Court File No. 456/19

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N :

ATTORNEY GENERAL FOR ONTARIO

Applicant

- and -

INFORMATION AND PRIVACY COMMISSIONER and CANADIAN BROADCASTING CORPORATION

Respondents

APPLICATION UNDER the *Judicial Review Procedure Act*, RSO 1990, c J.1

FACTUM OF THE MOVING PARTIES, THE CENTRE FOR FREE EXPRESSION, CANADIAN JOURNALISTS FOR FREE EXPRESSION, THE CANADIAN ASSOCIATION OF JOURNALISTS, and ABORIGINAL PEOPLES TELEVISION NETWORK (Motion For Leave to Intervene)

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FACTUM OF THE MOVING PARTIES
(Motion for Leave to Intervene)

I. OVERVIEW

1. The Moving Parties bring this unopposed motion for leave to intervene as a friend of the Court in a Judicial Review of a decision of the Information and Privacy Commissioner of Ontario. In the proceedings below the Commissioner ordered that the Cabinet Office disclose to the Canadian Broadcasting Corporation, copies of "mandate letters" provided by the Premier of Ontario to his Cabinet Ministers following the most recent provincial election. In doing so, the Commissioner rejected the argument of Cabinet Office that the mandate letters fell within the 'cabinet confidences' exemption set out in s. 12(1) of the *Freedom of Information and Protection of Privacy Act*.

2. The proposed interveners are a coalition of media and free-expression organizations, who wish to assist the Court though making submissions on the important legal issues that arise in the context of this Application.

II. THE FACTS

A. THE UNDERLYING ACCESS TO INFORMATION REQUEST

3. The Requestor, a journalist with the CBC, filed an access to information request with the Cabinet Office for copies of all ministerial mandate letters provided by Premier Ford to members of his Cabinet. The Cabinet Office issued a decision refusing access to the requested documents on the basis of s. 12(1) of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*).[1] This provision requires the head of an institution to refuse access to a record "where disclosure would reveal the substance of deliberations of the Executive Council or its committees".[2]

4. The Requestor appealed to the Information and Privacy Commissioner of Ontario (Commissioner). The Cabinet Office filed representations, in which it maintained that the mandate letters were exempted under s. 12(1) for three separate, but related reasons:[3]

a. The letters were placed on the agenda of an early Cabinet meeting, and were distributed to Ministers at that time. Disclosure of the letters would reveal the substance of discussions and deliberations that took place at that Cabinet meeting related to the guidance and policy priorities expressed in the letters;[4]

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[1] Order PO-3973, *Cabinet Office (Re)* [*Decision*], at paras. 1-2, **Motion Record of the Moving Party [MR], Tab 2(B)**.
[2] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s. 12(1) [*FIPPA*].
[3] Representations of Cabinet Office, dated December 13, 2018 [*CO Representations*], at paras. 18-22, **MR, Tab 2(E)**; See also *Decision* at paras. 80-83, **MR, Tab 2(B)**.
[4] See also *CO Representations* at paras. 45-48, **MR, Tab 2(E)**.

b. The letters would disclose the substance of the Premier's own deliberative process in arriving at the policy priorities identified in the letters. Given the special role played by the Premier in setting the priorities and agenda of Cabinet, disclosing the substance of the Premier's deliberations could not be separated from disclosing the substance of Cabinet's deliberations as a whole;[5] and

c. Disclosure of the letters would identify proposed legislative, fiscal and operational matters that would have to return to Cabinet at a later date for further discussion, deliberation and debate. Disclosure of the letters would therefore disclose the substance of future Cabinet deliberations over those matters.[6]

5. In support of these submissions, Cabinet Office provided the Commissioner with background information about the policy justification for the protection of Cabinet confidences,[7] the constitutional role of the Premier as the head of Cabinet,[8] and the work of Cabinet's itself.[9]

6. Cabinet relied on the concept of a "continuum" of deliberation that began with the Premier himself deliberating over what the priorities of Cabinet would be.[10] The provision of letters to ministers would then "open to dialogue between the Premier and his ministers" about governmental plans and priorities.[11] Cabinet office indicated that while not ever topic listed in the mandate letters would have been discussed at an early Cabinet meeting "it [was] reasonable to expect that the Premier's key messages including advice, guidance, significant government policy commitments and other matters of particular importance to the Premier, would have been

[5] See also *CO Representations* at paras. 48-49, **MR, Tab 2(E)**.
[6] See also *CO Representations* at paras. 50-55, **MR, Tab 2(E)**.
[7] *CO Representations* at paras. 24-28, **MR, Tab 2(E)**.
[8] *CO Representations* at paras. 29-34, **MR, Tab 2(E)**.
[9] *CO Representations* at paras. 35-39, **MR, Tab 2(E)**.
[10] *CO Representations* at paras. 48-49, **MR, Tab 2(E)**.
[11] *CO Representations* at para. 46, **MR, Tab 2(E)**.

discussed".[12] Ministers would then begin to develop policies, engage in consultations, or formulate proposals based on the letters, that would subsequently return to Cabinet and be the subject of deliberations.[13] Cabinet Office submitted that, because of this, "disclosure of the mandate letters, whether in whole or in part, would necessarily reveal the topics and initiatives that will be deliberated by Cabinet in the future."[14]

7. Cabinet Office also indicated that disclosure of the Mandate letters "may well result in the types of harms to the efficacy and candour of the Cabinet decision-making process" that the Cabinet records exemption was designed to avoid.[15]

8. After receiving further rounds of submissions by both the Requestor and Cabinet Office, the Commissioner ordered that the letters be produced in full.

9. The Commissioner indicated that s. 12 of the *FIPPA* sought to strike a balance between a citizen's right to know what the government is doing, and government's right to consider what it might do in private.[16] The Commissioner considered the overall purpose of the *FIPPA*, including the express purpose clause set out in s. 1. He also relied upon Supreme Court of Canada jurisprudence on the purpose of access to information legislation, and the interpretive principles that apply to them. Based on these considerations, the Commissioner held that s. 12(1) of the *FIPPA* should be interpreted in a manner that would both protect cabinet confidences while at the same time promoting accountability and transparency, and not shield government policies that emerged at the conclusion of the deliberative process.[17]

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[12] *CO Representations* at para. 45, **MR, Tab 2(E)**.
[13] *CO Representations* at paras. 51-53, **MR, Tab 2(E)**.
[14] *CO Representations* at para. 54, **MR, Tab 2(E)**.
[15] *CO Representations* at para. 55, **MR, Tab 2(E)**.
[16] *Decision* at para. 97, **MR, Tab 2(B)**.
[17] *Decision* at paras. 105-108, **MR, Tab 2(B)**.

10. In the Commissioner's view, the purpose of the Cabinet confidence rule was not to protect ministers from being questioned on matters that might become the subject of Cabinet deliberations, but rather to protect the substance of those deliberations from becoming the subject of public criticism.[18] This interpretation was consistent with prior orders from his office that interpreted the term "deliberations" to discussions conducted with a view towards making a decision; and "substance" to generally mean more than just the subject or topic of a meeting.[19]

11. The Commissioner rejected the Requestor's position that the 'substance of deliberations' extended only to information on the "pros and cons of a course of action", but also Cabinet Office's position that the substance of deliberations extended to the subject matters that Cabinet had or would discuss. The Commissioner held that the exemption encompassed Cabinet members' views, opinions, thoughts, ideas and concerns expressed when part of Cabinet's deliberative process.[20]

12. The Commissioner noted that there was nothing to suggest that the letters were intended to serve as Cabinet submissions or form the basis of discussions of Cabinet as a whole.[21] Similarly, the Commissioner noted that the letters did not reveal any discussions examining potential courses of action with a view to making a decision, nor did they reveal views, opinions, thoughts, ideas or concerns expressed by members of Cabinet in the course of the deliberative process.[22] At its highest, the letters revealed the subject matter of some number of policy

[18] *Decision* at para. 87, **MR, Tab 2(B)**.
[19] *Decision* at para. 90, **MR, Tab 2(B)**.
[20] *Decision* at paras. 98-99, **MR, Tab 2(B)**.
[21] *Decision* at para 113, **MR, Tab 2(B)**.
[22] *Decision, supra* at para. 115, **MR, Tab 2(B)**.

initiatives that would be considered at some future Cabinet meeting, which was insufficient to demonstrate that the letters would reveal the substance of any specific Cabinet deliberations.[23]

13. The Commissioner also noted that there was no persuasive evidence before him that disclosure of the letters would have any chilling effect on Cabinet deliberations.[24]

14. The Commissioner also rejected the argument that disclosure of the letters would reveal the substance of the Premier's own deliberations. The Commissioner distinguished previous decisions of his office that applied s. 12(1) to the deliberations of the Premier. He noted that the letters reveal the outcome of the Premier's deliberative process in setting government priorities, but not the substance of the process that led to those priorities.[25]

15. The Commissioner also noted that accepting Cabinet Office's position on the scope of s. 12(1) of the *FIPPA* would lead to a far broader exemption than the Legislature had intended. Cabinet Office's approach would result in all records revealing policy initiatives of Cabinet or the Premier would be exempt, which would not be consistent with the Legislature's decision to also explicitly enumerate categories of exempt documents in paragraphs (a) to (f) of the subsection.[26]

B. THE APPLICATION FOR JUDICIAL REVIEW

16. The Attorney General sought judicial review of the Commissioner's order.[27]

17. In its factum, the Applicant submitted that Commissioner applied too narrow and restrictive an interpretation of s. 12(1) of the *FIPPA*, without regard to the text, context and

[23] *Decision, supra* at para. 116, **MR, Tab 2(B)**.
[24] *Decision, supra* at para 131, **MR, Tab 2(B)**.
[25] *Decision, supra* at paras. 131-132, **MR, Tab 2(B)**.
[26] *Decision, supra* at para. 135, **MR, Tab 2(B)**.
[27] Notice of Application for Judicial Review, dated August 15, 2019, **MR, Tab 2(C)**.

purpose of either the *Act* or the particular statutory provision. In particular, the Applicant argued that the Commissioner incorrectly or unreasonably found that

a. Policy outcomes in the letters arising from the deliberations of the Premier were not captured by s. 12(1);

b. In respect of the first Cabinet meeting in which the letters were distributed, s. 12(1) required proof that the letters were the substance of cabinet deliberations as a whole; and

c. In respect of future Cabinet meetings, s. 12(1) required proof that the actual letters would be placed before Cabinet.[28]

18. The Applicant argued that the opening words of s. 12(1) ought to have been read broadly and purposively and in the context of the entire legislative scheme, legislative intent and policy purpose, namely, to protect the entirety of the deliberative process.[29] By relying on the notion that s. 12(1) sought to balance two competing rights, the Commissioner in fact adopted a narrow and restrictive view of s. 12(1).[30] A generous reading of s. 12(1), read harmoniously with the *Act* as a whole, would shield all government policies except those that are in fact implemented or otherwise made public, such as tabled legislation, published regulations or programs publicly announced by a Minister.[31]

19. The Applicant also noted that the exemption under s. 12(1) was the only "mandatory" exemption in the *FIPPA* that is not subject to the *Act*'s public interest override. The Applicant submitted that this is a clear indication from the Legislature that the Cabinet records exemption had an importance above all other exemptions in the *Act*.[32]

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[28] Factum of the Applicant, the Attorney General of Ontario [*Applicant's Factum*], at para. 52, **MR, Tab 2(D)**.
[29] *Applicant's Factum, supra* at para. 59, **MR, Tab 2(D)**.
[30] *Applicant's Factum, supra* at para. 70, **MR, Tab 2(D)**.
[31] *Applicant's Factum, supra* at para. 62, **MR, Tab 2(D)**.
[32] *Applicant's Factum, supra* at para. 85, **MR, Tab 2(D)**.

20. The Applicant submitted that the Commissioner took too narrow a view of the nature of Cabinet's deliberative process. The Premier's articulation of policy priorities was not the outcome of a process, but rather a step in Cabinet's deliberative continuum.[33] As a member of Cabinet, the letters would reveal the substance of his own deliberations prior to, and at the initial Cabinet meeting in which they were distributed.[34]

21. The Applicant pointed to the evidence that the mandate letters were distributed to Cabinet members at an early meeting of Cabinet. It submitted that it was reasonable to infer that records placed before Cabinet were discussed and would reveal the substance of deliberation of Cabinet.[35] The Applicant further submitted that the letters would permit the drawing of accurate inferences with respect to future Cabinet deliberations, as many of the policy priorities assigned to each Minister in the letters would require them to develop an operational, legislative or financial policy proposal that would have to be brought back to Cabinet for decision-making.[36]

22. Finally, the Applicant submitted that the Commissioner applied too high a standard of proof, seemingly above the balance of probabilities standard, when considering whether disclosure of the letters "would reveal" the substance of deliberations of Cabinet.[37]

C. THE MOVING PARTIES' & THEIR PROPOSED SUBMISSIONS

23. The moving parties are a coalition of free-expression and media organizations, all of whom have an interest in ensuring a robust access to information regime. The Coalition has a direct interest in ensuring public scrutiny of governmental action.[38]

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[33] *Applicant's Factum, supra* at para. 65, **MR, Tab 2(D)**.
[34] *Applicant's Factum, supra* at para. 75, **MR, Tab 2(D)**.
[35] *Applicant's Factum, supra* at paras. 72-73, **MR, Tab 2(D)**.
[36] *Applicant's Factum, supra* at para. 77, **MR, Tab 2(D)**.
[37] *Applicant's Factum, supra* at paras. 83-84, **MR, Tab 2(D)**.
[38] Affidavit of James L. Turk, dated March 2, 2020 [*Turk Affidavit*], at para. 18, **MR, Tab 2**.

24. The Centre for Free Expression is a non-partisan research, public education and advocacy centre based out of Ryerson University whose objects include advocacy on free expression and the public's right to seek, receive and share information.[39]

25. Canadian Journalists for Free expression is an organization whose core purpose is to defend the rights of journalists and to contribute to the development of media freedom, both in Canada throughout the world. It has a significant interest in protecting freedom of expression and the ability of journalists to gather and report news on matters of public interest.[40]

26. The Canadian Association of Journalists, founded in 1978 as the Centre for Investigative Journalism, has a mandate to promote excellence in journalism and to uphold the public's right to know. Amongst its various activities, it engages in advocacy on a variety of issues, including freedom of information, access to information and public disclosure.[41]

27. The Aboriginal Peoples Television Network is the first independent national Aboriginal broadcaster in the world. It's journalists frequently rely on federal and provincial access to information regimes in order to fulfill its journalistic mandate. Aboriginal peoples in Canada frequently interact with the Federal and provincial governments. Access to government records is often necessary in order to meaningfully report on subjects of importance to Aboriginal peoples. The ability of APTN to actively pursue its investigative journalism mandate is not only important to it from a traditional journalistic perspective. It is also a critical component of reconciliation, as recognized in the Truth and Reconciliation Commission of Canada's Call to Action Number 85.[42]

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[39] *Turk Affidavit, supra*, at para. 3, **MR, Tab 2**.
[40] *Turk Affidavit, supra* at paras. 6, 9, **MR, Tab 2**.
[41] *Turk Affidavit, supra* at para. 10.
[42] *Turk Affidavit, supra* at paras. 13-15, **MR, Tab 2**.

28. The four organizations, either independently or in coalition with each other, have extensive experience participating in cases that raise important questions relevant to journalism, freedom of expression and access to information.[43]

29. If granted leave, the Coalition would propose to focus its submissions on three areas: (1) the general approach to interpreting access to information legislation; (2) why the harms identified by the Applicant as justifying the cabinet records exemption do not arise in the case of ministerial Mandate Letters; and (3) the serious consequences for journalistic activities and the public's right to know that would result from adopting the Applicant's interpretation of the scope of s. 12(1) of *FIPPA*. The Coalition would submit that these considerations, taken together, are relevant in assessing the reasonableness of the Commissioner's decision in this case.[44]

i. The General Approach to Interpreting Access to Information Legislation

30. In its factum, the Appellant argued that the Commissioner erred (or acted unreasonably) in interpreting the scope of s. 12(1) "narrowly and restrictively" and instead was required to read the provision "broadly".[45] The Appellant advocates for a wider, more generous interpretation of s. 12(1). The Coalition believes that this submission represents a departure from the proper way to interpret access to information legislation. Contrary to the submissions of the Applicant, such an approach would undermine rather than further the purpose of the *FIPPA* regime.

31. The Coalition agrees that Dridger's "modern principle" is applicable to the interpretation of access to information legislation.[46] However, interpreting Access legislation purposively leads to the opposite conclusion than the Applicant reaches: exceptions to the right of access *should* be

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[43] *Turk Affidavit, supra* at para. 17, **MR, Tab 2**; Representative List of Cases in which one or more Members of the Coalition have Participated, **MR, Tab 2(A)**.
[44] See generally, *Turk Affidavit, supra* at paras. 24-47, **MR, Tab 2**.
[45] *Appellant's Factum, supra* at paras. 52, 59, **MR Tab 2(D)**.
[46] *Appellant's Factum, supra* at para. 56, **MR Tab 2(D)**.

read narrowly in order to ensure the fundamental purpose of such legislation – public access to information held by governments – is fulfilled. The broader the interpretation given to an exception to the right of access, the narrower the right of access becomes. Since the overall purpose of Part II of *FIPPA* is to give a robust right of access to the public, the "modern principle" requires that exceptions be applied in a manner that is "limited and specific".[47]

32. If granted leave to intervene, the Coalition would argue that, contrary to the suggestion of the Applicants,[48] the fact that s. 12(1) is not subject to the public interest override in s. 23 of the *FIPPA* reinforces the need to narrowly circumscribe the scope of the exemption. Where s. 12(1) applies, documents will be shielded from public scrutiny notwithstanding the fact that there may be a "compelling public interest in disclosure that clearly outweighs the purpose of the exemption". Given the remedial purpose of the *FIPPA*, such a harsh result should only arise with respect to documents that are clearly and unambiguously within the four corners of s. 12(1).

33. The Coalition would submit that the Commissioner's interpretative approach, which was informed by these general principles,[49] was a reasonable (indeed, the only reasonable) framework within which to interpret the scope of s. 12(1). Conversely, adopting the Applicant's approach, in which it is the *exemptions* to disclosure that are read generously, and not the *right of access*, would have significant and negative implications for the public's right to know about the operation of government.

ii. The Absence of Harms from Release of Mandate Letters

34. The Applicant argues in its factum that s. 12(1) of the *FIPPA* is intended to avoid certain types of harms to the cabinet decision-making process, and that the provision should be

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[47] *FIPPA,* s. 1.
[48] *Appellant's Factum, supra* at para. 20, **MR Tab 2(D)**.
[49] *Decision, supra* at paras. 1015-018, **MR, Tab 2(B)**.

interpreted in a manner that ensures that these harms would not come about. The Coalition agrees with the general premise of this approach, but disagrees with the Applicant that the type of records at issue in these proceedings – if released – would cause any of the harms s. 12(1) is designed to guard against. To the extent that there is no reasonable basis to believe that the records at issue in this case would result in these harms, it supports the reasonableness of the Commissioner's view that the records are not subject to the cabinet records exemption.

35. Cabinet Office made submissions to the Commissioner about the harms that could flow from the disclosure of deliberations of Cabinet. The thrust of these concerns is that disclosure of confidential cabinet materials would inhibit individual cabinet ministers from expressing their frank opinions for fear of later being identified as dissidents; that the ability for the public and the legislature to hold ministers responsible for government policy would be diminished if such policies were presented as a series of opposing views; and that ministers might engage in self-censorship if their views were subsequently subjected to public scrutiny.[50]

36. The Coalition does not dispute that these are the considerations that led the Legislature to enact s. 12(1). If granted leave to intervene, the Coalition would argue that the public release of mandate letters does not raise any realistic risk of these sorts of harms from materializing.

37. The record before the Commissioner contained extensive documentation about the use of mandate letters both in Ontario and other jurisdictions in Canada.[51] The evidence demonstrated that (1) mandate letters are regularly made matters of public disclosure across the Country; and (2) there does not appear to have been any negative consequences for cabinet decision-making that has resulted from this.

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[50] *CO Representations* at paras. 25-26, **MR, Tab 2(E)**.
[51] *Decision, supra* at paras. 76-78, **MR, Tab 2(B)**.

38. If granted leave to intervene, the Coalition would submit that this was an important consideration for the Commissioner to take into account, which supported the reasonableness of his decision. In deciding whether the requested mandate letters did or did not fall within the opening words of s. 12(1) it was reasonable for the Commissioner to take note of the fact that there was no evidence that disclosure would result in the harms that the provision were designed to protect against. Indeed, in light of the submissions by Cabinet Office that there *was* such a risk of harm,[52] this was a matter that the Commissioner was required to consider account.

39. In interpreting his home statute, the Commissioner was right not to assume that an exception to disclosure was broader than necessary in order to achieve its public policy purpose. The Commissioner's statement in his reasons that the past practice of disclosing mandate letters to the public was of "some relevance"[53] was an entirely reasonable one.

40. The Commissioner did have the benefit of access to the records at issue and was able to conclude that they were "largely similar to their counterparts in their overall approach, level of detail and purpose."[54] To the extent that the Commissioner's description of the records at issue is accurate, and that they are not substantially different from other Mandate Letters that have been made public,[55] there is little reason to believe that their disclosure would ever have resulted in the mischief that s. 12(1) was designed to prevent.

iii. The Harms that would Flow from Accepting the Applicant's Position

41. In proceedings before the Commissioner, Cabinet Office took the position that the Premier's personal deliberative exercise in deciding what the policies and priorities of Cabinet

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[52] *CO Representations* at para. 55, **MR, Tab 2(E)**.
[53] *Decision, supra* at para. 87, **MR, Tab 2(B)**.
[54] *Decision, supra* at para. 78, **MR, Tab 2(B)**.
[55] These materials are before this Court in Volumes II and III of the Public Record of Proceedings.

ought to be prior to the first meeting of Cabinet was necessarily captured by s. 12(1) of *FIPPA*.[56] Cabinet office went further, and submitted that s. 12(1) captured a broad "continuum of the deliberative process of the Executive Council".[57] The Appellant takes the same position now before this Court.[58] If granted leave to intervene, the Coalition would submit that this interpretation is overbroad and would cause significant harm to the expressive rights of individuals by shielding significant quantities of government records from public view.

42. The Appellant's position is, in effect, that a document is captured by s. 12(1) if that document would reveal the *subject matter* of a discussion of a previous or future Cabinet meeting, without regard to whether the document itself formed the basis of Cabinet deliberations or reveals the material substance of such deliberations.

43. The flaw of such an expensive approach is that it has no meaningful limit. As Cabinet Office itself represented to the Commissioner, anything that the government does that involves legislative or regulatory action or involves the expenditure of funds or allocation of resources must ultimately go to Cabinet for consideration.[59] There is little that a government does that does not relate to either legislation or resource allocation.

44. In the Coalition's view, the Commissioner was reasonable when he recognized the problem with such a broad approach. He rightly noted that, if s. 12(1) extended to records that identified the subject matter of a future Cabinet discussion, then "any subject matter or information generated by or originating with a Ministry would be protected on the basis that it also appears as the subject of an item on a Cabinet meeting agenda."[60]

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[56] *CO Representations* at para. 34, **MR, Tab 2(E)**.
[57] *CO Representations* at para. 46-49, **MR, Tab 2(E)**.
[58] *Appellant's Factum, supra* at para. 65, **MR Tab 2(D)**.
[59] *CO Representations* at paras. 51-52, **MR, Tab 2(E)**.
[60] *Decision, supra* at para. 99, **MR, Tab 2(B)**.

45. Given that Cabinet "is the summit of political and administrative power in the Executive Branch of Government"[61] all matters of any real substance will ultimately form the subject of a Cabinet discussion. If s. 12(1) is so broad as to encompass records that merely disclose the subject matter of future Cabinet discussions, then vast swaths of governmental records would be withheld from public scrutiny.

46. The Coalition would submit that this result would cause significant harm to the public interest generally, and the expressive rights of producers and consumers of media in particular. Shielding records that identify government priorities involving legislation, regulations, money or resources – all of which could, in principle, reveal the subject matter of future Cabinet discussions – would mean that members of the press could not have access to critical materials necessary to report on the direction the Government of Ontario was taking. Members of the public, in turn, would have their ability to know the plans and priorities of their own government significantly weakened. This result would be inconsistent with the underlying purpose of the *FIPPA*. The Coalition would submit that the Commissioner's decision reasonably rejected an interpretation that would have led to these significant harms.

III. ISSUES AND THE LAW

47. The issue on this motion is whether the moving parties should be granted leave to intervene, and if so, on what terms.

A. OVERVIEW

48. Rule 13.02 provides that:

> Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceedings, intervene as a friend

[61] *CO Representations* at para. 29, **MR, Tab 2(E)**.

> of the court for the purpose of rendering assistance to the court by way of argument.[62]

49. On a motion for leave to intervene, the court will normally consider the following factors:

a. The nature of the case;

b. The issues involved;

c. The likelihood that the proposed intervener can make a useful and distinct contribution to the resolution of the appeal; and

d. Whether the intervention will cause injustice to the parties.[63]

50. The relevant considerations support granting the moving parties leave to intervene. This case is not a mere private dispute between the parties. Rather, it raises broader issues about governmental secrecy over significant public policy matters and the ability of the government to shield information of broad public interest from scrutiny.

51. The Coalition will assist the court by providing a distinct set of perspectives on broader considerations that are not expected to form the focus of the submissions of the Respondents.

52. The moving parties are experienced interveners and understand the proper role for a friend of the court. They do not seek to expand the record, or to raise issues that would expand the scope of the Application beyond its proper boundaries.

53. No party opposes this motion, and none suggest the possibility of prejudice.

B. THE NATURE OF THE CASE & ISSUES INVOLVED RAISE ISSUES OF BROAD PUBLIC IMPORTANCE THAT ARE OF DIRECT CONCERN TO THE MOVING PARTIES[64]

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[62] *Rules of Civil Procedure,* RRO 1990, Reg 194, r. 13.02.

[63] *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 OR (2d) 164 (CA) at 167; *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541 (Div Ct) [*TWU*] at para. 4; *Elementary Teachers' Federation of Ontario v Ontario (Minister of Education)*, 2018 ONSC 6318 (Div Ct) at para. 8 [*ETFO*].

54. The threshold for granting leave to intervene in cases that raise issues of broad public interest or public policy is lower than for cases that are purely of private interest between the parties.[65] This case falls towards the public interest end of the spectrum.

55. The specific issue on this Application – whether the current Ontario government's ministerial Mandate Letters should be released, is itself a matter of significant interest to the Coalition, it's members, and the broader public. Mandate letters provide important information about the direction that new governments wish to take when they assume office. They are frequently relied on by members of the press to report on important matters of public policy, and by members of the public to understand the intentions of their elected representatives.[66]

56. This case also raises a broader question as to the scope of s. 12(1) of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), the cabinet records exemption. The Applicants argue in favor of a broad and generous interpretation of the provision. In the view of the Coalition, such an expansive view would have serious implications for the ability of the press to report on matters of public concern, and on the right of the public to know about the policies, priorities and intentions of the state.[67]

C. THE MOVING PARTIES WOULD PROVIDE THE COURT WITH A USEFUL PERSPECTIVE THAT IS DISTINCT FROM THE PARTIES

57. Demonstrating the potential to provide useful submissions that are distinct from the parties to a proceeding normally involves a focus on two related questions: the proposed

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[64] These two factors are normally considered together: *Leroux v Her Majesty the Queen in Right of Ontario*, 2020 ONSC 730 (CanLII) at para. 25 [*Leroux*].
[65] *TWU, supa* at para. 8; *Jones v. Tsige* (2011), 106 OR (3d) 721 (CA) at para. 23.
[66] *Turk Affidavit, supra* at para. 20, **MR, Tab 2**.
[67] *Turk Affidavit, supra* at para. 21, **MR, Tab 2**.

interveners' expertise and interest in the issues at stake; and the specific contribution that the intervener proposes to make.[68]

58. The Court of Appeal for Ontario has also recognized that a relevant consideration in determining the likelihood that an intervener will assist the court is the experience and expertise of the proposed intervener.[69] All of the members of the Coalition has extensive experience both in terms of access to information issues,[70] as well as acting as litigants before the Courts in cases dealing with such matters.[71]

59. With respect to the specific contribution the Coalition would make, it is respectfully submitted that the arguments outlined above will assist the Court by presenting useful, relevant submissions that are distinct from those made by the parties themselves. The Respondents have yet to file their factums, but counsel for the Coalition has been in contact with counsel for both Respondents in order to ensure that the Coalition's proposed submissions would not be merely repetitious of submissions that the Respondents intend to make.[72]

D. GRANTING LEAVE TO INTERVENE WOULD NOT CAUSE PREJUDICE TO ANY PARTY AND WOULD NOT DELAY THE PROCEEDINGS

60. There is no basis to believe that this proposed intervention would cause any prejudice to the parties. If granted leave to intervene, the Coalition would abide by any timelines imposed by the Court and would not be raising new issues or seeking to adduce new evidence.

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[68] *ETFO, supra* at para. 11; *Leroux, supra* at para. 29.
[69] *Jones, supra* at para. 25.
[70] *Turk Affidavit, supra* at para. 22, **MR, Tab 2**.
[71] *Turk Affidavit, supra* at para. 17, **MR, Tab 2**; Representative List of Cases in which one or more Members of the Coalition have Participated, **MR, Tab 2(A)**.
[72] *Turk Affidavit, supra* at para. 25, **MR, Tab 2**.

61. In this respect, it is notable that none of the parties to the proceeding are opposing the Coalitions motion for leave to intervene.[73] It is reasonable to infer that, if any party believed that the Coalition's intervention would cause them prejudice, they would have opposed this motion.

IV. ORDER REQUESTED

62. The Moving Parties request an Order:

a. Granting them leave to intervene as a friend of the Court;

b. Granting them permission to file a factum not to exceed 15 pages, or such other length as this Court may permit;

c. Granting them permission to make oral submissions at the hearing of the Application for Judicial Review, not to exceed 15 minutes, or such other length as this Court may permit;

d. That they shall take the record as they find it, and that they shall not be permitted to introduce any additional evidence; and

e. That they shall not seek their costs, and that they shall not be liable for costs to any other party; and

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DONE at the City of Toronto, this 3rd day of March, 2020.

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[73] *Turk Affidavit, supra* at paras. 52-56, **MR, Tab 2.**

Schedule "A" – Authorities Cited

1. *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 OR (2d) 164 (CA)

2. *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541 (Div Ct)

3. *Elementary Teachers' Federation of Ontario v Ontario (Minister of Education)*, 2018 ONSC 6318 (Div Ct)

4. *Leroux v Her Majesty the Queen in Right of Ontario*, 2020 ONSC 730 (CanLII)

5. *Jones v. Tsige* (2011), 106 OR (3d) 721 (CA)

Schedule "B" – Legislative Provisions Relied Upon

Rules of Civil Procedure, RRO 1990, Reg. 194

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceedings, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

Freedom of Information and Protection of Privacy Act, RSO 1990, c F.31

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.

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,

(a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;

(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

(c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

(d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and

(f) draft legislation or regulations.

Court File No. 456/19

Attorney General of Ontario and **Information and Privacy Commissioner and the Canadian Broadcasting Corporation**

Applicant Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
(Proceedings Commenced at Toronto)

FACTUM OF THE MOVING PARTIES, THE CENTRE FOR FREE EXPRESSION, CANADIAN JOURNALISTS FOR FREE EXPRESSION, THE CANADIAN ASSOCIATION OF JOURNALISTS, and ABORIGINAL PEOPLES TELEVISION NETWORK
(Motion for Leave to Intervene)

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