure to the harms outlined in sections 14(1)(e) and (i), could reasonably be expected to occur. […] The evidence before me does not establish a reasonable expectation of endangerment to the life or physical safety of any person, or to the security of a building, vehicle or system or procedure […]. This finding is in keeping with a fundamental purpose of the Act, as recognized by the Supreme Court of Canada [in *Dagg*].[21]

(b) The statutory purposes and principles of FIPPA

50. The purposes of *FIPPA* are spelled out in section 1. They are, first, to provide a right of access to information under the control of "institutions" as defined in section 2, and, second, to protect the privacy of individuals with respect to personal information about themselves held by institutions.

51. The first purpose is further broken down into three principles in section 1(a)(i)-(iii). Section 1 of *FIPPA* states:

> **Purposes**
>
> 1. The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[21] Order PO-1747, s*upra*, at 11, **Applicants' Authorities, Tab 7**.

52. The section 65(5.7) exclusion is contrary to all three principles set out in section 1(a).

53. First, the general right of access to information which lies at the heart of *FIPPA* no longer applies to abortion-related information. As the MGS Briefing Note states, "An **exclusion** removes a record from the jurisdiction of the Act, meaning that there is no right to obtain access to it under the FOI process."[22]

54. Second, rather than "limited and specific" exemptions limiting access to information about the provision of abortion services, which can only be relied on by a government institution where reliance is justified using evidence,[23] *FIPPA*'s exemptions, like its general right of access, no longer apply here. If the information in question has "some connection" with the provisions of abortion services, it is inaccessible.[24]

55. Third, with the section 65(5.7) exclusion, there is no longer effective independent oversight of disclosure decisions with respect to information related to the provision of abortion services. The IPC derives its existence and powers from *FIPPA*, but *FIPPA* no longer applies where "information related to the provision of abortion services" is the subject of a request. As previously noted above, the MGS Briefing Note contrasts exclusions and exemptions:

> An **exclusion** removes a record from the jurisdiction of the Act, meaning that there is no right to obtain access to it under the FOI process. Where there is a right to seek access to a record under the Act an **exemption** requires or permits the withholding information in limited circumstances, where legitimate interests need to be protected. <u>The decision to exempt a record can be challenged, reviewed and overturned by the Act's oversight body (e.g. IPC)</u>. Further, when a record falls under the Act It can also be subject to a public interest override, in circumstances where the public interest in disclosure is found to outweigh the purpose of the exemption [<u>emphasis added</u>].[25]

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[22] MGS Briefing Note, appendix to Answers to Undertakings from Kassam examination, **RAR, Tab 3**.

[23] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, at paras 52-59, [*Ontario v IPC*] **Applicants' Authorities, Tab 12**.

[24] Order PO-3222 and Order PO-3442, *supra*, **Applicants' Authorities, Tabs 2 and 3.**

[25] MGS Briefing Note, appendix to Answers to Undertakings from Kassam examination, **RAR, Tab 3**.

56. The IPC is now unable to exercise oversight over government decisions with respect to the non-disclosure of records related to the provision of abortion services (except on the question of whether or not the section 65(5.7) exclusion applies to the records in question). A decision about whether an exclusion applies is really a decision about whether *FIPPA* applies.

(c) The principles of FIPPA and the Charter

57. So the section 65(5.7) exclusion is contrary to the core principles of *FIPPA*. Of course, if a right of access were *merely* statutory, the legislature could take it away as freely as it can give it. Where, however, a right is also protected by the *Charter*, the removal or limitation of that right can properly be subjected to *Charter* scrutiny.

58. The Supreme Court of Canada in *Dagg* (1997) recognized the importance of access to information legislation in facilitating democracy, as noted earlier (para 46). In other cases, the Supreme Court of Canada affirmed the important connection between a right of access to information—the first purpose of *FIPPA*—and freedom of expression under the *Charter*.

59. In *CBC v. Lessard*[26] (1991), the Supreme Court observed that "the freedom to disseminate would be of little value if the freedom under s. 2(b) did not also encompass the right to gather news and other information without undue government interference."[27]

60. In *CBC v. New Brunswick*[28] (1996), the Supreme Court stated: "The full and fair discussion of public institutions, which is vital to any democracy, is the raison d'être of the s. 2(b) guarantees. Debate in the public domain is predicated on an informed public, which in turn is reliant upon a free and vigorous press."[29]

61. In *Toronto Star v. Ontario*[30] (2005), the Supreme Court declared: "Section 2(b) of the

[26] *CBC v. Lessard,* [1991] 3 SCR 421 [*Lessard*], **Applicants' Authorities, Tab 13**.
[27] *Lessard, supra,* at 429, **Applicants' Authorities, Tab 13**.
[28] *CBC v. New Brunswick,* [1996] 3 SCR 480 [*New Brunswick*] **Applicants' Authorities, Tab 14**.
[29] *New Brunswick, supra,* at para 23, **Applicants' Authorities, Tab 14**.
[30] *Toronto Star v. Ontario,* [2005] 2 SCR 188 [*Toronto Star*], **Applicants' Authorities, Tab 15**.

Charter guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest."[31]

62. And in *Criminal Lawyers* (2010), the Supreme Court recognized a general derivative right under section 2(b) of the *Charter* to access information where access is needed to permit meaningful public discussion, criticism, or commentary on a matter of public interest.[32]

63. So the first principle in section 1(a) of *FIPPA*—that information should be available to the public—finds constitutional support in section 2(b) of the *Charter*. The second and third principles meanwhile, find support in section 1 of the *Charter*, which requires that limits on *Charter* freedoms be set out clearly in law, demonstrably justified, and minimally impairing.

(d) Exemptions versus exclusions

64. The objective of exemptions is to balance the right to access public information with other interests, such as effective operation of government, safety, and privacy. Exclusions, however, denote information to which the public has no right of access. The legislature has determined that the public has no right, for example, to access prosecution records in an ongoing case.[33]

65. Daniel Guttman, who was counsel for Ontario in *Criminal Lawyers,* explains the purpose of *exemptions*:

> The inclusion of these exemptions [sections 12-22 of *FIPPA*] reflects a careful balancing by the legislature of competing interests (i.e. giving access to government-held information while maintaining the ability to prevent harm from the disclosure of certain types of information).[34]

66. With exclusions, however, the government need not identify any harms in order to justify

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31 *Toronto Star, supra,* at para 2, **Applicants' Authorities, Tab 15**.

32 *Criminal Lawyers*, *supra*, at para 5, **Applicants' Authorities, Tab 1.**

33 *FIPPA*, *supra*, s. 65(5.2).

34 Daniel Guttman, "Criminal Lawyers' Assn. v Ontario: A Limited Right to Government Information under Section 2(b) of the Charter" (2010), 51 SCLR (2d) 199, at para 4, [Guttman] **Applicants' Authorities, Tab 5**.

not disclosing records relevant to the request. The Ontario Court of Appeal explained the difference between exclusions and exemptions in this way:

> By using the words 'this Act does not apply', the legislature has distinguished exclusions from exemptions, and has declared that the 'delicate balance between the need to provide access to government records and the right to protection of personal privacy', which engages the expertise of the Privacy Commissioner, plays no role in relation to the enumerated [excluded] records.[35]

(i) *FIPPA* Exemptions

67. All exemptions in *FIPPA* use the phrase "a head shall refuse to disclose a record where" (so-called "mandatory exemptions") or "a head may refuse to disclose a record…" (so-called "discretionary exemptions") or some slight variation thereof.[36]

68. Some exemptions require a "head" (defined in section 2(1)) to exercise discretion in deciding whether or not disclosure of a requested record would have a certain *effect*, such as: revealing the substance of deliberations of the Executive Council or its committees (section. 12); revealing the advice or recommendations of a public servant or consultant (section 13); interference with a law enforcement matter, investigation, or fair trial (section 14); prejudice the conduct of intergovernmental relations by the Government of Ontario (section 15); prejudice the defence of Canada or allied state (section 16); or reveal a trade secret or other information supplied to government in confidence (section 17). These and other exemptions contain their own internal limits or exceptions. For example, the exemption in section 13 does not apply to a record containing factual material, statistical surveys, valuator reports, and similar kinds of information.

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[35] *Ontario (Solicitor General) v. Mitchinson* (2001), 55 O.R. (3d) 355 (C.A.), at para 30 [*Mitchinson*], **Applicants' Authorities, Tab 16**.

[36] For a helpful summary of how exemptions are categorized, see Vincent Kazmierski, "Lights, Judges, Access: How Active Judicial Review of Discretionary Decisions Protects Access to Government Information" (2013) 51:1 Alta L Rev 49, at paras 8-11 [Kazmierski], **Applicants Authorities, Tab 26**.

69. If a head concludes that disclosure will have the effect mentioned in a given exemption, and that the exemption otherwise applies, some exemptions say a head "may" then refuse to disclose the requested record ("discretionary exemptions"), whereas others say a head "shall not" disclose ("mandatory exemptions").

70. Other exemptions require a head to determine whether information falls within a certain category. These are sometimes called "class-based exemptions".[37] Section 21 (personal information) is an example of a class-based mandatory exemption, subject to the public interest override contained in section 23.

71. The so-called "mandatory exemptions" are found only in sections 12, 17, and 21 of *FIPPA*. However, *FIPPA's* public interest override applies to sections 17 and 21 (as well as to the discretionary exemptions in sections 13, 15, 18, 20, and 21.1). That means that the only absolute mandatory exemption is found in section 12 (executive privilege). A head *shall not* disclose a record that would reveal information protected by executive privilege even if, in the head's judgement, it would be in the public interest to do so.

72. All exemptions must be interpreted in light of the principles of *FIPPA* (section 1(a)), namely that government information should be available to the public and exemptions should be limited and specific. Exemptions balance the right to access public information with other legitimate objectives, such as safety, privacy, and the effective functioning of government.[38]

73. Exemptions apply where a request for a record falls within the scope of *FIPPA* and its right of access in section 10, but other considerations (such as privacy, public safety, etc.) may weigh against disclosure. This explains why *FIPPA* has a general provision (section 23) precluding relying on most exemptions "where a compelling public interest in the disclosure

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37 Kazmierski, *Ibid*, at paras 8-11, **Applicants' Authorities, Tab 26**.

38 *Criminal Lawyers*, *supra*, at para 2, **Applicants' Authorities, Tab 1**; *Mitchinson*, *supra*, at para 30, **Applicants' Authorities, Tab 16**.

of the record clearly outweighs the purpose of the exemption".

(ii) FIPPA Exclusions

74. Whereas most exemptions require heads of institutions to decide whether or not certain consequences will occur if information is disclosed (decisions which heads are uniquely placed to make), exclusions simply limit the scope of the *Act*.

75. The Kassam Affidavit states:

> A decision was made to propose an exclusion instead of an exemption in order to give institutions with such records the ability to make case by case decisions about what information to disclose, or not disclose, based on the many different and specific considerations that apply in each case.[39]

But that is what exemptions do. Indeed, that is what the entire *FIPPA* framework does, but *FIPPA* does not apply to abortion data. Kassam has wrongly attributed the purpose of exemptions to the term exclusions.

76. The purpose of exclusions is not to grant statutory discretion to disclose or not disclose depending on various considerations that may apply. That is the purpose of exemptions. The non-application of *FIPPA* is not *FIPPA*-granted statutory discretion.

77. If the Applicants make a request for information that falls "outside of *FIPPA*", they may get a refusal or they may not, but there is no legal framework, no statutory grant of discretion, and no legal standard on which a court could review such a decision.

78. The section 65(5.7) exclusion therefore provides no accountability and no oversight.

<u>2. Section 65(5.7) causes a prima facie violation of section 2(b) of the Charter</u>

79. Daniel Guttman has commented on the Supreme Court of Canada's ruling on the *Criminal Lawyers* case in the Supreme Court Law Review:

> The recognition of a new *Charter* right to information will cause all governments to carefully consider the constitutional validity of the

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[39] Affidavit of Jawhar Kassam, at para 10**, RAR, Tab 1.**

> provisions of their existing access legislation and proceed cautiously with any amendments that reduce access.[40]

80. Those words were published before the section 65(5.7) exclusion was enacted. Unfortunately, the government of Ontario did not heed Mr. Guttman's good advice.

81. The case at bar involves a particularly egregious, blanket denial of the right to access information about a publicly funded service—information that is needed to inform meaningful public discussion, criticism, and accurate commentary on the issue of abortion (which remains perhaps the most controversial political and social issue in Canada) and related issues of pre-born human rights, health policy, and public spending.

82. Access to information is necessary for the exercise of freedom of expression under section 2(b) of the *Charter*. Indeed, the Supreme Court of Canada has recognized: "In the case of demands for government documents, the relevant s. 2(b) purpose is usually the furtherance of discussion on matters of public importance."[41]

83. "To show that access would further the purposes of s. 2(b)," the Supreme Court states, "the claimant must establish that access is necessary for the meaningful exercise of free expression on matters of public or political interest."[42] Put in negative terms:

> In sum, there is a *prima facie* case that s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded.[43]

84. The Applicants submit that the complete exclusion of any and all abortion-related information in government hands from the right of access in *FIPPA* results in a *prima facie* breach of section 2(b) of the *Charter*, in accordance with the test set out in *Criminal Lawyers*.

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40 Guttman, *supra*, at para 87, **Applicants' Authorities, Tab 25**.
41 *Criminal Lawyers*, *supra*, at para 34, **Applicants' Authorities, Tab 1**.
42 *Criminal Lawyers*, *supra*, at para 36, **Applicants' Authorities, Tab 1**.
43 *Criminal Lawyers*, *supra*, at para 37, **Applicants' Authorities, Tab 1**.

That is, the section 65(5.7) exclusion: (a) substantially impedes (b) meaningful public discussion, criticism, and commentary on (c) a matter of public importance, namely the provision of abortion services with public funds.

(b) substantially impedes

85. The MGS Briefing Note on the section 65(5.7) exclusion correctly explains the effect of *FIPPA* exclusions: "An exclusion removes a record from the jurisdiction of the Act, meaning that ***there is no right to obtain access to it*** under the FOI process."[44]

86. Based on the plain language of the section 65(5.7) exclusion, and as demonstrated by Ms. Maloney's 2012 FOI request, all information related to the provision of abortion services, even the most general statistical information, has indeed become "inaccessible under *FIPPA*", as the MGS Briefing Note anticipated it would.

87. The section 65(5.7) exclusion is broad on its face and would exclude from access such data in the custody of the Ontario government as (1) the number and types of abortions which occur in any given time period, (2) the amount of taxpayer dollars used to fund abortions during any given time period, (3) the rate of medical complications, (4) the gestational age of aborted fetuses, (5) demographics of women who have had abortions, (6) the number of repeat abortions, among other information. It would also exclude information about a public body's policies on the provision of abortion services.

88. The information excluded by section 65(5.7) is not limited to patients' personal health information, which would be protected anyway under *PHIPA*. Nor is the section 65(5.7) exclusion limited to information that might identify particular facilities or providers, which could be withheld or redacted in any case under the exemptions in sections 14, 17, 20, or 21 of *FIPPA*, depending on the circumstances. Orders PO-3222 and PO-3442 and the plain

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[44] MGS Briefing Note, appendix to Answers to Undertakings from Kassam examination, **RAR, Tab 3**.

language of section 65(5.7) confirm the breadth of this exclusion.[45]

89. In Ontario, *FIPPA* (and the *Municipal Freedom of Information and Protection of Privacy Act*) provides the only legal mechanism by which members of the public can seek access to information in the control of public institutions (as defined in section 2 of *FIPPA*).

90. Daniel Guttman explains, "FIPPA is remedial legislation that provides a right of access where none would otherwise exist."[46]

91. Most provinces' access to information legislation specifies that the legislation does not replace other legal procedures for access to information. For example, Alberta's access to information legislation says, "This Act is in addition to and does not replace existing procedures for access to information or records".[47] *FIPPA* contains no such provision and there are no legal avenues outside of *FIPPA* for access to the kind of information the Applicants seek.

92. Section 10 of *FIPPA* contains the general right of access to a record or part of a record where an exemption applies and part of the record can be severed. Where an exemption is relied on, the IPC has authority to review the records that are responsive to the request to determine whether the records can be withheld, in whole or in part, based on an exemption.[48]

93. Having no right to access any abortion-related information seriously undermines Ms. Maloney's and ARPA Canada's ability to carry on their educational and advocacy work on a matter of public importance. FOI requests for "information related to the provision of abortion services" will be made in vain.

(c) Meaningful public discussion, criticism or commentary

94. As the IPC stated in Order PO-1747 (2000):

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[45] Order PO-3222 and Order PO-3442, *supra*, **Applicants' Authorities, Tabs 2 and 3**

[46] *Guttman, supra*, at para 3, **Applicants' Authorities, Tab 25**.

[47] *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, at s. 3(a).

[48] Guttman, *supra*, at paras 3-4, **Applicants' Authorities, Tab 25**.

> In my view, to deny access to generalized, non-identifying statistics regarding an important public policy issue such as the provision of abortion services would have the effect of hindering citizens' ability to participate meaningfully in the democratic process and undermine the government's accountability to the public.[49]

95. The plain wording of the section 65(5.7) exclusion and IPC Orders PO-3222 and PO-3442-make clear that the section 65(5.7) exclusion makes even generalized abortion statistics that do not identify particular abortion providers inaccessible. When the right of access to information about a certain public policy issue is completely erased, passing the next component of the *Criminal Lawyers* test for *prima facie* breach follows as a matter of course.

96. The term "meaningful" is not defined by the Supreme Court in *Criminal Lawyers* but naturally, the term should be given a broad and liberal meaning, in keeping with the broad and liberal interpretation always afforded section 2(b) of the *Charter*.

97. Commenting on the Supreme Court of Canada's use of the term "meaningful" in the *Criminal Lawyers* ruling, Ryder Gilliland, counsel for the Criminal Lawyers Association in that case, writes:

> […] the scope of the right of access will necessarily expand over time. This is so for two principal reasons. First, the freedom [of] expression right from which the right of access derives has always been very broadly construed. A narrow construction of the words "necessary" and "meaningful" is inconsistent with the approach to section 2(b) developed since *Ford* [([1988] SCJ No 88)]. Second, as access to information and freedom of expression are recognized as fundamental to democracy, undue constraint of either right is inconsistent with modern national and international societal values. There is a clear trend in the case law towards increased openness and transparency.[50]

98. For discussion, criticism, or commentary to be meaningful, it needs to be informed. Blind criticism or commentary regarding Ontario's policy of publicly funded abortion is not

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[49] Order PO-1747, *supra*, at 11, **Applicants' Authorities, Tab 7**.

[50] Ryder L Gilliland, "Supreme Court Recognizes (a Derivative) Right to Access Information" (2010) 51 SCLR (2d) 233-243, at para 3, **Applicants' Authorities, Tab 27**.

meaningful discussion, criticism, or commentary.

99. Obtaining information "related to the provision of abortion services" is necessary for meaningful expression on the issue. More specifically, obtaining accurate information about the number of abortions performed in Ontario and related statistics, which cannot be obtained through the Canadian Institute for Health Information ("CIHI") or by other means, is necessary in order to meaningfully comment and educate readers about abortion trends in the province, how much the Ontario government spends on abortion year to year, and so on.

100. While ARPA Canada and Ms. Maloney have and continue to write about abortion since Bill 122 came into force, their ability to meaningfully discuss the issue is severely limited. Ms. Maloney and ARPA have and continue to write about the lack any legal protection for the unborn, about sex-selective abortion, about politicians' and political parties' positions on abortion, however, they are limited in their ability to express themselves on this important political, social, moral, fiscal, medical and public policy issue.

101. Because of the 65(5.7) exclusion, Ms. Maloney and ARPA are forced to express themselves on issues related abortion without complete or accurate information.

102. It is no answer to the Applicants' claim to say, "You can keep talking about abortion generally, so you do not need access to data in the government's control about how many abortions are performed, other related statistics, or total costs to taxpayers."

103. If the government enacted a provision excluding all information in its control about the environmental impact of new highways or pipelines, for example, and an environmental group made a derivative freedom of expression claim, it would be no answer to say, "Look, you are still saying a lot about environmental issues as it is, just look at your website."

104. The point of the affidavit of Mark Mancini and of Ontario's cross-examination of Mike

Schoutten on his affidavit appears to be attempts to fill the record with articles by pro-life individuals and organizations—many of which have no relation or connection to Ms. Maloney or ARPA—in order to suggest that free expression about abortion-related issues carries on after Bill 122.[51] Some of the articles have nothing to do with abortion-related statistics.[52]

105. Several of the articles attached to the Mancini Affidavit are actually regarding the section 65(5.7) exclusion and the problems it causes, namely the inability to obtain reliable data for years after 2012. Other Exhibits to that Affidavit contain commentary on the inaccuracy of data from CIHI and the need to rely on data obtained through ATI requests. Exhibits Z and AA to the Mancini Affidavit show pro-life groups writing in 2014, but relying on the data obtained by Ms. Maloney in 2010 by an ATI request. Exhibit FF to the Mancini Affidavit is another good example—it mentions (in footnote 1) how, while CIHI reported only 28,765 abortions for Ontario in 2010, a "pro-life researcher" (Ms. Maloney) "made a freedom of information request" which uncovered that there were actually 43,997.

106. Ontario may want to suggest that the section 65(5.7) exclusion has not impeded Ms. Maloney and ARPA's ability to comment on abortion. The only way that could plausibly be true is if we accept that commentary related to the freedom of expression violation (as it pertains to abortion) is the equivalent of commentary on abortion itself.

107. It is notable, where discussions about numbers arise in the articles attached to the Mancini Affidavit, that the numbers discussed are from before Bill 122 came into force.[53]

108. As with other public policy issues, commentators might estimate numbers for the current or previous year based on statistics available from two or three years back. With each passing

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[51] Affidavit of Mark Mancini, Exhibit "A", **RAR, Tab 4**.

[52] Affidavit of Mark Mancini, Exhibits "S", "T", "U", **RAR, Tab 4**.

[53] Affidavit of Mark Mancini, Exhibits "B", "D", "I", "J", "N", "P", "W", "AA", "FF", **RAR, Tab 4**. The article in Exhibit W relies on CIHI numbers for Ontario in 2010, thus erring significantly.

year that the section 65(5.7) exclusion is in force, however, the less reasonable it becomes to do so. We cannot estimate 2016's numbers based on 2010's. Nor, having made estimates for previous years, can commentators hope to verify their estimates when actual statistics become available, since going forward such statistics will be "inaccessible under *FIPPA*."

109. In *Criminal Lawyers*, the Supreme Court of Canada did not dismiss the freedom of expression claim by saying that criminal defence lawyers can and do talk a lot about police misconduct without obtaining records through *FIPPA*. The issue in that case was whether the Criminal Lawyers Association could meaningfully comment on how a *particular investigation* was handled. The Supreme Court found that much information about that particular investigation was already available to the public,[54] that certain records that were withheld were protected by privilege,[55] and that the 318-page internal investigation report (although the Criminal Lawyers Association failed to establish that it was necessary under the *Charter*) should be reconsidered by the IPC.[56]

110. The *Criminal Lawyers* case was very fact specific. None of the records that had been withheld, which were known to the Court, were considered by the Court to be necessary for meaningful commentary. The Criminal Lawyers Association failed to establish that meaningful discussion of the handling of the police investigation and prosecution of the murder could not be achieved under the existing *FIPPA* framework—which provided them a right of access subject to legitimate limitations.[57] Nor could the Criminal Lawyers Association show that changing *FIPPA* so that the section 23 public interest override also applied to ss. 14

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54 *Criminal Lawyers*, *supra*, at para 59, **Applicants' Authorities, Tab 1**.
55 *Criminal Lawyers*, *supra*, at para 75, **Applicants' Authorities, Tab 1**.
56 *Criminal Lawyers*, *supra*, at para 74, **Applicants' Authorities, Tab 1**.
57 *Criminal Lawyers*, *supra*, at para 59, **Applicants' Authorities, Tab 1**.

and 19 would actually help them obtain any additional information.[58]

111. In the case at bar, Ms. Maloney's previous effort to obtain information related to abortion is but one illustration of a broader, structural, and perennial problem caused by the section 65(5.7) exclusion. Going forward from the *Criminal Lawyers* ruling, the Criminal Lawyers Association can still count on obtaining information in the government's control related to police practices, data about arrests, and so on, subject to *necessary*, *limited*, and *specific exemptions* (*FIPPA*, s. 1(a)). The Applicants in the case at bar cannot. The Applicants cannot afford to repeatedly go through what Ms. Maloney went through before, only to record a longer history of lacking information.

112. Ms. Maloney's prior attempt at obtaining information, even that of a statistical nature, illustrates the problem. She wished to inform herself and her readers about the number of claims and the total dollar amount that Ontario paid for "medical management of non-viable fetus or intra-uterine fetal demise between 14 and 20 weeks gestation" (service code P001) in 2009 and 2010.[59] But she had no right to know and did not find out until over two years later (and after incurring approximately $30,000 in legal fees), when the government released the information "outside the Act", apparently on a whim or perhaps for litigation strategy purposes in the face of Ms. Maloney's factum on her Application for Judicial Review.[60]

(d) On a matter of public importance

113. Abortion is undoubtedly a matter of public importance. Abortion has been the subject of many Parliamentary bills and motions,[61] court rulings, books, newspaper articles, editorials,

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[58] *Criminal Lawyers*, *supra*, at paras 56 and 61, **Applicants' Authorities, Tab 1**.

[59] Affidavit of Patricia Maloney, at para 4, **AAR,** Volume 1, Tab 3.

[60] Affidavit of Patricia Maloney, at paras 33-34, **AAR,** Volume 1, Tab 3.

[61] To name a few relevant bills in the last twenty years: Bill C-510, *An Act to Prevent Coercion of Pregnant Women to Abort (Roxanne's Law)*, 3rd Sess, 40th Parl, 2008; Bill C-338, *Act to amend the Criminal Code (procuring a miscarriage after twenty weeks gestation)*, 2nd Sess, 39th Parl, 2007; Bill C-452, *An Act to provide for a referendum to determine whether Canadians wish medically unnecessary abortions to be*

and debates. The IPC, in a decision ordering disclosure of abortion-related data, called it "an important public policy issue".[62] It is perhaps the most controversial political, social, moral and public policy issue of our day.

114. Simply knowing that publicly funded abortion occurs in Ontario is not enough. Accurate numbers are important. Every abortion matters. Statistical information about the age of patients, the gestational age of aborted fetuses, complications from the procedure, repeat procedures, and other information the government may have in its control are all matters of public importance and public policy. Such information was accessible under *FIPPA* prior to the section 65(5.7) exclusion coming into force. Such information remains accessible through access to information legislation in all other Canadian jurisdictions.[63]

115. Why is this information too sensitive for public access in Ontario but not in Alberta, or Manitoba, or Nova Scotia?

116. In *Grant v. Torstar Corp*.[64] , which involved a claim in defamation, a local newspaper article claiming that a businessman may have exercised political influence to obtain municipal approval for a golf course was considered to be commentary on a matter of public importance. The defendant newspaper company used commentary on a matter of public importance as a defence against a defamation claim. The Supreme Court of Canada stated:

> It is simply beyond debate that the limited defences available to press-related defendants may have the effect of inhibiting political discourse and debate on matters of public importance, and impeding the cut and

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insured services under the Canada Health Act and to amend the Referendum Act, 1st Sess, 37th Parl, 2002; Bill C-246, *An act to amend the Criminal Code to prohibit coercion in medical procedures that offend a person's religion or belief that human life is inviolable*, 1st Sess, 37th Parl; Bill C-208, *An Act to amend the Criminal Code (human being)*, 2nd Sess, 35th Parl, 1996.

62 Order PO-1747, *supra*, at 11, **Applicants' Authorities, Tab 7.**

63 British Columbia is the only other jurisdiction in Canada whose access to information legislation mentions "abortion". In British Columbia, some (but not all) abortion-related information is exempted, but not general, non-identifying information and data related to abortion. *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s. 22.1.

64 *Grant v. Torstar Corp*., 2009 SCC 61 [*Grant*], **Applicants' Authorities, Tab 17**.

> thrust of discussion necessary to discovery of the truth.[65]

117. The Supreme Court of Canada in *Torstar* interpreted the statutory defence to defamation with a view to protecting freedom of expression, especially on political matters and matters of public importance.

118. As Peter Hogg recognizes, "Perhaps the most powerful rationale for constitutional protection of freedom of expression is its role as an instrument of democratic government."[66]

119. When it comes to matters of public policy and public administration, the Supreme Court has said that "the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours."[67]

120. In *Irwin Toy Ltd. v Quebec (AG)*[68], the Supreme Court summarized the core reasons for protecting free expression:

> (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated.[69]

121. The Applicants in this case claim a derivative right under section 2(b) of the *Charter* to access information related to the government's provision of abortion. This is an important and controversial political, social and public policy issue. As such, informed discussion and commentary on an issue such as this goes to the core of what constitutionally protected free expression is all about.

122. Robust *Charter* protection should apply here, if anywhere.

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65 *Grant, supra,* at para. 57, **Applicants' Authorities, Tab 17**.

66 Peter W. Hogg, *Constitutional Law of Canada: Fifth Edition Supplemented* (Thomson Reuters Canada Ltd.: Toronto, 2007), at 43-7, **Applicants' Authorities, Tab 28**.

67 *Switzman v. Elbling*, [1957] SCR 285 (SCC) at 326, **Applicants' Authorities, Tab 18**.

68 *Irwin Toy Ltd. v. Quebec (AG),* [1989] 1 S.C.R. 927, [*Irwin Toy*], **Applicants' Authorities, Tab 19.**

69 *Irwin Toy, supra,* at 976, **Applicants' Authorities, Tab 19**.

<u>3. The prima facie section 2(b) protection is not removed by countervailing considerations inconsistent with production of the information sought.</u>

123. The Supreme Court in *Criminal Lawyers* found that section 2(b) of the *Charter* "includes a right to access to documents only where access is necessary to permit meaningful discussion on a matter of public importance, <u>*subject to privileges and functional constraints*</u>."[70] *FIPPA exemptions* set out privileges and functional constraints.

124. A claimant must show that there are no countervailing considerations negating the *prima facie* rights claim.[71] In the present case, the absence of countervailing considerations is easily inferred. Indeed, Ontario has been unable to point to any evidence supporting a pressing and substantial objective. All Ontario has been able to point to is unfounded and speculative concerns and to one news article dating back to 15 years before the section 65(5.7) exclusion was introduced.

125. In *Criminal Lawyers*, the Supreme Court of Canada cites as examples of appropriate limits on the derivative right to access information: solicitor-client privilege, judicial pre-judgement memos and notes, and cabinet confidences.[72] None of those apply here.

126. In *Criminal Lawyers*, the government denied disclosure of requested records, relying on *FIPPA* exemptions in sections 14 and 19. The Criminal Lawyers Association wished to use *FIPPA*'s "public interest override" (section 23) to effectively trump the government's reliance on the section 14 and 19 exemptions, but section 23 does not apply to sections 14 or 19. The Criminal Lawyers Association argued that the non-application of section 23 to sections 14 and 19 violated section 2(b) of the *Charter*. (Section 23 does not apply to any exclusions.)

127. On this the second part of the *Criminal Lawyers* test, however, the Supreme Court of

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70 *Criminal Lawyers*, *supra*, at para 31 (emphasis added), **Applicants' Authorities, Tab 1**.

71 *Criminal Lawyers, supra*, at para 33, **Applicants' Authorities, Tab 1**.

72 *Criminal Lawyers, supra*, at paras 39-40, **Applicants' Authorities, Tab 1**.

Canada found that the applicants had not established that "access to ss. 14 and 19 documents, obtained through the s. 23 override, would not impinge on privileges or impair the functioning of relevant government institutions." This conclusion was unavoidable, because, "As discussed, ss. 14 and 19 are intended to protect documents from disclosure on these very grounds";[73] that is, the grounds of privilege (section 19) and proper functioning of government (section 14).

128. However, there are no countervailing considerations that would negate the derivative right to access <u>non-identifying statistical information</u> about the provision of abortion services. That is why such information was accessible before Bill 122. That is why Ontario's position is that disclosure of the records requested by Ms. Maloney in the previous litigation did not present any risk. And that is why Ontario is unable to point to any evidence to support the need for excluding such information from *FIPPA*.

129. Section 65(5.7) excludes even the most general abortion statistics from the right of access. Pre-Bill 122 IPC Orders granted access to such information, judging that public safety and other considerations captured by *FIPPA* did not outweigh the right of access.

130. There is no reason to believe that a right of access to "information related to the provision of abortion services" would impair the proper functioning of, for example, the MOH.

131. The government failed in pre-Bill 122 cases to justify denying access to non-identifying statistical abortion-related information.

132. The Ministry of Health received fourteen *FIPPA* requests prior to January 1, 2012 for documents related to abortion services.[74]

133. Two of those requests were made by Ms. Maloney to the MOH and granted in full. With

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[73] *Criminal Lawyers, supra*, at para 60, **Applicants' Authorities, Tab 1**.

[74] Answers to Kassam Undertakings, **RAR, Tab 3.**

respect to the other *FIPPA* requests received by the MOH, one was granted in full, one was granted in part, four were abandoned before the Ministry made a decision, and in one the MOH had no responsive records.

134. The other five of the fourteen requests were denied and the denials were appealed to the IPC. In each case, the IPC reviewed the MOH's reliance on certain *exemptions* contained in FIPPA. These IPC decisions are briefly reviewed below.

135. In Order 202 (1990)[75], the IPC upheld the MOH's decision not to disclose the date, time, and place of the abortion performed by the appellant's wife's physician, and other information related to that particular procedure. The IPC found that it was "abundantly clear that [the appellant] was seeking access to information relating to another person, namely his wife."[76] The IPC concluded that the relevant records should not be disclosed, pursuant to s. 21 of *FIPPA*.

136. In Order P-1499 (1997)[77], the requester sought access to a record revealing the number of abortions performed by hospital and clinic. The Assistant Commissioner upheld the MOH's decision to deny disclosure of the relevant record, which contained listed information under the headings "HOSPITAL/CLINIC" and "COUNT". The Assistant Commissioner found that this record could serve to identify particular facilities and individuals involved in providing abortion services and that disclosure could therefore reasonably be expected to lead to the harms described in sections 14(1)(e):

> […] the Ministry and affected parties have provided sufficient evidence to establish that disclosure of the record could reasonably be expected to endanger the life or physical safety of individuals associated with the abortion facilities. […] Although I acknowledge that similar information has previously been disclosed, I also accept

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75 Order 202, *supra*, **Applicants' Authorities, Tab 5**.
76 Order 202, *supra*, at 6, **Applicants' Authorities, Tab 5**.
77 Order P-1499, *supra*, **Applicants' Authorities, Tab 10**.

> the Ministry's position that the more abortion-related information that is made available, such as the numbers associated with each facility, the more likely specific individuals will be targeted for harassment and violence.[78]

137. In Order PO-1747 (2000)[79], the IPC dealt with an appeal involving the MOH where the information at issue consisted of the number of obstetricians/gynaecologists billing OHIP for therapeutic abortions, as well as the number of therapeutic abortions which were billed to OHIP on an annual basis over a period of five years. Senior Adjudicator Goodis reviewed a number of previous IPC orders, as well as other relevant jurisprudence, in determining whether the information at issue was properly exempt under sections 14(1) and 20. He found that it was not and ordered disclosure.

> In both the animal experimentation and abortion cases, information associated with individuals or facilities has been found to meet the "harm" threshold in section 14, while more generalized information which cannot be linked to specific individuals or facilities, or which would not reveal new or additional identifying information, has been considered accessible under the Act.
>
> […]
>
> Like the B.C. and Ontario cases, the U.S. authorities suggest that generalized statistical data regarding abortion services should be accessible under freedom of information legislation.
>
> […]
>
> In my view, to deny access to generalized, non-identifying statistics regarding an important public policy issue such as the provision of abortion services would have the effect of hindering citizens' ability to participate meaningfully in the democratic process and undermine the government's accountability to the public.[80]

Senior Adjudicator Goodis ordered the MOH to disclose the relevant records, namely the bill fee schedules and fee schedule code analyses.

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[78] Order P-1499, *supra*, at 4, **Applicants' Authorities, Tab 10**.
[79] Order PO-1747, *supra*, **Applicants' Authorities, Tab 7**.
[80] Order PO-1747, *supra*, at 9-11, **Applicants' Authorities, Tab 7**.

138. In Order PO-1880 (2001)[81], the IPC reviewed the MOH's refusal to disclose "the top 10 items the Toronto GP/FP [General Practitioner/Family Practitioner] top biller in 1998/99 billed for, how many times the doctor individually billed those 10 items, and a brief explanation of the items as described under the Schedule of Benefits." The relevant record included information about abortion-related medical services. The requester was not seeking the identity of the physician, but the MOH relied on section 21 exemptions (personal privacy) anyway, arguing that the information contained in the responsive record could be used to identify a particular individual. However, the MOH did not produce sufficient evidence to show that any individuals could be identified, so the IPC concluded that the MOH could not rely on the section 21 exemption.

139. The MOH also sought to rely on the section 20 exemption (serious threat to health or safety), citing violence in relation to anti-abortion protests in the early 1990s as evidence of a risk of harm. The IPC ordered disclosure of the relevant record, concluding: "The evidence before me does not establish a reasonable expectation of endangerment to the life or physical safety of any person within the meaning of section 20."[82]

140. Finally, in Order PO-2378 (2005)[83], the IPC reviewed the MOH's refusal to disclose five records containing the summary pages of the approved budgets for five publicly funded clinics, relying on the exemptions in section 17(1) (third party information) and section 14(1)(e) (endangering life or safety) and (i) (endangering security of building). The IPC was not persuaded that disclosure of the overall funding level in each record could reasonably be expected to result in any of the harms articulated in section 17(1), but accepted that full disclosure could reasonably be expected to give rise to the harms contemplated in section

81 Order PO-1880, *supra*, **Applicants' Authorities, Tab 8**.
82 Order PO-1880, *supra*, at 16, **Applicants' Authorities, Tab 8**.
83 Order PO-2378, *supra*, **Applicants' Authorities, Tab 9**.

14(1)(e) because the financial information in question was linked to particular identifiable clinics. Such harm could not be reasonably expected, however, "when the financial information contained in the remaining portions of the records, namely the line item from the Approved Budget documents for each of the facilities […] is disclosed without any other identifying information attached to it."[84] Consequently, the IPC ordered the MOH to disclose line items in the relevant documents showing total costs only.

141. The forms of privilege identified by the Supreme Court in *Criminal Lawyers* were never relied on by the MOH in any of the pre-Bill 122 IPC decisions reviewed above.[85]

142. There are no new concerns today that could be considered countervailing considerations negating the derivative *Charter* right to access such information.

143. There is not even a scintilla of evidence that revealing non-identifying information related to the provision of abortion services, including even statistical data about publicly funded abortions in Ontario would endanger anybody. Such concerns are speculative at best.

144. A *prima facie* right to access information may also be negated where disclosure would impair the proper functioning of affected public institutions.[86] Ontario has provided no evidence that the proper functioning of any public institutions would be impaired were the section 65(5.7) exclusion not part of *FIPPA*.

145. Ontario has been unable to point to any research or reports conducted or prepared by any government body with respect to concerns that disclosing documents related to abortion services could pose a security or safety threat. These alleged concerns are not supported by the evidence and are at best, speculative.

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[84] Order PO-2378, *supra*, at 9, **Applicants' Authorities, Tab 9**.

[85] The Supreme Court in *Criminal Lawyers*, *supra*, at paras 39 and 43, **Applicants' Authorities, Tab 1**, specifically mentions solicitor-client privilege, the privilege relating to confidences of the Queen's Privy Council, and law enforcement privilege.

[86] *Criminal Lawyers*, *supra*, at para 40, **Applicants' Authorities, Tab 1**.

Issue 2: If there is a breach of section 2(b) of the *Charter*, can the government justify this breach under section 1 of the *Charter*?

146. The onus is on Ontario to demonstrably justify the limit on freedom of expression. To do so, Ontario must establish that the limit is prescribed by law. It must also, in accordance with the Supreme Court of Canada's test set out in the *Oakes* test, establish that the law advances a "pressing and substantial objective" in a manner that is rational, minimally impairing, and proportionate.[87] Ontario cannot rely on section 1 if it fails to establish any of the foregoing. The Applicants submit that Ontario cannot satisfy any section 1 requirements in this case.

147. In *Criminal Lawyers*, the delicate balance between the right of access and the legitimate interests protected by exemptions limiting access was at issue.

> **1** Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance.
>
> **2** Both openness and confidentiality are protected by Ontario's freedom of information legislation, the *Freedom of Information and Protection of Privacy Act* [citations omitted]. The relationship between them under this scheme is at the heart of this appeal. At issue is the balance struck by the Ontario legislature in exempting certain categories of documents from disclosure.[88]

148. Where the legislature attempts to strike a balance, it is entitled to greater deference from the courts. Where, however, the legislature takes a more absolute position, it is less entitled to deference.[89]

149. Formerly, *FIPPA* balanced the right of access to government information related to the provision of abortion services with protections for privacy, safety, security, and so on. Since

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87 *Oakes, supra* 7, at paras 69-70, **Applicants' Authorities, Tab 4**.

88 *Criminal Lawyers, supra* 4, at paras 1-2, **Applicants' Authorities, Tab 1**.

89 *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331, at paras 97-98, **Applicants' Authorities, Tab 20**.

the section 65(5.7) exclusion came into force in 2012, however, government information related to abortion has been wholly inaccessible under *FIPPA*. The government is therefore entitled to little deference here.

150. The infringement of section 2(b) of the *Charter* caused by the section 65(5.7) exclusion cannot be justified under section 1 of the *Charter* because:

a. it is not a limit “prescribed by law”;

b. it has no pressing and substantial objective;

c. there is no rational connection between the exclusion and a pressing and substantial objective;

d. it is not minimally impairing of freedom of expression; and,

e. its ills outweigh its benefits.

1. There is no limit “prescribed by law”

151. The requirement that a limit on a *Charter* right or freedom must be “prescribed by law” means that limits on *Charter* rights or freedoms must flow from a sufficiently clear legal standard that can inform legal debate.

152. The limit on freedom of expression in this case is not prescribed by law because it results from the non-application of *FIPPA*, resulting in there being no intelligible standard governing the exercise of discretion to disclose or not disclose abortion-related information nor any legal basis upon which to judicially review disclosure decisions with respect to such information.

(a) No law granting discretion

153. When we speak in law about “discretion”, we necessarily look for a source. Section 65(5.7) is not a statutory grant of discretion, it is the repeal of statutory discretion conferred by *FIPPA* with respect to information related to abortion services. Section 65(5.7) denotes the non-application of *FIPPA*.

154. Jawhar Kassam appears to believe that the section 65(5.7) exclusion was adopted in order to grant institutions discretion to disclose or not disclose abortion-related information depending on various considerations, such as public safety,[90] but that is exactly the kind of discretion *FIPPA* granted *before* the section 65(5.7) exclusion came into force.

155. Contrary to Mr. Kassam's apparent understanding, rather than maintaining *FIPPA*-granted and *FIPPA*-guided discretion (derived from sections 10, 17, 19, 21, and 23 and whatever other exemptions may apply), the section 65(5.7) exclusion removes it entirely.

156. As the Court of Appeal for Ontario has explained:

> By using the words 'this Act does not apply', the legislature has distinguished exclusions from exemptions, and has declared that the 'delicate balance between the need to provide access to government records and the right to protection of personal privacy', which engages the expertise of the Privacy Commissioner, plays no role in relation to the enumerated [excluded] records.[91]

157. Exemptions, by contrast, confer discretion. As the Supreme Court of Canada said in *Criminal Lawyers* of the exemptions in sections 14 and 19 of *FIPPA*: "Law enforcement privilege and solicitor-client privilege already take public interest considerations into account and, moreover, confer a discretion to disclose the information on the Minister."[92]

158. The Supreme Court of Canada also reminds us in *Criminal Lawyers* that "[a] discretion conferred by statute must be exercised consistently with the purposes underlying its grant".[93]

(b) No intelligible standard governing the exercise of discretion

159. As the Supreme Court of Canada stated in *Irwin Toy*: "[W]here there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in

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90 Affidavit of Jawhar Kassam, at para 9, **RAR, Tab 1.**

91 *Mitchinson*, *supra*, at para 30, **Applicants' Authorities, Tab 16**.

92 *Criminal Lawyers*, *supra*, at para 43, **Applicants' Authorities, Tab 1.**

93 *Criminal Lawyers*, *supra*, at para 46, **Applicants' Authorities, Tab 1**.

a wide set of circumstances, there is no 'limit prescribed by law'."[94]

160. In order to constitute a limit "prescribed by law", the law in question must place discernible limits on the discretion to disclose or not disclose information.

161. The section 65(5.7) exclusion does the opposite. Mr. Kassam suggests in his affidavit that the section 65(5.7) exclusion was designed to *grant* institutions with discretion to disclose or not, but institutions already had such discretion before Bill 122. That discretion was guided and limited by the purposes, right of access, and exemptions of *FIPPA* and the section 65(5.7) exclusion strips institutions of that discretion.

162. What guides the exercise of discretion with respect to "information related to the provision of abortion services"? We do not and cannot know. All we know is that *FIPPA* no longer provides limits or guidance for such "discretion", since it does not apply.

163. Ontario may claim that where *FIPPA* does not apply, the government has discretion. Mr. Kassam asserts this in his affidavit. But Ontario cannot point to any law governing the exercise of that so-called discretion. Mr. Kassam says that "various considerations" might be relevant to a decision to disclose or not disclose information "outside of *FIPPA*". But the Applicants and the public have no way of knowing what the relevant considerations are.

164. The "prescribed by law" requirement of section 1, like the "rule of law" principle in the *Charter*'s preamble, requires intelligibility and accessibility.[95] If the person seeking access to information necessary for meaningful expression on an issue of public importance cannot know in advance what factors will govern the government's decision to disclose or not disclose information, there can be no limit prescribed by law.[96]

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94 *Irwin Toy v Quebec*, *supra*, at 983, **Applicants' Authorities, Tab 19**.

95 *Irwin Toy v Quebec*, *supra*, at 983, **Applicants' Authorities, Tab 19**.

96 *R*. *v*. *Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, at 632-643 [*Pharmaceutical Society*] **Applicants' Authorities, Tab 21**.

165. As the Supreme Court of Canada stated in *R. v Nova Scotia Pharmaceutical Society*:

> What becomes more problematic is not so much general terms conferring broad discretion, but terms failing to give direction as to how to exercise this discretion, so that this exercise may be controlled. Once more, an unpermissibly vague law will not provide a sufficient basis for legal debate; it will not give a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements. In giving unfettered discretion, it will deprive the judiciary of means of controlling the exercise of this discretion.[97]

<u>(c) No legal basis for judicial review of decisions to disclose or not disclose</u>

166. With the section 65(5.7) exclusion in force, courts have no basis upon which to review whether a refusal to disclose a record is correct or incorrect, reasonable or unreasonable. Courts determine whether administrative discretion is appropriately exercised based on the statute granting the discretion.

167. Judicial review is a critical component in guaranteeing access to information, as Professor Kazmierski observes in a case comment on the *Criminal Lawyers* ruling:

> While further renewal of legislative access frameworks is necessary, and the recognition of constitutional protection of access rights is commendable, the focus on legislative reform and constitutional protection ignores perhaps the most important factor in protecting our rights to access government information: ongoing and effective supervision of administrative discretion exercised under existing legislative regimes.[98]

168. Daniel Guttman also recognizes the important role of judicial review of *FIPPA*-granted discretion in protecting the derivative *Charter* right to access to information:

> <u>In my view, the Court's focus on the proper exercise of discretion is a signal to government that discretionary decisions refusing to disclose information will be carefully reviewed by information commissioners and courts on administrative law grounds</u>. Paramount in the exercise of the discretion is whether the public interest outweighs the purpose of an exemption, and a government that fails to provide adequate reasons for non-disclosure can expect to be asked to justify the

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[97] *Pharmaceutical Society*, *supra*, at 642, **Applicants' Authorities, Tab 21**.

[98] Kazmierski, *supra*, at para 1, **Applicants' Authorities, Tab 26**.

> exercise of discretion upon judicial review. The Court's direction on this issue is entirely consistent with Ontario's main purpose in enacting FIPPA: that government information should be available to the public except where a countervailing interest justifies a decision to resist disclosure for the greater public good.[99]

169. The section 65(5.7) exclusion, however, erases the right of access to government information even if no countervailing interests justify non-disclosure. No countervailing interest need be demonstrated, provided the requested record relates to abortion services.

170. Justice McLachlin (as she then was) writes:

> The power which the state confers on government appointees must not be exercised by the arbitrary whim of the state agent. It must be exercised reasonably, in good faith and on proper grounds. It must not be exercised for an improper purpose nor on the basis of irrelevant considerations. These rules constitute, in effect, a practical expression of the rule of law, one that is supervised by the courts.[100]

171. The section 65(5.7) exclusion, where it applies, permits arbitrary decision making with respect to what to do with records containing information related to abortion, as Ms. Maloney's previous case illustrates. This undermines the rule of law.

172. Where there is no basis for judicial review of "discretionary" decisions to disclose or not disclose information, there can be no limit "prescribed by law" as required by section 1 of the *Charter*. The kind of discretion Jawhar Kassam speaks of in his affidavit is plenary discretion, which is repugnant to the rule of law.

2. No pressing and substantial objective

173. In Order PO-3222, the IPC said this of section 65(5.7): "The evident intent of the Legislature in enacting this provision is to exclude records relating to the provision of

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[99] Guttman, *supra*, at para 88, **Applicants' Authorities, Tab 25**.

[100] Justice McLachlin, "Rules and Discretion in the Governance of Canada" (1992), 56 Sask. L. Rev. 167, **Applicants' Authorities, Tab 29**.

abortion services from the Act."[101]

174. Beyond that, it is not clear what the objective of the section 65(5.7) exclusion is. Since the section was added along with others relating to hospitals, it might be suggested that the objective was to protect *hospitals* from hospital-specific FOI requests for abortion-related information in order to ensure their proper functioning and to keep their facilities and staff safe, but that interpretation was rejected by the IPC in Order PO-3222.[102] Moreover, such protections were already available under *FIPPA* exemptions (ss. 14, 17, and 20) anyway.

175. It is Ontario's position that the charts Ms. Maloney had requested in 2012 which contain statistical abortion information, did "not pose a threat to health and safety".[103]

176. Ontario could produce no research or report regarding any risk that the section 65(5.7) exclusion was addressing. Nor does it have any documentation from the Ontario Hospitals Association to support the concern that disclosure of "information related to the provision of abortion services" could pose risks to the safety or security of patients, hospitals, or their staff.[104]

177. Any such concerns are not based on evidence and are at best, speculative.

178. There was no discussion of the section 65(5.7) exclusion during debate of Bill 122 in the Legislative Assembly.[105]

179. In short, even if the objective of the section 65(5.7) exclusion is to protect the safety and security of facilities or persons, such an objective is based on speculative concerns and is not pressing and substantial.

3. No rational connection between complete exclusion and statutory objective

180. If the objective of the section 65(5.7) exclusion were safety and security, section 65(5.7)

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101 Order PO-3222, *supra*, at para 31, **Applicants' Authorities, Tab 2**.
102 Order PO-3222, *supra*, **Applicants' Authorities, Tab 2**.
103 Answers to Kassam Undertakings, **RAR, Tab 3.**
104 Answers to Kassam Undertakings, **RAR, Tab 3.**
105 Affidavit of Colin Postma, **AAR,** Volume 2, Tab 5.

would add nothing that *FIPPA* exemptions did not already provide. Information "related to the provision of abortion services" could be and in fact was withheld in several cases pursuant to *FIPPA* exemptions designed for that purpose.[106] Reliance on such exemptions requires evidence and could be subject to independent review by the IPC.[107]

181. The notion that permitting access to any "information related to the provision of abortion services", including even to general statistics and other non-identifying data could cause violent reactions from pro-life people is baseless. There is no evidence that the section 65(5.7) exclusion contributes in any way to public safety and security.

4. A complete exclusion is not minimally impairing

182. Making any and all information related to the provision of abortion services inaccessible under *FIPPA* is an unnecessary and overly broad means of protecting individual abortion providers, facilities, and patients from harassment or other harm, if that even is the objective.

183. When relying on *FIPPA* exemptions (mandatory or discretionary) to withhold information from a requester, "The head must consider individual parts of the record, and disclose as much of the information as possible."[108]

184. As section 10(2) of *FIPPA* states:

> (2) If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.[109]

185. The same is not true with respect to exclusions. Where an exclusion applies, *FIPPA* does not apply and there is simply no right of access. The head need not disclose a record in whole

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106 Further Answers to Kassam Undertakings, **RAR, Tab 3**, pp. 151-152.
107 *Ontario v. IPC*, *supra*, **Applicants' Authorities, Tab 12**.
108 *Criminal Lawyers*, *supra*, at para 67, **Applicants' Authorities, Tab 1**.
109 *FIPPA, supra,* at s. 10(2).

or in part or offer any explanation beyond citing the exclusion, if it applies. The section 65(5.7) exclusion applies if the requested information has "some connection" to the provision of abortion services.[110]

186. In *Criminal Lawyers*, unlike in the present case, *FIPPA* actually provided a right of access to the information the applicants sought. However, the government in that case relied on several discretionary exemptions in *FIPPA* to deny access.[111]

187. One issue in *Criminal Lawyers* was whether that discretion was exercised reasonably in light of the purposes of the Act and the specific exemptions relied on. The Supreme Court of Canada sent the matter back to the IPC for reconsideration, since it seemed to the Court that denying access to the entire 318-page record requested may not have been justified had section 14 of *FIPPA* been properly interpreted and applied by the IPC in the first place.[112]

188. Another issue in *Criminal Lawyers*, the *Charter* issue, was whether or not *FIPPA*'s general public interest override in section 23 violated the *Charter* for being too narrow. Section 23 could overcome exemptions, including mandatory exemptions, to favour disclosure where it was in the public interest to disclose, but it did not apply to the exemptions in sections 14 (law enforcement) and 19 (privilege). The Criminal Lawyers Association wanted to read ss. 14 and 19 into s. 23.

189. The Supreme Court of Canada contemplated that an access provision (section 23) could possibly be not broad enough. The Court did not disqualify the claim on the basis that it cannot broaden the public interest override. The Applicants in the present case ask this Court to restore the right of access to abortion-related information.

190. The Supreme Court of Canada concluded in *Criminal Lawyers* that section 23 of *FIPPA*

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110 Order PO-3222, *supra*, at para 31, **Applicants' Authorities, Tab 2**.
111 *Criminal Lawyers*, *supra*, at para 4, **Applicants' Authorities, Tab 1**.
112 *Criminal Lawyers*, *supra*, at para 74, **Applicants' Authorities, Tab 1**.

did not violate section 2(b) of the *Charter* because *FIPPA* may allow access to the records sought in that case even without section 23:

> Law enforcement privilege and solicitor-client privilege already take public interest considerations into account and, moreover, confer a discretion to disclose the information on the Minister.[113]

191. The Supreme Court of Canada concluded in *Criminal Lawyers* that "the public interest override contained in section 23 would add little to what is already provided for in sections 14 and 19 of the Act."[114] That is, sections 14 and 19 already favour disclosure when disclosure is in the public interest, but create a presumption that disclosure is detrimental to the public interest in certain circumstances. [115]

192. The *Criminal Lawyers* judgment continues:

> However, by stipulating that '[a] head may refuse to disclose' a record in this category, the legislature has also left room for the head to order disclosure of particular records[116] [...] This creates a discretion in the head.[117]

It is the word "may" in the exemptions that "confers a discretion".[118]

193. The Supreme Court of Canada in *Criminal Lawyers* found that applying section 23 to the discretionary exemptions in sections 14 and 19 was not necessary to safeguard the right of access or to ensure that right was appropriately balanced with other considerations.[119] In short, section 23 did not impair the applicant's ability to obtain documents in that case.[120]

194. The same cannot be said of the section 65(5.7) exclusion. Unlike the provision of *FIPPA* challenged in *Criminal Lawyers* (section 23), the section 65(5.7) exclusion does not preserve a legal right of access.

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113 *Criminal Lawyers*, *supra*, at para 43, **Applicants' Authorities, Tab 1**.
114 *Criminal Lawyers*, *supra*, at para 43, **Applicants' Authorities, Tab 1**.
115 *Criminal Lawyers*, *supra*, at para 44, **Applicants' Authorities, Tab 1**.
116 *Criminal Lawyers*, *supra*, at para 45, **Applicants' Authorities, Tab 1**.
117 *Criminal Lawyers*, *supra*, at para 45, **Applicants' Authorities, Tab 1**.
118 *Criminal Lawyers*, *supra*, at para 47, **Applicants' Authorities, Tab 1**.
119 *Criminal Lawyers*, *supra*, at para 55, **Applicants' Authorities, Tab 1**.
120 *Criminal Lawyers*, *supra*, at para 56, **Applicants' Authorities, Tab 1**.

5. The deleterious effects of the section 65(5.7) exclusion outweigh the benefits

195. The final stage of *Oakes* requires the state to demonstrate that the benefits of the provision that infringes a *Charter* right outweigh its negative consequences.[121]

196. The deleterious effects of the section 65(5.7) exclusion are easy to grasp. Ms. Maloney made a simple request for easily identifiable records containing general, non-identifying statistical information about the Ontario government's provision of abortion services. Ms. Maloney wished to use the requested records to educate Ontarians about the government's funding of abortion and to engage in meaningful commentary on the issue.

197. Ms. Maloney was denied access with no explanation beyond a citation of section 65(5.7). She appealed the denial of access to the IPC, but the IPC could not help her, since the requested records clearly had "some connection" with abortion and were therefore excluded from the right of access under *FIPPA*. It was only after two and half years from the time of the initial request, a great deal of effort and after incurring significant legal fees trying to obtain the records, and in the face of her factum on her Application for Judicial Review, that the MOH finally disclosed the records. Again, little explanation was given.

198. For those two and half years Ms. Maloney could not educate her readers about, nor meaningfully comment on how the government of Ontario was spending money on abortions. The records eventually disclosed to Ms. Maloney contain information that is highly relevant to an important public policy issue and which is not publicly available.

199. This is not to say that Ms. Maloney was not able to comment on abortion at all – she was and did – but she was not able to *meaningfully* comment on several aspects of the abortion issue in Ontario, such as, the cost to taxpayers of publicly-funded abortion.

200. Ms. Maloney's ordeal sends a strong message to her and to everyone that requests for

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[121] *Oakes*, *supra*, **Applicants' Authorities, Tab 4**.

government information related to the provision of abortion services will not be granted and that if someone is prepared to take the matter before the courts, the government will simply disclose the requested information "outside of the *FIPPA*" days before any hearing or trial so as to avoid the risk of having the section 65(5.7) exclusion reviewed by the courts.

201. What of the benefits of the section 65(5.7) exclusion? It is not hyperbole to say it adds no benefits that *FIPPA* did not already provide before the section 65(5.7) exclusion was added. Ontario's own position is that the records requested by Ms. Maloney in 2012 posed no risk. Nevertheless, Ontario opposed her FOI request for more than two years, causing her to incur approximately $30,000 in legal fees.

202. Even today, Ontario maintains that Ms. Maloney ought not have access to the information that Ontario disclosed to her "outside of *FIPPA*" when it was faced with having to respond to her Application for Judicial Review.

203. While such records contain important data on a public policy issue, they identify no doctors, hospitals, or clinics. The section 65(5.7) exclusion is not needed to protect hospitals or clinics, which were and are adequately protected by *FIPPA* exclusions in sections 14, 17, and 20 anyway, as the pre-Bill 122 IPC cases illustrate.

204. The section 65(5.7) exclusion is not needed to protect personal health information, which was and is protected by *PHIPA* anyway.

<u>Issue 3: What is the appropriate remedy?</u>

1. Striking down

205. The Applicants submit that the section 65(5.7) exclusion infringes section 2(b) of the *Charter*, is not saved by section 1, and should be declared of no force or effect in accordance with section 52 of the *Charter*. The result of such a declaration is that the *FIPPA* framework, which worked perfectly well in the past to govern access to information related to abortion

services, will once again apply to such information.

206. Striking down the section 65(5.7) exclusion would remove the infringement of the derivative *Charter* right to access information and restore the rule of law in this context. The plenary discretion which Mr. Kassam suggests section 65(5.7) grants would be removed.

207. No harm would result from such a declaration taking effect immediately.

208. As before, FOI requests for "information related to the provision of abortion services" would be dealt with in accordance with *FIPPA*. Any safety concerns can be adequately addressed within *FIPPA* framework.

Issue 4: Costs

209. The Applicants claim that they ought to be entitled to costs regardless of the outcome of this Application.

210. The Applicants here are an individual and a not-for-profit organization, both with limited resources. Neither of the Applicants have financial interest or potential financial gain from succeeding in this Application.

211. Although the Applicants seek to strike the section 65(5.7) exclusion of *FIPPA* because it violates their 2(b) *Charter* rights, their efforts through this litigation have been made in the public interest. The issues raised in this Application have never been considered by the courts in Ontario or in Canada.

212. The Respondent however, is the Crown with taxpayer funding. The Respondent's resources are virtually unlimited and significantly and severely outweigh the Applicants' resources.

213. That being the case, the Applicants submit that they should be entitled to their costs on a substantial indemnity basis regardless of the outcome or alternatively, that each party should bear their own costs.

Public-Interest Litigation

214. This litigation is of a public interest. The legal issues raised in this application have never been considered by the courts in Ontario and will benefit the development of the law in Ontario and Canada.

215. The Applicants rely on case law relating to costs in public-interest litigation to support their claim for costs, or alternatively, that each party should bear their own costs.

216. The seminal case on costs in public-interest litigation is *British Columbia (Minister of Forests) v. Okanagan Indian Band*.[122] In *Okanagan,* the Supreme Court of Canada pointed to the importance of cost awards in favour of applicants involved in public-interest litigation. It stated:

> […] it is desirable that *Charter* litigation not be beyond the reach of the citizen of ordinary means" and that "costs can be used as an instrument of policy and making *Charter* litigation accessible to ordinary citizens is recognized as a legitimate and importance policy objective.[123]

217. In cases of social significance, costs awards against the successful party may be appropriate. Indeed, Rule 57.01(2) of the *Rules of Civil Procedure* allows such awards.[124]

218. As stated by the Supreme Court of Canada, the common purposes of costs awards are often superseded by other policy objectives which include ensuring that ordinary citizens will have access to the Court to determine their constitutional rights and other issues of broad social significance as well as cases which deal with issues of public importance.[125]

219. It is submitted that this is one of the "special" cases alluded to in *Okanagan* and that the issues raised in this litigation are of a public importance. They will affect the relationship

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[122] *British Columbia (Minister of Forests) v. Okanagan Indian Band,* [2003] 3 SCR 371, ["*Okanagan*"] **Applicants' Authorities, Tab 22**.

[123] *Okanagan, supra,* at para. 28, **Applicants' Authorities, Tab 22**.

[124] *Okanagan, supra,* at paras. 29 and 30, **Applicants' Authorities, Tab 22**; *Rules of Civil Procedure,* R.R.O. 1990, Regulation 194, at Rule 57.01(2).

[125] *Okanagan*, *supra*, **Applicants' Authorities, Tab 22**, at para. 38.

between government and those seeking access to government information and the *Charter* freedom of expression, including freedom of the press and other media of communication. As such, costs should be awarded to the Applicants regardless of the outcome of the Application.

220. As cited in *Harris v. Canada (TD)*[126] the criteria to consider when deciding if costs should not be awarded against applicants in public-interest litigation are whether:

a. The proceeding involves issues the importance of which extends beyond the immediate interest of the parties involved.
b. The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceedings economically.
c. The issues have not been previously determined by a court in a proceeding against the same defendant.
d. The defendant has a clearly superior capacity to bear the costs of the proceeding.
e. The plaintiff has not engaged in vexatious, frivolous or abusive conduct.[127]

221. The criteria above were again reaffirmed by the Supreme Court in *Carter*.[128] When applying these criteria, the Applicants and this application clearly satisfy all five components.

a. The proceeding involves issues the importance of which extends beyond the Applicants' immediate interests;
b. The Applicants have no personal, proprietary or pecuniary interest in the outcome of the proceeding;
i. If the Applicants are deemed to have such an interest, it certainly does not justify these proceedings economically;
c. The issues in this application have <u>never been determined or considered by the Ontario courts</u>;
d. The Respondent clearly has superior capacity to bear the costs of this Application; and,

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126 *Harris v. Canada (TD,* [2002] 2 F.C. 484, [*Harris*], **Applicants' Authorities, Tab 23**.
127 *Harris, supra,* at para. 222, **Applicants' Authorities, Tab 23**.
128 *Carter, supra,* at paras. 134 and 140, **Applicants' Authorities, Tab 20**.

e. The Applicants have not engaged in frivolous, vexatious or abusive conduct.

222. The Applicants submit that in the alternative, regardless of the disposition of the application, no costs should be ordered against them because the issues raised were novel, involve a matter of public interest and were brought in good faith for the genuine purpose of having a point of law of general public interest resolved.[129]

PART IV: ORDER REQUESTED

223. The Applicants ask that this Honourable Court:

a. declare that section 65(5.7) of *FIPPA* infringes section 2(b) of the *Charter*, is not saved by section 1, and is of no force or effect in accordance with section 52 of the *Charter*;

b. that the declaration take immediate effect; and,

c. that it be awarded costs on a substantial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28th DAY OF OCTOBER, 2016.

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[129] *Mahar v. Rogers Cablesystems Ltd*. (1995), 25 O.R. (3d) 690, at para. 7, **Applicants' Authorities, Tab** 24.

Schedule "A"

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23

Ministry of Health and Long Term Care (Re), Order PO-3222, Appeal PO12-243, 2013 CanLII 38913

Ottawa Hospital (Re), Order PO-3442, Appeal PA13-213, 2014 CanLII 79900

R. v. Oakes, [1986] 1 SCR 103

Ontario (Health) (Re), Order 202, Appeal 890310, 1990 CanLII 3881

Ontario (Health) (Re), Order PO-1695, Appeal PA-980277-1, 1999 CanLII 14374

Ontario (Health) (Re), Order PO-1747, Appeal PA-980336-1, 2000 CanLII 20933

Ontario (Health and Long-Term Care) (Re), Order PO-1880, Appeal PA-000196-1, 2001 CanLII 26053

Ontario (Health and Long-Term Care) (Re), Order PO-2378, Appeal PA-040173-1, 2005 CanLII 56495

Ontario (Health) (Re), Order P-1499, Appeal P_9700188, 1997 CanLII 11658, [Order P-1499]

Dagg v. Canada (Minister of Finance), [1997] 2 SCR 403

Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31

CBC v. Lessard, [1991] 3 SCR 421

CBC v. New Brunswick, [1996] 3 SCR 480

Toronto Star v. Ontario, [2005] 2 SCR 188

Ontario (Solicitor General) v. Mitchinson (2001), 55 O.R. (3d) 355 (C.A.)

Grant v. Torstar Corp., 2009 SCC 61

Switzman v. Elbling, [1957] SCR 285

Irwin Toy Ltd. v. Quebec (AG), [1989] 1 S.C.R. 927

Carter v. Canada (Attorney General), 2015 SCC 5
R. v. Nova Scotia Pharmaceutical Society, [1992] 2 SCR 606

British Columbia (Minister of Forests) v. Okanagan Indian Band, [2003] 3 SCR 371

Harris v. Canada (TD, [2002] 2 F.C. 484

Mahar v. Rogers Cablesystems Ltd. (1995), 25 O.R. (3d) 690

Schedule "B"

***Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11**

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

[…]

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

***Freedom of Information and Privacy Protection Act,* R.S.O. 1990, CHAPTER F.31**

Purposes

1. The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,
(ii) necessary exemptions from the right of access should be limited and specific, and
(iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information. R.S.O. 1990, c. F.31, s. 1.

Right of access

10. (1) Subject to subsection 69 (2), every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

(a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Cabinet records

12. (1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

[…]

13. (1) 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.

14. (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(a) interfere with a law enforcement matter;

(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

(d) disclose the identity of a confidential source of information in respect of a law enforcement

matter, or disclose information furnished only by the confidential source;

(e) endanger the life or physical safety of a law enforcement officer or any other person;

(f) deprive a person of the right to a fair trial or impartial adjudication;

(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

(h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

(j) facilitate the escape from custody of a person who is under lawful detention;

(k) jeopardize the security of a centre for lawful detention; or

(l) facilitate the commission of an unlawful act or hamper the control of crime.

14.1 A head may refuse to disclose a record and may refuse to confirm or deny the existence of a record if disclosure of the record could reasonably be expected to interfere with the ability of the Attorney General to determine whether a proceeding should be commenced under the *Civil Remedies Act, 2001*, conduct a proceeding under that Act or enforce an order made under that Act.

15. A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;

(b) reveal information received in confidence from another government or its agencies by an institution; or

(c) reveal information received in confidence from an international organization of states or a body thereof by an institution,

and shall not disclose any such record without the prior approval of the Executive Council.

16. A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council.

17. (1) 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, […]

18. (1) A head may refuse to disclose a record that contains,

(a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;

(b) information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication;

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

(d) information where the 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;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

(f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

(g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

(h) information relating to specific tests or testing procedures or techniques that are to be used for an educational purpose, if disclosure could reasonably be expected to prejudice the use or results of the tests or testing procedures or techniques;

(i) submissions in respect of a matter under the *Municipal Boundary Negotiations Act* commenced before its repeal by the *Municipal Act, 2001*, by a party municipality or other body before the matter is resolved;

(j) information provided in confidence to, or records prepared with the expectation of confidentiality by, a hospital committee to assess or evaluate the quality of health care and directly related programs and services provided by a hospital, if the assessment or evaluation is for the purpose of improving that care and the programs and services.

19. A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

(c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

20. A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

21. (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

(b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;

(c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;

(d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

(e) for a research purpose if,

(i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,

(ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and

(iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

21.1 A head may refuse to disclose a record where the disclosure could reasonably be expected to lead to,

(a) killing, harming, harassing, capturing or taking a living member of a species, contrary to clause 9 (1) (a) of the *Endangered Species Act, 2007*;

(b) possessing, transporting, collecting, buying, selling, leasing, trading or offering to buy, sell, lease or trade a living or dead member of a species, any part of a living or dead member of a species, or anything derived from a living or dead member of a species, contrary to clause 9 (1)

(b) of the *Endangered Species Act, 2007*; or

(c) damaging or destroying the habitat of a species, contrary to clause 10 (1) (a) or (b) of the *Endangered Species Act, 2007*.

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

Application of Act

65 (5.7) This Act does not apply to records relating to the provision of abortion services. 2010, c. 25, s. 24 (17).

***Rules of Civil Procedure, Courts of Justice Act*, R.R.O. 1990, Regulation 194**

Costs Against Successful Party

(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case. R.R.O. 1990, Reg. 194, r. 57.01 (2).